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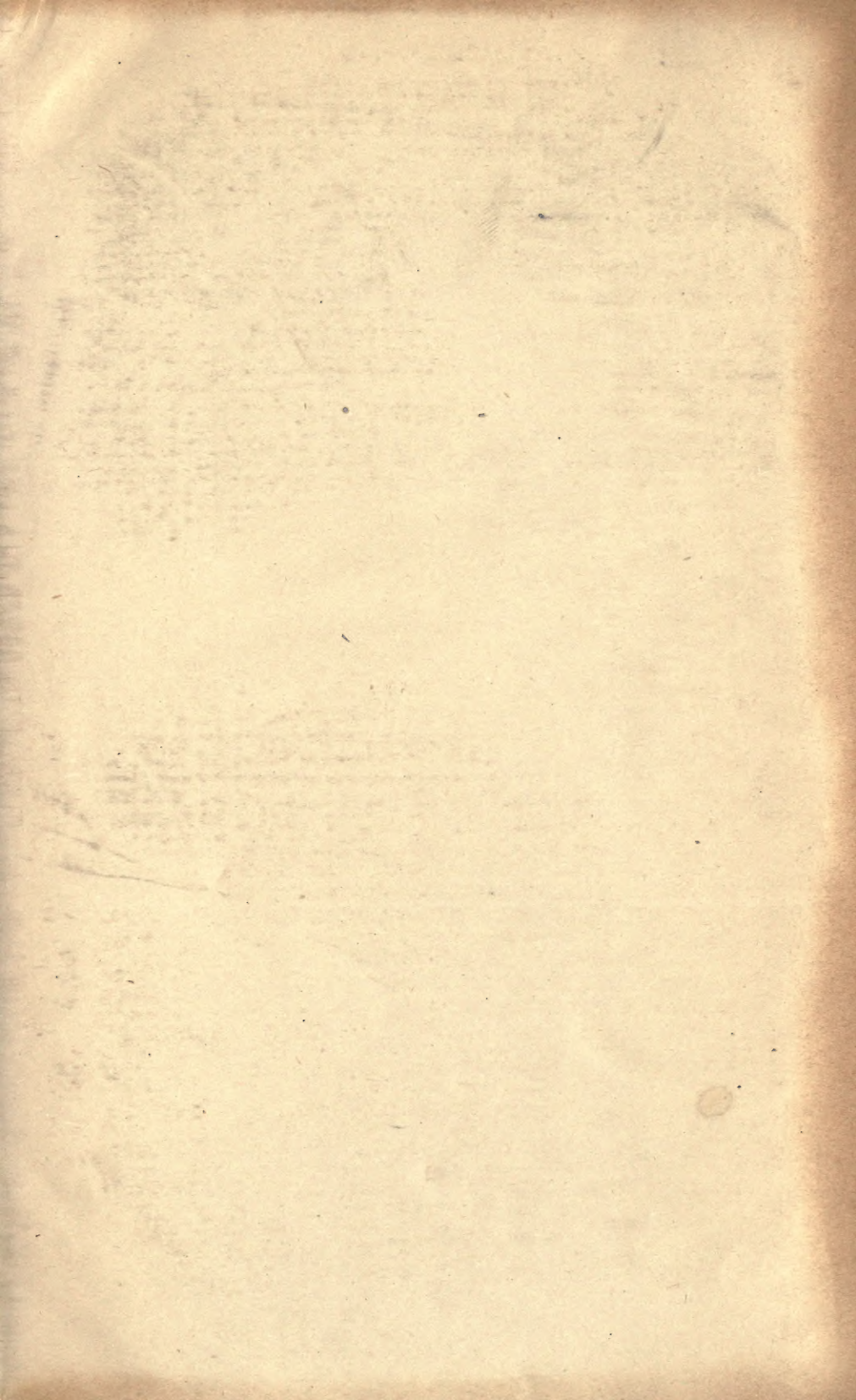


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KEY TITLES

Give the formal parts of pleadings in each particular jurisdiction, furnishing the method of making the forms in the other titles of general application. Thus, to adapt the New York complaint, Form No. 4999, to use in California, turn to the Key Title COMPLAINTS, and substitute the formal parts of the California complaint as given in Form No. 5910 for the formal parts in Form No. 4999, and the complaint becomes good for California. In the same manner, this form may be used in other jurisdictions. Again, take the Michigan bill, Form No. 5638; to adapt this bill to use in another jurisdiction, as for example in the District of Columbia, turn to Form No. 4268 in the Key Title BILLS IN EQUITY and substitute the formal parts there given for the formal parts in Form No. 5638. In like manner, any declaration, as for instance the Illinois precedent, Form No. 6875, may be readily transformed into a declaration for use in another jurisdiction by referring to the Key Title DECLARATIONS for the formal parts. The Key Titles thus far are AFFIDAVITS, ANSWERS, BILLS IN EQUITY, COMPLAINTS, CRIMINAL COMPLAINTS, DECLARATIONS, DEMURRERS, INDICTMENTS, INFORMATIONS IN CRIMINAL CASES, JUDGMENTS AND DECREES, MOTIONS, NOTICES, ORDERS, PETITIONS, PLEAS, REJOINDERS AND SUBSEQUENT PLEADINGS, REPLICATIONS AND REPLIES.

ENCYCLOPÆDIA
OF
FORMS AND PRECEDENTS

FOR
PLEADING AND PRACTICE, AT COMMON LAW,
IN EQUITY, AND UNDER THE VARIOUS
CODES AND PRACTICE ACTS.

EDITED BY
THOMAS E. O'BRIEN

UNDER THE SUPERVISION OF
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AUTHOR OF
The American and English Encyclopædia of Law
AND THE
Encyclopædia of Pleading and Practice.

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SEQUESTRATION.

BY HAROLD N. ELDRIDGE.

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For a Form of Complaint in Proceedings to Sequester Property of a Corporation on Return of Execution Unsatisfied, see the title RECEIVERS, vol. 15, Form No. 17120.

I. ON FAILURE TO OBEY PROCESS, ORDER OR DECREE OF COURT.¹1. Order of Sequestration.²

a. For Not Appearing to Bill of Complaint.

Form No. 18421.

(3 Barb. Ch. Pr. (2d ed.) 382.)³

At a court of chancery held for the state of *New York* at the town of *Saratoga Springs*, on the *fourteenth* day of *April*, 1843.

Present — *Reuben H. Walworth*, Chancellor.

John Doe }
against
Richard Roe. }

The defendant *Richard Roe*, being in contempt for not appearing to the bill of complaint in this cause, and a warrant having been issued to the sheriff of the county of *Saratoga*, attending this court at its present (or *last January*) term, and as such executing all the duties of a sergeant-at-arms, requiring him forthwith to go and take the said *Richard Roe* into his custody and bring him into this court to answer for his contempt, in pursuance of an order of this court dated the *seventeenth* day of *April* in the year aforesaid; and the said sheriff, acting as sergeant-at-arms, having returned that he had made diligent search and inquiry after the said *Richard Roe*, but that he did so abscond and secrete himself that he could not be found to be apprehended, as by the said warrant and the return thereto appears; on motion of *Mr. Jeremiah Mason*, of counsel for complainant, it is ordered that a commission of sequestration do issue against the said *Richard Roe*, directed to *William West*, *Samuel*

1. Sequestration Recognized. — Sequestration to compel the performance of some process, order or decree of the court is recognized in the following cases: *Grew v. Breed*, 12 Met. (Mass.) 363; *White v. Geraerd*, 1 Edw. (N. Y.) 336; *Hosack v. Rogers*, 11 Paige (N. Y.) 603; *Anonymous*, 1 Hayw. (2 N. Car.) 347; *McDaniel v. Stoker*, 5 Ired. Eq. (40 N. Car.) 274; *Peck v. Crane*, 25 Vt. 146; *Ross v. Colville*, 3 Call (Va.) 382; *Hook v. Ross*, 1 Hen. & M. (Va.) 310; *Steam Stone Cutter Co. v. Jones*, 13 Fed. Rep. 567; *Steam Stone Cutter Co. v. Sears*, 9 Fed. Rep. 8.

In *Maryland*, the writ of sequestration is in full force, both as a mesne process against a party in contempt and as a judicial writ to enforce the performance of a decree, and in its latter office is analogous to an execution at law. *Keighler v. Ward*, 8 Md. 254.

Statutes relating to sequestration proceedings on failure to obey a process,

order or decree of the court exist in the following states:

Alabama. — Civ. Code (1896), §§ 657, 852, 856.

Delaware. — Rev. Stat. (1893), p. 683, c. 89, § 52; p. 705, c. 95, §§ 4, 5.

Illinois. — Starr & C. Anno. Stat. (1896), c. 22, pars. 42, 47.

Maryland. — Pub. Gen. Laws (1888), art. 16, § 168; art. 93, § 256.

Michigan. — Comp. Laws (1897), § 493 *et seq.*

Mississippi. — Anno. Code (1892), § 489.

New Jersey. — Gen. Stat. (1895), p. 375, § 21.

Tennessee. — Code (1896), § 6304.

2. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

3. See, generally, *supra*, note 1, this page.

This form was sufficient under the old chancery practice of *New York*, which has been abolished.

Short, Jonathan White and Richard Black, commissioners, directing them to sequester the said defendant's personal estate, and the rents, issues and profits of his real estate, until the said defendant shall appear to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary.

b. For Not Answering Bill of Complaint.¹

Form No. 18422.¹

(3 Barb. Ch. Pr. (2d ed.) 394.)

(*Title of court and cause as in Form No. 18421.*)

The defendant *Richard Roe* having, by an order of this court made on the *tenth* day of *May*, A. D. 1843, been committed to the common jail of the county of *Saratoga*, for his contempt in not putting in his answer to the bill of complaint in this cause, as directed by a previous order of this court; and it now appearing by the certificate of the sheriff of said county of *Saratoga* that the said *Richard Roe* is still held by him in his custody by virtue of such commitment for his contempt, and it being shown by due proof by affidavit that the said *Richard Roe* hath not yet obeyed the order of this court directing him to put in his answer, but still persists in his contempt; on motion of Mr. *Oliver Ellsworth*, of counsel for the complainant, ordered that a commission of sequestration do issue, directed to (*naming commissioners*), commissioners, to sequester the personal estate, and the rents, issues and profits of the real estate of the said *Richard Roe*, until he shall put in his answer to the bill of complaint in this cause, clear his contempt, and this court shall make an order to the contrary.

c. For Not Delivering Property to Receiver as Ordered.

Form No. 18423.²

(3 Hoffm. Ch. Pr. 127.)

(*Title of court and cause as in Form No. 18421.*)

Upon reading the writ under the seal of this court for the commitment of the defendant *Warren Rogers* for his contempt in not obeying an order made by this court on the *nineteenth* day of *November last*, in this cause, by which order the said *Warren Rogers* was ordered to deliver into the hands of a receiver all and singular the goods, chattels, debts, choses in action, moneys, effects and property mentioned by him in his answer to the bill of complaint in the said cause,

1. Sequestration for Failure to Answer.
— Where, notwithstanding the issuance of an attachment against the defendant for failure to answer the bill of complaint, the defendant still persists in the contempt, the court may commit the defendant, and upon a certificate of the sheriff of his detainer and proof

by affidavit of his continued contempts in not filing his answer a sequestration may be granted. 1 Barb. Ch. Pr. (2d ed.) 88.

2. See, generally, *supra*, note 1, p. 2.

This form was sufficient under the old chancery practice of New York, which has been abolished.

or in any manner derived from or connected with the property of *Joseph Lyon*, assigned to him, the said *Warren Rogers*, as mentioned in the proceedings in the said cause, and also produce and deliver over all books, vouchers and securities relating thereto, upon oath; and upon reading the certificate of the sheriff of the city and county of *New York*, that the said *Warren Rogers* was held by him in his custody, by virtue of the said commitment for his said contempt, and on reading the affidavit of the receiver appointed in the said cause, showing that the said *Warren Rogers* had not yet obeyed the said order, but persisted in his said contempt—it is therefore ordered, on motion of *Mr. H. Bleeker*, on behalf of the complainants, that all the lands, tenements and hereditaments of the said *Warren Rogers*, and all the rents, issues and profits thereof, and all and singular his goods, chattels, credits and effects whatsoever be sequestered, and that the sequestrators appointed by this court do take the same into their hands, and deliver the same into the hands of the receiver aforesaid, and that all persons having in their hands any of the aforesaid lands, tenements, hereditaments, rents, issues, profits, goods, chattels, credits and effects, or who are indebted to the said *Warren Rogers*, be and they are hereby enjoined from delivering or paying to him, or to his order, the same, or any of them, or from applying the same to his use, after publication of notice of this order, on pain of contempt; and that a copy of this order be published for *three* weeks in the newspapers printed in the city of *New York*, entitled the "*Morning Courier*" and "*New York Enquirer*," and in the "*New York American*," and that a commission of sequestration be issued under the seal of this court to *William A. Tomlinson*, *Oliver H. Hicks*, *James Hamilton* and *James Lovett*.

d. For Not Paying Fine on Conviction for Contempt.¹

Form No. 18424.

(3 Barb. Ch. Pr. (2d ed.) 697.)²

(Title of court and cause as in Form No. 18421.)

The defendant *Richard Roe*, having been committed to the common jail of the county of *Saratoga*, in pursuance of an order of this court made on the *nineteenth* day of *May*, A. D. 1843, by which it was ordered that the said defendant should stand committed to the common jail of said county, there to remain charged upon the contempt mentioned in said order, until he should have paid the fine of \$100 imposed upon him for his misconduct, together with the costs and expenses of the proceedings for such misconduct, which were taxed at \$10, and it now appearing to the court by the certificate of the

1. Sequestration Authorized.—Where a party, after being committed for an omission to do some act required by an order or decree of the court, perseveres in his refusal to do such act, a sequestration may be issued and his servants, agents, etc., may be prohibited from delivering his property to him or

applying it to his use, on pain of contempt. 2 Barb. Ch. Pr. (2d ed.) 280.

2. See, generally, *supra*, note 1, p. 2.

This form was sufficient under the old chancery practice of *New York*, which has been abolished.

sheriff of said county of *Saratoga*, indorsed upon the warrant of commitment issued in pursuance of said order, that the said defendant has been taken and kept, and is still kept, by the said sheriff in his custody in said common jail by virtue of said warrant; and it appearing from the affidavit of the complainant's solicitor in this cause that the said defendant hath not yet obeyed the said order, but perseveres in his refusal to pay the money in the said order directed to be paid; on reading and filing the said warrant of commitment, sheriff's certificate, and affidavit, and on motion of *Jeremiah Mason*, solicitor for complainant, ordered that a writ of sequestration issue out of and under the seal of this court directed to (*Here state to whom the writ is to be directed*), giving them, or any *three* of them, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said *Richard Roe*, and to take, collect, receive, and sequester into their hands, not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever, and commanding them, or any *three* of them, at certain proper and convenient days and hours, to go to, and enter upon, all the messuages, lands, tenements and real estate of the said *Richard Roe*; and that they collect, take, and get into their hands, not only the rents and profits of all his said real estate, but also all his goods, chattels, personal estate and choses in action, and to detain and keep the same under sequestration in their hands, or to pay the same in such manner, and to such persons, as this court shall appoint, until the said *Richard Roe* shall clear his said contempts, and this court shall make an order to the contrary.

e. For Not Performing Decree of Chancellor.

Form No. 18425.¹

(Precedent in *Hayes v. Hayes*, 4 Del. Ch. 22, note.)²

And, now, to wit, this *31st* day of *May*, A. D. 1866, upon motion of *George B. Rodney*, Esq., Solicitor for the complainant, it appearing to the Chancellor by the record of this cause, that *John Hayes, Jr.*, the defendant, is in contempt by reason of his nonperformance of the decree of the Chancellor made on the *19th* day of *February*, A. D. 1857, and that an attachment issued against him to compel the performance of said decree has been ineffectual, it is, thereupon, now ordered that all the lands, tenements and hereditaments of the said *John Hayes, Jr.*, and the rents, issues and profits thereof, and all and singular his goods, chattels, rights, credits and personal estate whatsoever, be sequestered; and that a writ of sequestration be issued, directed to the sheriff of *New Castle County*, commanding him to enter upon all the lands, tenements, hereditaments of the said *John Hayes, Jr.*, in his bailiwick, and to collect, take and receive the rents, issues and profits thereof, and all his goods, chattels and

1. *Delaware*. — Rev. Stat. (1893), p. 795, c. 95, §§ 4, 5.

See also, generally, *supra*, note 1, p. 2.

2. This order was granted.

personal estate, and to sequester all his rights and credits whatsoever, and summon the persons in whose hands such rights and credits may be, to appear in this court and declare what rights and credits of the said *John Hayes, Jr.*, are in their hands respectively. And it is further ordered that all persons having in their hands or possession any lands, tenements, hereditaments, rents, issues, profits, goods, chattels, rights, credits or personal estate of the said *John Hayes, Jr.*, or who are indebted to him, be and they are hereby enjoined from delivering or paying to him or to his order, the same or any of them, or from applying the same to his use, on pain of contempt.

2. Writ of Sequestration.¹

a. For Not Appearing to or Answering Bill of Complaint.

(1) IN GENERAL.

Form No. 18426.

(3 Barb. Ch. Pr. (2d ed.) 383.)²

(SEAL) The People of the state of *New York* to *William West, Samuel Short, Jonathan White* and *Richard Black*, greeting:

Whereas *John Doe* lately exhibited his bill of complaint in our court of *chancery* against *Richard Roe*. And whereas the said *Richard Roe*, being duly served with a writ of subpoena issuing out of said court, commanding him under a certain penalty to appear to and answer the said bill, hath refused so to do, and thereupon all process of contempt hath regularly issued against him unto a sergeant-at-arms. And whereas the said *Richard Roe* hath of late absconded, and so concealed himself that the sheriff of the county of *Albany*, attending this court at the present (or *last January*) term thereof, and executing the powers and duties of a sergeant-at-arms, hath not been able to find him, so that he could be apprehended, as by the certificate and

1. Statutes relating to writs of sequestration are set out *supra*, note 1, p. 2.

Requisites of Writ, Generally. — For the formal parts of a writ in a particular jurisdiction see the title WRITS.

Address. — The writ of sequestration is directed to the sheriff, or (which is most usual) to certain persons of the complainant's own nomination. 1 Barb. Ch. Pr. (2d ed.) 68.

Number of Sequestrators. — A sequestration upon mesne process is usually directed to four sequestrators. 1 Barb. Ch. Pr. (2d ed.) 68.

Command. — The writ empowers the sheriff or persons named to enter upon and sequester the real and personal estate and effects of the defendant (or some particular part or parcel of his lands), and to take, receive and seques-

ter the rents, issues and profits thereof, and keep the same in their hands or pay the same in such manner and to such persons as the court shall, in its discretion, appoint, until the defendant shall have appeared to or answered the complainant's bill (or performed some other matter which has been ordered and enjoined by the court, in the process specifically mentioned), and for not doing thereof he is in contempt. 1 Barb. Ch. Pr. (2d ed.) 68.

Seal. — The writ of sequestration must be under the seal of the court. 1 Barb. Ch. Pr. (2d ed.) 68.

2. See, generally, note 1, this page.

This form was sufficient under the old chancery practice of *New York*, which has been abolished.

return of the said sheriff appears: Know ye, therefore, that we, in confidence* of your prudence and fidelity, have given, and by these presents do give, to you or any *three* of you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said *Richard Roe*, and to take, collect, receive and sequester into your hands, not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever; and therefore we command you, or any *three* of you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said *Richard Roe*, and that you do collect, take, and get into your hands, not only the rents and profits of all his said real estate, but also all his goods, chattels, and personal estate, and detain and keep the same under sequestration in your hands, or pay the same in such manner and to such persons as the said court shall appoint, until the said *Richard Roe* shall appear to (or *fully answer*) the said complainant's bill, clear his contempts, and our said court shall make an order to the contrary.

Witness, (*concluding as in Form No. 14333*).

Form No. 18427.

(Bright. Pur. Dig. Pa. (1894), p. 1630, § 46.)¹

The Commonwealth of *Pennsylvania*: To the Sheriff of the County of *Philadelphia*, greeting:

Whereas *John Doe* (*Here set out the decree, or so much thereof as is material to explain the duty to be performed*). Therefore we command you, that you do, at proper and convenient hours in the day-time, go to and enter upon all the messuages, lands, tenements and real estates of the said *John Doe*, and that you do collect, take and get into your hands, not only the rents, issues and profits of all his said real estates, but also all his goods, chattels and personal estate, and detain and keep the same under sequestration in your hands; and also that you attach all stocks held by him in incorporated companies, and keep the same under attachment, until our said orphans court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand of the manner in which you shall have executed this writ to our said court on the *tenth day of May next*.

Witness, (*concluding as in Form No. 14909*).

(2) AGAINST CORPORATION.²

1. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 1630, § 46, provides that writs of sequestration shall be in the above form.

2. *Sequestration Against Corporation*. — The proceedings against a corporation, either for the purpose of compelling an appearance or an answer to a

bill of complaint, are commenced by distraining the property of the corporation. For this purpose a writ of *distringas* is the first process. This is followed, in case of disobedience, by an alias *distringas*, and this in turn by a *pluries distringas*. If the *pluries distringas* fails of effect, upon its being

Form No. 18428.

(3 Barb. Ch. Pr. (2d ed.) 387.)¹

(SEAL) The People of the State of *New York* to *Samuel Ireland, Jonathan Short, William Smith, James White* and *William West*, greeting: Whereas *John Doe* lately exhibited his bill of complaint in our court of *chancery* against the *Commercial Bank of Albany*, and caused a subpoena in said cause to be issued out of and under the seal of this court, and duly served upon the said *Commercial Bank of Albany*, which subpoena was tested on the *tenth* day of *May*, A. D. 1843, and returnable on the *twenty-fifth* day of *May* aforesaid; and whereas the said *Commercial Bank of Albany* having neglected and refused to enter their appearance in said cause, a writ of *distringas* was thereupon issued against the said *Commercial Bank of Albany*, directed to the sheriff of the county of *Albany*, requiring him to make a distress upon the lands and tenements, goods and chattels of the said corporation within his bailiwick, so that neither the said corporation nor any other person or persons for them might possess them until the court of *chancery* should make order to the contrary; and whereas further process of contempt has issued against the said corporation to compel its appearance in said cause, without effect, unto a pluries *distringas*, as appears by the said process and the returns thereto; know ye, therefore, that we, in confidence (*concluding as in Form No. 18426, from **).

b. For Not Delivering Property to Receiver as Ordered.

Form No. 18429.

(3 Hoffm. Ch. Pr. 128.)²

(SEAL) The people of the state of *New York*, to *William A. Tomlinson, Oliver H. Hicks, James Hamilton*, and *James Lovett*, Greeting:

Whereas *James Lovett, William A. Tomlinson, William A. Booth, James Hamilton, James Donaldson*, and *William F. Hamilton*, The President and Directors of the *Manhattan Company*, and The President, Directors and Company of the *Fulton Bank*, complainants on behalf of themselves and other creditors, filed their bill of complaint in our court of *chancery* against *Warren Rogers, Joseph Lyon, James*

returned by the sheriff, a commission of sequestration may be obtained against the corporation. 1 Barb. Ch. Pr. (2d ed.) 76.

Requisites of Writ, Generally.—See *supra*, note 1, p. 6.

Address.—The writ of sequestration is usually directed to five persons named by the complainant. 1 Barb. Ch. Pr. (2d ed.) 76.

Command.—The writ must direct the sequestrators to sequester the goods and chattels, the rents and profits and real estate of the corporation, until

they shall appear or answer the complainant's bill or the court make further order to the contrary. 1 Barb. Ch. Pr. (2d ed.) 76.

1. See, generally, *supra*, note 2, p. 7.

This form was sufficient under the old chancery practice of New York, which has been abolished.

2. See, generally, *supra*, note 1, p. 6.

This form was sufficient under the old chancery practice of New York, which has been abolished.

Gallagher, Edmund J. Rogers, Obediah W. Jones, and The President, Directors and Company of the Union Bank, defendants: And whereas after the answer of the said Warren Rogers to the said bill of complaint was put in, an order was made on the nineteenth day of November last, among other things, ordering that the defendant Warren Rogers should deliver over to the receiver, to be appointed under the said order, all and singular the goods, chattels, debts, choses in action, moneys, effects and property whatsoever, mentioned by him in his said answer, or in any manner derived from or connected with the property of Joseph Lyon, assigned to him as mentioned in the pleadings in the said cause, upon oath, before a master in chancery; and also that the said Warren Rogers should produce and deliver over all books, vouchers and securities relating thereto, upon oath as aforesaid; and whereas the said Warren Rogers hath refused to comply with said order, and process of contempt hath thereupon issued against him, and he hath for the said contempt been committed by our chancellor, in the said court of chancery, to the common gaol of the city and county of New York, and still hath persisted in his said contempt, as to our chancellor in our court of chancery hath been fully made to appear. Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give to you, or any two of you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever, of the said Warren Rogers, and to take, collect, receive and sequester into your hands, not only all the rents and profits of the said messuages, lands and tenements and real estate, but also all his goods, chattels and personal estate whatsoever; and therefore we command you, that you do, at certain proper and convenient days and hours, go to and enter upon all the messuages, lands, tenements and real estate of the said Warren Rogers; and that you do collect, take and get into your hands, not only the rents and profits of his said real estates, but also all his goods, chattels and personal estate, and keep the same under sequestration in your hands, until our court of chancery shall make further order to the contrary.

Witness, *Reuben Hyde Walworth*, Chancellor, at the city of *Albany*, this *twentieth* day of *April*, in the year of our Lord one thousand eight hundred and *thirty*.

D. Lord, junior, Sol.

James Porter, Register.

e. For Not Paying Fine on Conviction for Contempt.

Form No. 18430.

(3 Barb. Ch. Pr. (2d ed.) 698.)¹

(SEAL) The People of the State of *New York* to (naming commissioners), greeting: Whereas, by an order of our court of chancery made on the *tenth* day of *May*, A. D. 1843, in a certain cause depending in

1. See, generally, *supra*, note 1, p. old chancery practice of New York, which has been abolished.

6. This form was sufficient under the

said court, wherein *John Doe* was complainant and *Richard Roe* defendant, the said *Richard Roe* was convicted of a contempt of our said court in violating the writ of injunction issued in said cause, and was fined \$100 therefor, and was directed to pay to the said complainant the costs and expenses of the proceedings for such misconduct, taxed at the sum of \$10, and to stand committed to the common jail of the county of *Saratoga*, there to remain charged upon the said contempt until he should pay such fine and costs. And whereas the said *Richard Roe*, having been committed to the common jail of said county in pursuance of the said order, under and by virtue of a warrant issued for that purpose, is still kept by the sheriff of said county in his custody there by virtue of said warrant, and hath not yet obeyed the said order, but perseveres in his refusal to pay the money in the said order directed to be paid, as to our said court of *chancery*, before the chancellor thereof, has been fully made to appear.

Know ye, therefore, that we, in confidence of your prudence and fidelity, have given, and by these presents do give, to you or any *three* of you, full power and authority to enter upon all the messuages, lands, tenements and real estate whatsoever of the said *Richard Roe*, and to make, collect, receive and sequester into your hands, not only all the rents and profits of the said messuages, lands, tenements and real estate, but also all his goods, chattels and personal estate whatsoever; and therefore we command you, or any *three* of you, that you do, at certain proper and convenient days and hours, go to, and enter upon, all the messuages, lands, tenements and real estate of the said *Richard Roe*, and that you do collect, take, and get into your hands, not only the rents and profits of all his said real estate, but also all his goods, chattels and personal estate and choses in action, and to keep and detain the same under sequestration in your hands, or pay the same in such manner and to such persons as our said court shall appoint, until the said *Richard Roe* shall clear his said contempts, and our said court shall make an order to the contrary.

Witness, (*concluding as in Form No. 14333*).

3. Attornment of Defendant's Tenants to Sequestrators.

a. Notice to Attorn.¹

Form No. 18431.

(3 Barb. Ch. Pr. (2d ed.) 383.)²

By virtue of a writ of sequestration issued out of and under the seal of the court of *chancery* of the state of *New York*, in a certain suit pending in said court between *John Doe*, complainant, and *Rich-*

1. Notice to Attorn. — On entering upon a defendant's estate, the sequestrators should serve the tenants in possession, if there are any, with a notice in writing to attorn and pay their arrears and growing rents to such sequestrators. 1 Barb. Ch. Pr. (2d ed.) 71.

For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. This form was sufficient under the old chancery practice of *New York*, which has been abolished.

ard Roe, defendant, to us directed and delivered as commissioners to execute the same, and which writ under the seal of said court is now shown to you (or *with a copy of which writ you are hereby served*), you are hereby notified and required to attorn to us in future as your landlords of the premises in your occupation belonging to the said *Richard Roe*; and you are also notified and required to pay to us the arrears of rent now due from you respectively, as tenants of the said *Richard Roe*; and also to pay to us the rents which shall hereafter grow due from you, and each of you, on account of the said premises, from time to time, as the same shall become due, until the further order of said court of *chancery*.

Dated this *tenth* day of *May*, 1843.

Samuel Ireland,
William Billings,
Charles Curtis,
James Williams, } Commissioners.

To *John Hill* and *Allen Merrill*, Tenants of *Richard Roe*.

b. Affidavit to Obtain Order to Attorn.¹

Form No. 18432.

(3 Barb. Ch. Pr. (2d ed.) 384.)²

(*Title of court and cause, and venue as in Form No. 14328.*)

John Jones, of *Saratoga Springs*, in said county, being duly sworn, deposeth and saith that on the *tenth* day of *May* instant, this deponent personally served upon *Timothy Noakes*, a tenant occupying a portion of the premises belonging to the defendant *Richard Roe*, as his tenant, a notice of which a copy is hereunto annexed, by delivering the same to him, and at the same time showing to him the writ of sequestration therein mentioned, issued out of and under the seal of this court; and further that the said *Timothy Noakes* has not as yet attorned, or paid the rent due from him as such tenant, according to the requirements of such notice, to this deponent, nor to either of the other commissioners, to the knowledge or belief of this deponent.

(*Signature and jurat as in Form No. 14328.*)

c. Order to Attorn.³

1. **Necessity of Affidavit.**—No order will be granted that a tenant attorn and pay his rent to sequestrators until an affidavit has first been made of service of a notice in writing to the tenant to attorn and pay his arrears and growing rents to the sequestrators. 1 Barb. Ch. Pr. (2d ed.) 71.

For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. This form was sufficient under the

old chancery practice of New York, which has been abolished.

3. **Order for Attornment.**—Upon an affidavit of service of a notice in writing upon a tenant to attorn and pay his arrears and growing rents to the sequestrators, an order will be granted that the defendant attorn and pay his rent to such sequestrators. 1 Barb. Ch. Pr. (2d ed.) 71.

For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Form No. 18433.

(3 Barb. Ch. Pr. (2d ed.) 384.)¹*(Title of court and cause as in Form No. 18421.)*

A commission of sequestration having heretofore issued in this cause, directed to *Samuel Ireland, William Billings, Charles Curtis* and *James Williams*, as commissioners, directing them to sequester the personal estate of the defendant *Richard Roe*, and the rents, issues and profits of his real estate, until the said *Richard Roe* should appear to the bill of complaint in this cause, clear his contempt, and the court should make an order to the contrary; and on reading and filing the affidavit of *Samuel Ireland*, one of the said commissioners, proving the service upon *Timothy Noakes*, one of the tenants of said *Richard Roe*, of a notice requiring him to attorn to the said commissioners and to pay to them the rent then due or thereafter to grow due from the said *Timothy Noakes* on account of the said premises; and showing that the said *Noakes* had not complied with such notice; on motion of Mr. *Jeremiah Mason*, of counsel for the complainant, it is ordered that the said *Timothy Noakes* do attorn to the said commissioners, and pay to them the arrears of rent now due, and the rents which shall hereafter grow due from him on account of the said premises, from time to time, as the same shall become due, until the further order of the court.

4. Examination of Claimant Pro Interesse Suo.²

Form No. 18434.

(3 Barb. Ch. Pr. (2d ed.) 385.)¹*(Title of court and cause as in Form No. 18421.)*

A commission of sequestration having heretofore issued in this cause directed to *Samuel Ireland, William Billings, Charles Curtis* and *James Williams*, as commissioners, directing them to sequester the personal estate of the defendant *Richard Roe*, and the rents, issues and profits of his real estate, until the said *Richard Roe* should appear to the bill of complaint in this cause, clear his contempt, and the court should make an order to the contrary; under and by virtue of which commission the said commissioners have taken possession of a certain farm or lot of land, with the appurtenances, situate, lying and being in the town of *Saratoga Springs*, in the county of *Saratoga*, called the *Baker* lot, as part of the real estate of the said *Richard Roe*, and then being in his actual possession, as appears by the return

1. This form was sufficient under the old chancery practice of New York, which has been abolished.

2. Examination Pro Interesse Suo. — Where any person claims title to an estate or other property sequestered, whether by mortgage or judgment, lease or otherwise, or he has a title paramount to the sequestration, the proper course for him is to apply to the court to direct the complainant to ex-

hibit interrogatories before a master, in order that the party applying may be examined as to his title to the estate. An examination of this sort is called an examination *pro interesse suo*, and an order for it may be obtained as well where the property consists of goods and chattels, or personalty, as where it is real estate. 1 Barb. Ch. Pr. (2d ed.) 72.

of the said commissioners to the said commission of sequestration; and it now appearing by the affidavit of *John Doe* that he claims title to the said farm or lot of land under and by virtue of a certain deed or conveyance thereof alleged by him to have been executed by the said *Richard Roe* to him, the said *John Doe*, and dated the *tenth* day of *May*, A. D. 1843, and the said *John Doe* now applying for leave to be examined *pro interesse suo* before a master of this court touching his interest and title in the farm or lot of land so claimed by him; thereupon, on reading and filing the return of the said commissioners to the said commission of sequestration, and the affidavit of the said *John Doe*, and on motion of *Mr. Oliver Ellsworth*, of counsel for the said *John Doe*, it is ordered that it be referred to one of the masters of this court residing in the county of *Saratoga*, to take the examination of the said *John Doe pro interesse suo*, and that within *three* days from the service of a copy of this order, the complainant in this cause exhibit before said master interrogatories for that purpose; that the master settle such interrogatories; that the said *John Doe* put in his examination thereto within *twenty-four* hours after such interrogatories are settled; and that, if a replication to such examination is filed, the master may examine any other persons as witnesses touching such claim. And it is further ordered that the said master do certify whether the said *John Doe* hath made out a title to the said premises so claimed by him, or any part thereof; and that the said *John Doe* procure and file such report within *ten* days from the date of this order, to the end that such further order may be made in the premises as shall be just.

II. OF PROPERTY PENDING SUIT.

1. Affidavit for Sequestration.¹

a. By Plaintiff.

(1) IN GENERAL.

Form No. 18435.²

State of *Mississippi*,)
Webster County.) In Chancery Court.

John Doe, a citizen of *Walthall*, in said county, }
 complainant, }
 No. 400. }
 against }
Richard Roe, a citizen of *Walthall*, in said county, }
 defendant. }

State of *Mississippi*,)
Webster County, ss. }

Personally appeared before me, the undersigned, clerk of the Chancery Court of said county, the above named complainant *John*

1. **Requisites of Affidavit, Generally.** — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. I, p. 548.

2. *Mississippi.* — Anno. Code (1892), §§ 511, 512.

Affidavit Necessary. — A writ of sequestration is obtained by affidavit. Miss. Anno. Code (1892), §§ 511, 512.

Doe, who, being duly sworn, on oath says that he has good cause to believe, and does believe, that there is danger of the removal of the hereinafter described property, which is involved in the above styled suit, beyond the limits of the state of *Mississippi* (or of its concealment in said state so as to be beyond the process of said court, or of its transfer so as to defeat the rights of the said complainant), and that such removal (or concealment or transfer) is about to occur; the said property being described as follows, to wit: (*Here describe the property*), the aggregate value of said property being *one thousand* dollars. Wherefore he prays that a writ of sequestration be issued, as provided by the statute.

John Doe.

Sworn to and subscribed before me this *tenth* day of *May*, A. D. 1899.

Calvin Clark, Clerk.

Form No. 18436.¹

<i>John Doe</i> , plaintiff, against <i>Richard Roe</i> , defendant. State of <i>Texas</i> , County of <i>Hill</i> .	}	No. 400. In <i>Justice's</i> Court, Precinct No. 4, of <i>Hill</i> County, <i>Texas</i> .
} ss.		

Before me, the undersigned authority, on this day personally appeared *John Doe*, plaintiff in the above entitled cause, who, being by me duly sworn, on oath deposes and says that he is the owner² of the following described property, situated in *Hill* county, *Texas*,³ and that he is entitled to the possession of the same,⁴ to wit: (*Here describe the property*⁵ and state the value of each article

Form of Affidavit. — The affidavit must show that complainant has good cause to believe, and does believe, that there is danger of the removal of the property involved in the suit beyond the limits of the state, or of its concealment in the state so as to be beyond the process of the court, or of its transfer so as to defeat the rights of the complainant, and that such removal, concealment or transfer is about to occur. Miss. Anno. Code (1892), § 512.

1. *Texas*. — Rev. Stat. (1895), art. 4864 *et seq.*

Affidavit Necessary. — No sequestration shall issue in any cause until the party applying therefor shall file an affidavit in writing. Tex. Rev. Stat. (1895), art. 4865.

2. **Interest in Property.** — The affiant must state that he is the owner of the property sued for, or has some interest therein, specifying such interest. Tex. Rev. Stat. (1895), art. 4865.

3. **Situation of Property.** — The county in which the property to be sequestered is situated must be stated. Tex. Rev. Stat. (1895), art. 4865; *Bemis v. Wells*, 10 Tex. Civ. App. 626.

4. **Entitled to Possession.** — The affiant must state that he is entitled to the possession of the property sued for. Tex. Rev. Stat. (1895), art. 4865.

5. **Description of Property — Generally.** — The property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind. Tex. Rev. Stat. (1895), art. 4865.

In *Boykin v. Rosenfield*, 69 Tex. 115, the property to be sequestered was described as saw-logs in the defendant's possession in the county where the suit was brought, "each marked cross within a circle on the end of the log, averaging from fourteen to thirty feet in length and from one foot to thirty inches in diameter, and containing in the aggregate about 465,750 feet in measurement." The value of each log was stated. It was held that the property to be sequestered was described with sufficient certainty, there being nothing in the pleadings of either party showing that there was any other property not seized which answered the description given.

thereof¹); that all of said property is now in the possession of the defendant *Richard Roe*; that affiant fears the said defendant will injure, ill treat, waste or destroy said property, or remove the same out of the limits of said county, during the pendency of said suit. (*Here set out any other statutory cause for the issuance of a writ of sequestration.*)²

John Doe.

Sworn to and subscribed before me this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace,
Precinct No. 4, *Hill County, Texas.*

(2) IN SUIT TO FORECLOSE MORTGAGE LIEN ON PERSONAL PROPERTY.³

Form No. 18437.⁴

(Precedent in *McMillan v. Moon*, 18 Tex. Civ. App. 228.)⁵

[(*Title of court and cause, and venue as in Form No. 18436.*)]⁶

Before me, the undersigned authority, personally appeared *W. J.*

1. Value of Property.—The value of each article of the property to be sequestered must be alleged. Tex. Rev. Stat. (1895), art. 4865; *Watts v. Overstreet*, 78 Tex. 571; *Endel v. Norris*, 15 Tex. Civ. App. 140; *Huckins v. Leitner*, 4 Tex. App. Civ. Cas., § 16; *Morgan v. Turner*, 4 Tex. Civ. App. 192. And this allegation must be definite and positive. *Morgan v. Turner*, 4 Tex. Civ. App. 192.

An affidavit which, after fully describing the animals sought to be sequestered, states that they "are worth about the sum of \$50 per head, or in the aggregate about the sum of \$500," is insufficient. *Morgan v. Turner*, 4 Tex. Civ. App. 192.

2. Statutory Causes.—The affidavit shall set forth one or more of the statutory causes entitling the affiant to the writ of sequestration. Tex. Rev. Stat. (1895), art. 4865; *Bemis v. Wells*, 10 Tex. Civ. App. 626.

Supplemented by Petition.—As the proceedings for sequestration are ancillary to the main suit, it is not necessary to state in the affidavit who the defendants were or that they were in possession, where the petition shows both these facts. *Watts v. Overstreet*, 78 Tex. 571.

3. Requisites of Affidavit, Generally.—See *supra*, note 1, p. 13.

Existence of Mortgage.—The fact of the existence of the mortgage or lien must be stated. Tex. Rev. Stat. (1895), art. 4865.

Mortgage Just and Unsatisfied—Generally.—That the mortgage or lien is

just and unsatisfied must be stated. Tex. Rev. Stat. (1895), art. 4865.

Amount Unsatisfied.—The affidavit must state the amount of the mortgage or lien still unsatisfied. Tex. Rev. Stat. (1895), art. 4865.

When Payable.—The date when the mortgage or lien was due must be stated. Tex. Rev. Stat. (1895), art. 4865.

Cause for Writ.—That affiant fears that defendant or person in possession of the mortgaged property will injure, ill treat, waste or destroy such property, or remove the same out of the county during the pendency of the suit, must be stated. Tex. Rev. Stat. (1895), art. 4864; *Watts v. Overstreet*, 78 Tex. 571.

4. Texas.—Rev. Stat. (1895), art. 4865.

5. A motion to quash the writ of sequestration in this case, on the ground that the nature of the property was not stated definitely, as required by statute, was refused. The court said: "We overrule this assignment, because the amount of the debt was definitely set forth in the preceding part of the affidavit, and it was clearly stated that the lumber described was worth the amount above set forth. This was sufficiently definite, and in compliance with the statute, because there was but one sum of money or amount set forth in the affidavit, and the reference could have applied to no other. That is certain which can be made certain."

6. The matter to be supplied within [] will not be found in the reported case.

Moon, plaintiff in the above entitled cause, and being duly sworn says that he has brought suit against the defendant *A. N. McMillan* for the recovery of a debt due plaintiff by the said defendant, and to foreclose his mortgage lien on the following described property, to wit: All lumber of every kind, quality, and description, manufactured, sawed, and made at the defendant *McMillan's* mill, from and after *January 25, 1895*, up to the present date. That plaintiff has a mortgage on said above described property, and the same is just and unsatisfied, and the amount still due and unsatisfied is *thirteen hundred and twenty dollars and thirty-six cents*, and the same was due *June 25, 1895*, and [said mortgaged property] is situated in *Morris* county, *Texas*, and is worth the above set forth amount, and plaintiff says he fears the defendant *A. N. Millan* will remove the property out of the county during the pendency of this suit.

[(Signature and jurat as in Form No 18436.)]¹

b. By Agent of Plaintiff.³

Form No. 18438.³

(Precedent in *Cahn v. Jaffray*, 12 Tex. Civ. App. 325.)⁴

[(Title of court and cause as in Form No. 5934.)]¹

The State of *Texas*,
County of *Dallas*. }

Now comes plaintiffs, *E. S. Jaffray & Co.*, by their agent, *G. W. Cary*, who, being sworn, says he is agent for *E. S. Jaffray & Co.*, and that *E. S. Jaffray & Co.* are the owners of the property sued for and hereinafter described, and are entitled to the possession thereof; that the property aforesaid, which plaintiffs seek to sequester, is situated in *Dallas* county, *Texas*, and the value and quantity and description of each article is respectively as follows: (*describing the property*). The affiant further states that plaintiffs sue for the possession of said above described property, which is situated in *Dallas* county, and makes oath that he fears that said *Sigmund Loeb*, who is in possession thereof, will remove the same out of the limits of the county during the pendency of this suit.

G. W. Cary.

[(Jurat as in Form No. 18436.)]¹

1. The matter to be supplied within [] will not be found in the reported case.

2. **Affidavit by Agent.** — An affidavit by an agent which recites his agency and states that he fears that the property will be removed, etc., is sufficient. It is not necessary to state that the plaintiff, a nonresident, fears that the defendant will remove said property. "The statute contemplates that such fear shall exist in the mind of the person applying for its issuance, by the making of the affidavit. It is certainly

not intended that an agent should swear what is in the mind of his principal, who is a great distance away, and perhaps ignorant of the facts. *Cahn v. Jaffray*, 12 Tex. Civ. App. 324.

3. *Texas*. — Rev. Stat. (1895), art. 4865.

4. A motion to quash the affidavit in this case was overruled. The court said, "we think the affidavit is in substantial compliance with the statute, and that the action of the court below in refusing to quash the sequestration proceedings was proper."

2. Sequestration Bond of Plaintiff.

Form No. 18439.¹

State of *Mississippi*, }
Webster County. } In *Chancery Court*.

Know all men by these presents, that we, *John Doe*, principal, and *Samuel Short* and *William West*, sureties,² are held and firmly bound unto *Richard Roe*³ in the sum of *two thousand* dollars,⁴ for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed with our hands, and delivered this the *tenth* day of *May*, A. D. 1899.

The condition⁵ of this obligation is such, that whereas the said *John Doe*, principal obligor herein, has duly made affidavit for the sequestration of certain personal property involved in the suit in said court, wherein said *John Doe* is complainant and said *Richard Roe* is defendant, No. 400, said property being described in said affidavit as follows, to wit: (*Here describe the property as in the affidavit*), the aggregate value of said property being *one thousand* dollars.

Now, if the said *John Doe*, principal obligor herein, shall pay all damages which may accrue from the wrongful seizure of said property, then this obligation shall be void.

John Doe.
Samuel Short.
William West.

I approve the above bond this the *tenth* day of *May*, A. D. 1899.
Calvin Clark, Chancery Clerk.

State of *Mississippi, Webster County.*

Personally appeared before me, the undersigned, clerk of the *Chancery Court* of said county, *Samuel Short* and *William West*, the sureties whose names are signed to the foregoing bond, each of whom, being by me duly sworn, on oath, says that he is worth, in property situated in *Webster county, Mississippi*, which he holds in his own name and right, over and above all his legal exemptions and all his debts and liabilities, the amount below set opposite his name, to wit:

1. *Mississippi*. — Anno. Code (1892), § 513.

Bond Necessary. — No writ of sequestration shall issue until the complainant shall enter into bond. Miss. Anno. Code (1892), § 513.

2. *Sureties*. — The bond shall be with sufficient sureties. Miss. Anno. Code (1892), § 513.

3. *Payable to Defendant*. — The bond shall be made payable to the defendant. Miss. Anno. Code (1892), § 513.

4. *Amount of Bond*. — The bond shall be in double the value of the property proposed to be seized, to be fixed by the clerk from the affidavit or such evidence as may satisfy him. Miss. Anno. Code (1892), § 513.

5. *Condition*. — The bond shall be conditioned to pay all damages which may accrue from the wrongful seizure of the property to be sequestered. Miss. Anno. Code (1892), § 513.

The said *Samuel Short*, the sum of *ten thousand* dollars;
The said *William West*, the sum of *twenty thousand* dollars.

Samuel Short.

William West.

Sworn to and subscribed before me this the *tenth* day of *May*, A. D. 1899.

Calvin Clark, Clerk.

Form No. 18440.¹

John Doe, plaintiff, } No. 400.
 against } Suit in *Justice's Court*, Precinct No. 4, of
Richard Roe, defendant.² } *Hill County*.

Know all men by these presents, that we, *John Doe*, as principal, and *William West* and *Samuel Short*, as sureties, do hereby acknowledge ourselves bound to pay to *Richard Roe*, defendant in the above entitled suit,³ the sum of *one thousand* dollars,⁴ conditioned⁵ that said *John Doe*, plaintiff in the above entitled suit, who has applied for a writ of sequestration in said suit, will pay to the defendant all such damages as may be awarded against him, and all costs, in case it shall be decided that such sequestration was wrongfully issued.

Witness our hands this *tenth* day of *May*, A. D. 1899.

John Doe, Principal.

William West, Surety.

Samuel Short, Surety.⁶

Approved this *tenth* day of *May*, 1899.

Abraham Kent,

Justice of the Peace, Precinct No. 4, *Hill Co., Texas*.

1. *Texas*. — Rev. Stat. (1895), art. 4864 *et seq.*

Separate Bond. — If the action in which the sequestration is sought is against several who are jointly sued, the plaintiff need not execute a separate bond to each defendant. *Boykin v. Rosenfield*, 69 Tex. 115.

2. **Description of Parties.** — The parties to the suit must be properly described. *Rohrbough v. Leopold*, 68 Tex. 254. And where the name of the plaintiff is given, but the place for the name of the defendant is left blank, the bond is insufficient. *Rohrbough v. Leopold*, 68 Tex. 254.

3. **Payable to Defendant.** — The bond must be made payable to the defendant. Tex. Rev. Stat. (1895), art. 4865. And where the bond is made payable to J. E. Rohrbough and I. Franklin, without describing them as defendants, and is conditioned that plaintiffs "will pay to the defendants in said suit all such damages," etc., without stating who the defendants are, it does not clearly appear on the face of the bond that Rohrbough and Franklin are defendants. *Rohrbough v. Leopold*, 68 Tex. 254.

4. **Penalty.** — The bond must be for a sum of money not less than double the value of the property to be sequestered, or stated in the affidavit. Tex. Rev. Stat. (1895), art. 4865.

5. **Condition.** — The bond must be conditioned that the plaintiff or person suing out the writ will pay to the defendant all such damages as may be awarded against him and all costs in case it shall be decided that such sequestration was wrongfully issued. Tex. Rev. Stat. (1895), art. 4865; *Finegan v. Read*, 8 Tex. Civ. App. 33.

A sequestration bond conditioned that the plaintiff will pay to the defendants all such damages as may be adjudged against them (instead of against her) is manifestly defective. *McLeod Artesian Well Co. v. Craig*, (Tex. Civ. App. 1897) 43 S. W. Rep. 934.

6. **Sureties.** — Bond must be with two or more good and sufficient sureties. Tex. Rev. Stat. (1895), art. 4865.

Seal. — No seal is required on the sequestration bond. Tex. Rev. Stat. (1895), art. 4862; *Tompkins v. Toland*, 46 Tex. 584.

3. Writ of Sequestration.

Form No. 18441.¹

The State of *Mississippi* to the Sheriff of *Madison* County, Greeting:²

We command³ you to seize and take into your possession the following described property, if it be found in your county, viz: (*Here describe the property to be seized*), and hold the same until the further order of our *Chancery* Court of the county of *Madison*, in a certain cause therein pending, wherein *John Doe* is complainant and *Richard Roe* is defendant, or until said *Richard Roe*, defendant, shall enter into bond with sufficient sureties payable to said *John Doe*, complainant, to have said property forthcoming to abide the decree to be made by our said *Chancery* Court in said cause, which bond the said *Richard Roe*, defendant, may give and thereby be restored to the possession of said property.

Given under my hand and official seal, and issued this *tenth* day of *May*, A. D. 1900.

Calvin Clark,

Clerk of the *Chancery* Court of *Madison* County.

Form No. 18442.⁴

John Doe, plaintiff, } No. 400.
 against } In *Justice's* Court, Precinct No. 4, *Hill*
Richard Roe, defendant. } County, *Texas*.
 The State of *Texas* to the Sheriff or any Constable of *Hill* County,
 Greeting:⁵

You are hereby commanded⁶ that you take into your possession the following described property, if to be found in your county, viz: (*Here describe the property as in the affidavit*),⁷ and keep the same sub-

1. *Mississippi*. — Anno. Code (1892), § 514.

2. *Address*. — The writ of sequestration shall be directed to the sheriff or other proper officer. Miss. Anno. Code (1892), § 514.

3. *Command*. — The writ shall command the officer to seize and take into possession the property in question, and to hold the same until the further order of the court or chancellor, or until the defendant from whose possession the same is taken shall enter into bond, with sufficient sureties, payable to the complainant, to have the property forthcoming to abide the decree to be made by the court in the cause, which bond the defendant may give, and thereby be restored to the possession of the property. Said bond, if given, shall be returned with the writ and filed in the cause, and, in case the property shall not be delivered or forthcoming to abide the decree, shall have the force and effect of a judgment; and execution may issue thereon against all the obligors for the amount of the

decree or the value of the property, according to the nature of the case. Miss. Anno. Code (1892), § 514.

4. *Texas*. — Rev. Stat. (1895), art. 4864 *et seq.*

5. *Address*. — The writ of sequestration may be directed to the sheriff or any constable of any county wherein the property is alleged to be situated. Tex. Rev. Stat. (1895), § 4869.

6. *Command*. — The writ shall command the sheriff or any constable to take into his possession the property described, if it be found in the county, and keep the same subject to the future order of the judge, court or justice of the peace who issued the writ, unless the same is replevied according to law. Tex. Rev. Stat. (1895), art. 4869; Thompson v. Graves, 4 Tex. App. Civ. Cas., § 7; Wilkin v. Weller, 1 Tex. App. Civ. Cas., § 879.

7. *Description of Property*. — The property to be sequestered must be described as it is described in the affidavit. Tex. Rev. Stat. (1895), art. 4869; Woessner v. Fly, 63 Tex. 198.

ject to the future order of our *Justice's Court*, of Precinct No. 4, in and for the county of *Hill*, in a certain cause therein pending, wherein the said *John Doe* is plaintiff and the said *Richard Roe* is defendant, unless the same is replevied according to law.

Herein fail not, but have you this writ, with your return thereon, showing how you have executed the same, before our said court at its next regular term, to be holden at *Abbott*, in said county of *Texas*, on the *tenth* day of *May*, A. D. 1899.

Witness my official signature, at *Abbott*, this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace,
Precinct No. 4, *Hill Co., Texas*.

4. Affidavit of Claimant to Property Sequestered.¹

Form No. 18443.²

The State of *Texas*, }
County of *Freestone*. }

Before me, *Abraham Kent*, a justice of the peace³ in and for the county of *Freestone*, on this day personally appeared *Richard Fern*, who, being duly sworn, says that he claims title to the following described property, to wit: (*describing it*) levied upon by *Clyde Culp*, sheriff of *Freestone* county, by virtue of a writ of sequestration issued out of the *District Court* of *Freestone* county, and dated the *first* day of *July*, A. D. 1900, in favor of *John Doe* against *Richard Roe*, and that this claim is made in good faith.⁴

Richard Fern.

Sworn to and subscribed before me this the *tenth* day of *July*, A. D. 1900.

Abraham Kent,
Justice of the Peace.

5. Bond of Claimant.⁵

Form No. 18444.⁶

(Tex. Rev. Stat. (1895), art. 5291.)⁷

Whereas, by virtue of a writ of sequestration issued out of the *District Court* (or by *Abraham Kent*, justice of the peace for precinct No. 3), of the county of *Freestone*, in favor of *John Doe* against *Richard Roe*, and tested on the *first* day of *July*, A. D. 1900, *Clyde Culp*, sheriff (or constable) of *Freestone* county, has seized and taken

1. **Affidavit Necessary.** — In *Texas*, the claimant must file an affidavit. Tex. Rev. Stat. (1895), art. 5286.

2. **Texas.** — Rev. Stat. (1895), art. 5286.

3. **Before Whom Made.** — Claimant's affidavit may be made before any officer authorized to administer oaths. Tex. Rev. Stat. (1895), art. 5286.

4. **That claim is made in good faith**

must be alleged. Tex. Rev. Stat. (1895), art. 5286.

5. **Bond Necessary.** — In *Texas*, the claimant must file a bond. Tex. Rev. Stat. (1895), art. 5287 *et seq.*

6. **Texas.** — Rev. Stat. (1895), art. 5287 *et seq.*

7. Any bond which is a substantial compliance with the statutory form is sufficient. Tex. Rev. Stat. (1895), art. 5292.

the following described personal property, viz: (*Here describe the property*), the value of which property has been assessed by said officer at *four hundred* dollars; and whereas *Richard Fern* has claimed said property, and presented to said officer his oath, in writing, that said claim is made in good faith; now, therefore, we, *Richard Fern*, as principal, and *Samuel Short* and *William West*, as sureties,¹ acknowledge ourselves bound to pay to the said *John Doe*, plaintiff,² the sum of *eight hundred* dollars,³ being double the value of said property, conditioned⁴ that the said *Richard Fern*, in case he fails to establish his right to said property, will return the same to the said *Clyde Culp*, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase or fruits of the same from the date of this bond, and costs; or, in case he fail to return said property, and pay for the use, hire, increase or fruits thereof, that he will pay the plaintiff the value of the same, with legal interest thereon from date, and shall also pay all damages and costs that may be awarded against him.

Witness our hands this *tenth* day of *July*, A. D. 1900.

Richard Fern.
Samuel Short.
William West.

Approved:⁵ *Clyde Culp*, Sheriff (or Constable) of *Freestone* County.

6. Replevy Bond of Defendant.⁶

Form No. 18445.⁷

John Doe, plaintiff, } Suit in *District* Court, *Freestone* County
No. 400. against } (or in *Justice's* Court, Precinct No. 3,
Richard Roe, defendant. } of *Freestone* County).

Whereas by virtue of a writ of sequestration issued out of the

1. **Sureties.**—Claimant's bond must be executed by two or more sufficient sureties. Tex. Rev. Stat. (1895), art. 5287.

2. **Obligee of bond** must be the plaintiff in the sequestration suit, and where more than one writ has been levied the bond must be payable to all the plaintiffs in the several writs. Tex. Rev. Stat. (1895), art. 5287.

3. **Penalty of bond** must be in an amount equal to double the value of the property claimed, to be assessed by the officer. Tex. Rev. Stat. (1895), art. 5287.

4. **Condition of bond** must be that the claimant, in case he fails to establish his right to the property, shall return the same to the officer making the levy, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase and fruits thereof from the date of the bond, or, in case he fails to

return the property and pay for the use thereof, he shall pay the plaintiff the value of the property with legal interest thereon from the date of the bond, and shall also pay all damages and costs that may be awarded against him. Tex. Rev. Stat. (1895), art. 5288.

5. **Approval.**—The bond must be approved. Tex. Rev. Stat. (1895), art. 5287.

6. **Replevy Bond Authorized.**—In *Texas*, a replevy bond is authorized. Tex. Rev. Stat. (1895), art. 4873.

Requisites of Bond, Generally.—For the formal parts of a bond in a particular jurisdiction see the title BONDS AND UNDERTAKINGS ON APPEAL AND ERROR, vol. 3, p. 833.

Conformity to Statute.—The replevy bond is statutory and must conform substantially to the statute. *Haile v. Oliver*, 52 Tex. 443.

7. *Texas.*—Rev. Stat. (1896), art. 4873.

District Court, Freestone county (or by Jeremiah Mason, justice of the peace for Precinct No. 3, Freestone county), in favor of John Doe, plaintiff, against Richard Roe, defendant, tested on the first day of May, A. D. 1900, Charles Hatch, sheriff of said Freestone county, has seized and taken the following described personal property, viz: (Here describe the property), the value of which property has been assessed by said officer at six hundred dollars;

Now, therefore, in consideration that said property has been permitted to remain in the hands of the said *Richard Roe*, defendant, we, *Richard Roe*, as principal, and *William West* and *Samuel Short*, as sureties,¹ acknowledge ourselves bound to pay to *John Doe*, plaintiff,² the sum of *twelve hundred dollars*;³

Conditioned⁴ that the said *Richard Roe* will not remove the said property out of the county (or that he will not waste, ill treat, injure or destroy, sell or dispose of the same), and that he will have such property, with value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, and of the fruits, hire or revenue of the same, in case he shall be condemned so to do.

Witness our signatures this the *sixth day of May, 1900.*

Richard Roe, Principal.

William West, Surety.

Samuel Short, Surety.

Approved the *sixth day of May, 1900.*

Charles Hatch, Sheriff of *Freestone County, Texas.*

III. OF LIFE ESTATE OF LANDS TAKEN IN EXECUTION.

1. Sureties. — The bond must be with two or more good and sufficient sureties to be approved by the officer executing the writ of sequestration. Tex. Rev. Stat. (1895), art. 4873.

2. Obligee. — The bond must be made payable to the plaintiff. Tex. Rev. Stat. (1895), art. 4873.

3. Penalty. — The bond must be for an amount of money not less than double the value of the property to be replevied. Tex. Rev. Stat. (1895), art. 4873.

4. Condition — Personal Property. — If the property to be replevied be personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill treat, injure, destroy, sell or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof, and

of the fruits, hire or revenue of the same, in case he shall be condemned so to do. Tex. Rev. Stat. (1895), art. 4874; *Krall v. Campbell Printing Press, etc., Co.*, 79 Tex. 556; *Bemis v. Wells*, 10 Tex. Civ. App. 626.

Real Property. — If the property be real estate, the condition of the bond shall be that the defendant will not injure the property, and that he will pay the value of the rents of the same in case he shall be condemned so to do. Tex. Rev. Stat. (1895), art. 4875.

In *Finegan v. Read*, 8 Tex. Civ. App. 33, the replevy bond was conditioned "that the said plaintiffs, *Martin Read* and *Eliza Read*, would not injure the said property, and that they would pay the value of the rents of same in case they should be condemned so to do, and that said property should be forthcoming, together with the fruits, hire, revenue and rents of the same, to abide the decision of the court." It was held that the bond was conditioned as required by the statute.

Form No. 18446.¹*(Title of court and cause as in Form No. 15226.)*

To the Honorable the Judges of the Court of *Common Pleas* of
Philadelphia County:

The petition of *John Doe* respectfully represents that he is a lien creditor of the above named defendant, *Richard Roe*, and that, by virtue of the above writ of *fieri facias*, there has been taken in execution the life estate of said defendant, *Richard Roe*, in the following described tract of land, to wit, (*describing land*), such tract of land being improved land, yielding rents, issues and profits.

The petitioner therefore prays the court to award a writ to sequester the rents, issues and profits of the said tract of land and to appoint a sequestrator to carry the same into effect.

John Doe.

(Verification.)

1. *Pennsylvania*. — Bright, *Pur. Dig.* (1894), p. 849, § 108.

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CROSS-REFERENCES.

- For Forms of Officers' Returns to Capias or Order of Arrest, see the title ARREST IN CIVIL ACTIONS, vol. 2, p. 117.*
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- For Forms of Officers' Returns in Commitment Proceedings, see the title COMMITMENT AND DISCHARGE, vol. 4, p. 926.*
- For Forms of Returns to Writ or Summons in Ejectment, see the title EJECTMENT, vol. 7, p. 279.*
- For Forms of Returns to Writ of Error, see the title ERROR, WRIT OF, vol. 7, p. 711.*

- For Forms of Returns to Executions Against Person, see the title EXECUTIONS AGAINST PERSON, vol. 7, p. 953.*
For Forms of Returns to Executions Against Property, see the title EXECUTIONS AGAINST PROPERTY, vol. 8, p. 1.
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For Forms of Returns to Writ of Habeas Corpus, see the title HABEAS CORPUS, vol. 9, p. 143.
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I. AFFIDAVIT OF SERVICE.¹

1. Personal Service.

a. Of Summons.

(1) IN GENERAL.

1. Affidavit Strictly Construed. — The practice of allowing process to be served by persons other than the officer of the law or his deputy acting under oath is a relaxation of the common-law rule, and no presumption is to be indulged in such cases upon facts which are not wholly inconsistent with any other hypothesis than that the service was legally and properly made. *Sayles v. Davis*, 20 Wis. 302; see also *Linott v. Rowland*, 119 Cal. 452; *McMillan v. Reynolds*, 11 Cal. 372; *Black v. Clendenin*, 3 Mont. 44.

Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

See also, *infra*, note 1, p. 37.

The affidavit must show affirmatively compliance with all the requirements of the statute; that the affiant is a person described in the statute and that he has acted in the manner prescribed by law. *McMillan v. Reynolds*, 11 Cal. 372; *Black v. Clendenin*, 3 Mont. 44.

Age of Affiant. — That the affiant was of the required age at the time of the

service of the process must be shown. *Horton v. Gallardo*, 88 Cal. 581; *Lyons v. Cunningham*, 66 Cal. 42; *Doerfler v. Schmidt*, 64 Cal. 265; *Weil v. Bent*, 60 Cal. 603; *Maynard v. MacCrellish*, 57 Cal. 355.

That the person making the affidavit was "a white male citizen of the United States" is not equivalent to the statement that he was over the required age. *Lyons v. Cunningham*, 66 Cal. 42.

Citizenship of Affiant. — The affidavit is not required to show that the person making the service was a white male citizen of the United States. *Williamson v. Cummings Rock Drill Co.*, 95 Cal. 652.

Affiant Disinterested. — That the affiant was not interested in the suit must be stated. *Raub v. Otterback*, 89 Va. 645.

Affiant a Competent Witness. — That the affiant is a competent witness need not be stated, where the affidavit states facts constituting the affiant a competent witness. *Dimick v. Campbell*, 51 Cal. 238.

Place of Service — Generally. — The place of service must be stated in the

Form No. 18447.¹

(Title of court and cause, and venue as in Form No. 8805.)

Samuel Short, being duly sworn, says: That at the time of the service of the summons hereinafter mentioned he was more than *twenty-one* years of age, and was the managing clerk in the office of *Jeremiah Mason*, the attorney for the plaintiff in the above entitled cause; that on the *tenth* day of *June*, 1899, at the office of the defendant above named, No. 10 *West* street, in the city of *Albany*, in said county of *Albany* and state of *New York*, deponent served the within (or annexed) summons upon the above named defendant, *Richard Roe*,* by delivering to the said *Richard Roe* personally and leaving with him, the said *Richard Roe*, a copy thereof; that deponent knew the person so served to be the person mentioned and described in the said summons as the defendant therein.

(Signature and jurat as in Form No. 8805.)

(2) UPON CORPORATION.²

affidavit. *Hahn v. Kelly*, 34 Cal. 391; *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 430; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Allen v. McIntyre*, 56 Minn. 351; *Forbes v. Bringe*, 32 Neb. 757; *Hunter v. Lester*, (Supreme Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 260; *Spaulding v. Lyon*, (Supreme Ct.) 2 Abb. N. Cas. (N. Y.) 203.

County. — Proof of service of a summons in Richmond county is sufficient although it does not state that the service was made in the state: the court will take judicial notice that the county is in the state. *Zwickey v. Haney*, 63 Wis. 464.

Time of Service. — The time of service must be stated in the affidavit. *Hahn v. Kelly*, 34 Cal. 391; *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 430; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Allen v. McIntyre*, 56 Minn. 351; *Forbes v. Bringe*, 32 Neb. 757; *Hunter v. Lester*, (Supreme Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 260; *Spaulding v. Lyon*, (Supreme Ct.) 2 Abb. N. Cas. (N. Y.) 203.

Where the affidavit of personal service of summons fails to state in the body thereof the date of the service, the legal presumption is that service was made on the day the jurat bears date, and the proof of service is sufficient. *Reed v. Catlin*, 49 Wis. 686.

Manner of Service. — The manner of service must be stated in the affidavit. *Hahn v. Kelly*, 34 Cal. 391; *Lloyd v. McCauley*, 14 B. Mon. (Ky.) 430; *People's Mut. Ben. Soc. v. Frazer*, 97 Mich. 627; *Allen v. McIntyre*, 56 Minn. 351; *Forbes v. Bringe*, 32 Neb. 757;

Hunter v. Lester, (Supreme Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 260; *Spaulding v. Lyon*, (Supreme Ct.) 2 Abb. N. Cas. (N. Y.) 203.

Copy Left with defendant. — Where the affidavit fails to state that a copy of the summons was left with the defendant as well as delivered to him, it is insufficient under the statute. *Wilkinson v. Bayley*, 71 Wis. 131.

Person Served Known to Affiant. — In *Wisconsin*, where service is made by a person other than an officer, the affidavit must show that the affiant knew the persons served to be the defendants mentioned in the process. *German Mut. Farmer F. Ins. Co. v. Decker*, 74 Wis. 556; *Reed v. Catlin*, 49 Wis. 686; *Grantier v. Rosecrance*, 27 Wis. 488.

In *Minnesota*, under a rule of court, it is held that a service of summons by a private person need not state that the person upon whom the service is made was to affiant known to be the person upon whom service was required to be made. *Cunningham v. Water-Power Sandstone Co.*, 74 Minn. 282.

Residence of Defendant. — Where the affidavit shows that summons was served on several defendants in the same county and that a copy of the complaint was served on one of them, it need not state that all the defendants were residents of the county. *Pellier v. Gillespie*, 67 Cal. 582.

1. *New York*. — Code Civ. Proc., § 426.

See also, generally, *supra*, note 1, p. 26.

2. *Requisites of Affidavit, Generally*. — For the formal parts of an affidavit

Form No. 18448.¹

(Commencing as in Form No. 18447, and continuing down to *) by delivering to *John Doe*, of said city of *Albany*, personally, and leaving with him, the said *John Doe*, a copy of said summons; that deponent knew, at the time he served said summons as aforesaid, the said *John Doe* to be the president (or clerk or treasurer, or other officer, as the case may be) of the said defendant, the said *National Tobacco Company*, of said city of *Albany*, and knew the said corporation so served to be the corporation mentioned and described in the said summons as the defendant therein.

(Signature and jurat as in Form No. 8805.)

(3) UPON INFANT UNDER FOURTEEN YEARS OF AGE.

Form No. 18449.²

(Commencing as in Form No. 18447, and continuing down to *) who was an infant under the age of fourteen years, by delivering to him personally and leaving with him a copy thereof, and also, at the same time and place, deponent delivered to and left with *John Roe*, the father (or *Rachael Roe*, the mother (or guardian), or *Samuel Short*, the person having the care and control of such minor, or *Samuel Short*, the person with whom said minor resided (or the person in whose service said minor was then employed), said minor having no father, mother or guardian within this state), a like copy of said summons.

That at the time deponent served said summons as aforesaid, he knew the defendant so served to be the person mentioned and

in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

See also, *infra*, note 2, p. 42.

Where the affidavit stated that summons upon a corporation was personally served upon a designated person described as a managing agent of the corporation, it was held to show sufficiently that the service was made upon the corporation and to be *prima facie* proof that the person served was the managing agent upon whom the summons was authorized to be served. *Keener v. Eagle Lake Land, etc., Co.*, 110 Cal. 627.

The affidavit need not state how the affiant knew that the person named was the managing agent of the corporation defendant: if it states that service was made upon the managing agent, naming him as such, it is sufficient. *Glines v. Supreme Sitting, etc., (Supreme Ct. Gen. T.)* 21 N. Y. Supp. 543.

Precedent.—In *Guernsey v. American Ins. Co.*, 13 Minn. 278, the affidavit of service on a foreign corporation was as follows:

"*Morris Lamprey* came before me

personally, and being sworn, says, that in said county, on the seventh day of November, A. D. 1867, he served the within summons upon the *American Insurance Company*, which is well known to this deponent to be the same *American Insurance Company* as the within-named defendant, in the within-entitled cause, and has property within said state, and the cause of action therein arose in said state, by then and there giving in hand to, and leaving with, *R. B. Currier*, who is well known to this deponent to be the same person as, and the general agent and general managing agent, and one of the officers, and a secretary of said *American Insurance Company*, a true copy thereof, then and there; and further saith not."

This was held sufficient.

1. *New York*.—Code Civ. Proc., § 431.

See also, generally, *supra*, note 2, p. 27.

2. *New York*.—Code Civ. Proc., § 426.

See also, generally, *supra*, note 1, p. 26.

described in the said summons as the defendant therein, and that the said *John Roe* was the father (or *guardian*, or as the case may be) of the said defendant.

(*Signature and jurat as in Form No. 8805.*)

(4) UPON LUNATIC OR PERSON OTHERWISE INCOMPETENT.

Form No. 18450.¹

(*Commencing as in Form No. 18447, and continuing down to **) a person judicially declared incompetent to manage his affairs and for whom a committee had been duly appointed, by delivering to him, the said *Richard Roe*, personally, and leaving with him a copy thereof, and also, at the same time and place, deponent delivered to and left with *John Doe*, the committee of said defendant, a like copy of said summons.

That at the time deponent served said summons as aforesaid, he knew the said *Richard Roe* so served to be the person mentioned and described in said summons as the defendant therein, and that the said *John Doe* was the committee of the said *Richard Roe*, the said defendant, appointed by the *Supreme Court* of the state of *New York*, at a term thereof held at *Riverhead*, in the county of *Suffolk* and said state of *New York*, on or about the *tenth* day of *May*, 1899, upon judicially declaring the said defendant incompetent to manage his affairs.

(*Signature and jurat as in Form No. 8805.*)

(5) IN DIVORCE PROCEEDINGS.

Form No. 18451.²

(*Title of court and cause, and venue as in Form No. 8805.*)

Samuel Short, being duly sworn, says: That at the time of the service of the summons hereinafter mentioned he was more than *twenty-one* years of age, and was the managing clerk in the office of *Jeremiah Mason*, the attorney of the plaintiff in the above entitled cause; that on the *tenth* day of *June*, 1899, at the office of the defendant above named, No. 10 *West* street, in the city of *Albany*, in said county of *Albany* and state of *New York*, deponent served the within (or *annexed*) summons personally on the above named defendant, *Richard Roe*, by delivering to and leaving with him, the said *Richard Roe*, a copy thereof; that deponent knew the person so served to be the person mentioned and described in the said summons as the defendant therein (*state how deponent knew the person served to be the defendant and the proper person to be served and how such knowledge was acquired*).

That the copy of the summons so delivered to and left with the said

1. *New York*. — Code Civ. Proc., § 426.

See also, generally, *supra*, note 1, p. 26.

2. *New York*. — Code Civ. Proc., §§ 796, 1774.

See also, generally, *supra*, note 1, p. 26.

defendant contained the following words, to wit: Action to Annul a Marriage (or *Action for a Divorce* or *Action for a Separation*), legibly written (or *printed*) upon the face thereof.

(*Signature and jurat as in Form No. 8805.*)

b. Of Paper Other than Summons.

(1) UPON DEFENDANT.

Form No. 18452.¹

In the *Superior Court* of the *City and County of San Francisco*,
State of *California*.

<i>John Doe</i> , plaintiff,	}	Affidavit of Service of any Paper.
against		
<i>Richard Roe</i> , defendant.	}	ss.
State of <i>California</i> ,		
<i>City and County of San Francisco</i> .		

Samuel Short, being duly sworn, deposes and says: That at the time of service hereinafter mentioned he was over the age of *twenty-one* years, and not a party to, or interested in, the above entitled action; that on the *tenth* day of *June*, 1899, at the *city and county of San Francisco*, state of *California*, he personally served the (*naming the paper served*) on *Richard Roe*, the defendant above named, personally known to him to be the defendant above named, by then and there delivering to and leaving with the said *Richard Roe*, personally, a copy of said (*naming the paper served*).

Samuel Short.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1899.

Norton Porter, Notary Public.

Form No. 18453.¹

State of <i>Michigan</i> ,	}	ss.
County of <i>Kent</i> .		

John Doe, of the city of *Grand Rapids*, in said county, being duly sworn, says that on the *tenth* day of *June*, A. D. 1899, at *Grand Rapids*, in said county of *Kent*, he served a true copy of a statement of account and lien, of which statement of account and lien a true copy is hereto annexed, on *Richard Roe*, the owner of the premises in said statement of account and lien described, by handing to said *Richard Roe*, personally, a true copy of said statement of account and lien. And further this deponent says not.

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, A. D. 1899.

(SEAL)

Norton Porter, Notary Public.

1. See, generally, *supra*, note 1, p. 26.

Form No. 18454.¹

New Jersey Supreme Court.

John Doe, plaintiff, }
 against } In Tort.
 Richard Roe, defendant. }
 State of New Jersey, } ss.
 County of Mercer. }

Samuel Short, of full age, being duly sworn, on his oath says that on the *tenth* day of *June*, 1899, he served *Richard Roe*, the defendant in this cause, with a true copy of the declaration filed therein, with the notice to plead indorsed thereon.

Samuel Short.

Sworn to and subscribed this *tenth* day of *June*, A. D. 1899, before me,
Norton Porter, Notary Public.

(2) UPON ATTORNEY OF DEFENDANT.

Form No. 18455.¹

State of *Arkansas*, }
 County of *Sebastian*. }

Richard Roe says that on the *first* day of *May*, 1898, he served a copy of the within notice upon *Jeremiah Mason*, attorney for the within named plaintiff, *John Doe*, by delivering to the said *Jeremiah Mason*, in person, said copy of said notice at the city of *Fort Smith*, in said county of *Sebastian*.

Richard Roe.

Sworn to before me this *first* day of *May*, 1898.

Abraham Kent, Justice of the Peace.

Form No. 18456.¹

(Title of court and cause, and venue as in Form No. 8805.)

Samuel Short, being duly sworn, says:

That he is the managing clerk in the office of *Jeremiah Mason*, the attorney of the plaintiff herein.

That on the *tenth* day of *June*, 1899, at the city of *Albany*, in the county of *Albany* and state of *New York*, he served (*Here specify the paper*), a copy of which is hereto annexed, on *Oliver Ellsworth*, attorney for the defendant herein,* by delivering the same to him personally, at his office, at No. 10 *West* street, in the said city of *Albany*, and leaving the same with him.

(Signature and jurat as in Form No. 8805.)

2. Substituted Service.

a. Affidavit of Inability to Make Personal Service.

Form No. 18457.²

(Title of court and cause, and venue as in Form No. 8805.)

Samuel Short, being duly sworn, on oath says: That during all

1. See, generally, *supra*, note 1, p. 26.

2. *New York*. — Code Civ. Proc. §§ 435-437.

the times hereinafter mentioned deponent was of the age of *twenty-one* years and over, and was the managing clerk in the office of *Jeremiah Mason*, attorney for the plaintiff in this action.

That for *five* years last past deponent has resided in the city of *Albany*, in the county of *Albany* and state of *New York*, and is well acquainted with *Richard Roe*, the defendant in this action.

That *Richard Roe*, the defendant in this action, resides in the state of *New York*, to wit, at said city of *Albany*, where his family now are (*state facts showing that defendant has a legal residence in the state*).

That the deponent, on or about the *first* day of *June*, 1899, received from the attorney of the plaintiff herein the summons herein, a copy whereof is hereto annexed, for service on the said *Richard Roe*.

That deponent has made proper and diligent effort to serve said summons upon the said *Richard Roe* by (*Here state facts showing proper and diligent effort*), but the said *Richard Roe* cannot be found either in or out of the state of *New York*, nor can deponent ascertain when defendant will be at home, although deponent has made diligent inquiries of (*state of whom inquiries have been made and the nature and result thereof*).¹

(*If defendant conceals himself, say, "That the said defendant, Richard Roe, avoids such service by keeping himself concealed," stating the mode of concealment so that the facts may satisfactorily appear.*)²

That although proper and diligent effort has been made, personal service cannot be made upon said defendant.

That no previous application for an order for substituted service has been made herein.

(*Signature and jurat as in Form No. 8805.*)

b. Order for Substituted Service.

Form No. 18458.³

(*Commencement as in Form No. 6957.*)

Proof having been satisfactorily presented to this court by the affidavit of *Samuel Short*, verified the *tenth* day of *June*, 1899, that the summons in this action, a copy of which is hereto annexed, has been delivered to the said *Samuel Short* to be served, and that the defendant, *Richard Roe*, named therein, is a resident of the city of

1. **Sufficient Statement.** — In *Nagle v. Taggart*, (Supreme Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 144, the following statement of facts was held to show proper and diligent effort to find defendant, to wit, "that the deponent used all proper and diligent means and efforts to serve the said papers, by continuously and repeatedly endeavoring to find the said defendant, and by visiting the various places which he was accustomed to frequent; that on several occasions deponent called at the said defendant's residence, but was told by the persons in charge that he was not at home, and that they

did not know when he would be at home; that the deponent could not ascertain when he would be at home, though he made diligent inquiry, and that he could not be found either within or without the state; and that deponent believed that he kept himself concealed, so that the summons could not be personally served."

2. **Sufficient Statement.** — For forms of affidavit held to show sufficiently concealment of defendant see *Baker v. Stephens*, (C. Pl. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 1.

3. *New York*. — Code Civ. Proc., §§ 435, 436.

Albany, in the county of *Albany* and state of *New York*; that said *Samuel Short* has made proper and diligent effort to serve the said summons personally upon the said defendant and that said defendant cannot be found within or without this state (or that said defendant avoids or evades such service), so that personal service cannot be made upon him. Now, on motion of *Jeremiah Mason*, attorney for the plaintiff herein,

Ordered, that service of the said summons be made upon the said defendant by leaving a copy thereof and of this order at the residence of the said defendant (*specifying place of residence*) with a person of proper age, if upon reasonable application admittance can be obtained and such proper person found who will receive the same, or if admittance cannot be obtained or no such person found who will receive the same, then that the said service be made by affixing a copy of said summons and of this order to the outer or other door of the said defendant's residence and by depositing another copy of said summons and of said order, properly enclosed in a postpaid wrapper, addressed to said defendant at his place of residence, in the post-office at the place where said defendant resides.

Enter:

John Marshall, J. S. C.

c. Affidavit of Substituted Service.¹

(1) UPON DEFENDANT.

(a) By Leaving Copy at Residence of Defendant with a Member of His Family.

Form No. 18459.²

(Title of court and cause, and venue as in Form No. 8805.)

Samuel Short, being duly sworn, on oath says:

1. Requisites of Affidavit. — For the requisites of an affidavit of substituted service see *infra*, note 2, p. 45.

Where the affidavit stated that at a specified place the affiant made service "by then and there delivering to and leaving with *Mary Peterson* [the wife of defendant], at the last and usual place of abode of said defendant *Peterson*, in said *Clark* county, a true and correct copy of said summons," etc., it was held to show that the copy was left at the usual place of abode of defendant as required by the statute. *Healey v. Butler*, 66 Wis. 9.

Precedent. — In *Heinemann v. Pier*, 110 Wis. 185, the affidavit of service was as follows:

"*Charles Friend*, being first duly sworn, on oath deposes and says: That he is an attorney at law, duly admitted to practice in the state of *Wisconsin*, residing in the city of *Milwaukee*, in said state; that on the 7th day of *September*, 1898, at about 9:30 o'clock in the forenoon, he served the annexed and fore-

going summons and complaint upon the defendant, *Kate Pier*, to him well known to be the identical person named as defendant in the said action, at her home, No. 577 *Van Buren* street, in the city of *Milwaukee*, which is her usual place of abode, by delivering to and leaving with her daughter, Mrs. *John H. Roemer*, a member of the family of said defendant, who resides with her, being a person of suitable age and discretion, a true and correct copy thereof, and of the whole thereof, and at the same time and place the affiant informed said Mrs. *John H. Roemer* of the contents thereof; that the reason said affiant did not serve said defendant, *Kate Pier*, personally is that she could not be found. *Charles Friend*."

The service in this case was held insufficient because the person served upon was not a member of the family of the defendant.

2. New York. — Code Civ. Proc., §§ 435, 436, 437.

See also, generally, note 1, this page.

1. That during all the times hereinafter mentioned he was of the age of *twenty-one* years and over, and was the managing clerk of *Jeremiah Mason*, the attorney for the plaintiff herein.

2. That on the *tenth* day of *June*, 1899, he served the summons in this action and the order therein, copies of which are hereto annexed, upon *Richard Roe*, the defendant herein, as in said order directed, by leaving a copy of the said summons and of said order at the residence of the said defendant, to wit, at No. *10 West* street, in the city of *Albany*, in the county of *Albany* and state of *New York*, the said defendant, as this deponent is informed and verily believes, being absent from (or *concealed in*) said residence,* by delivering said copies to and leaving the same with *Rachel Roe*, whom deponent knew to be the wife of the said defendant (or *whom deponent knew to be the child of said defendant, and who appeared to be of proper age to receive such service, to wit, of about the age of sixteen years*), and who received the same.

(Signature and jurat as in Form No. 8805.)

Form No. 18460.¹

County of *Henrico* (or *city of Richmond*), to wit:

This day personally appeared before me, the undersigned, a justice of the peace for the county (or *city*) aforesaid, *James Alfred*, and made oath that he went, on the *tenth* day of *June*, 1899, to the usual place of abode of *George Smith*, named in the within notice, and not finding* him at his usual place of abode, but finding his wife there, affiant delivered a copy of the within notice to *Sarah Smith*, the wife of the said *George Smith*, and gave information to her of the purport of said notice.

Given under my hand on this *tenth* day of *June*, A. D. 1899.

Abraham Kent, Justice of the Peace.

Form No. 18461.¹

(Commencing as in Form No. 18460, and continuing down to *) the said *George Smith* or his wife, at the usual place of abode of the said *George Smith*, but finding there *Jared Ammons*, a person over the age of *sixteen* years, and a member of the family of the said *George Smith*, affiant delivered to the said *Jared Ammons* a copy of the within notice, and gave information of its purport to the said *Jared Ammons*.

Given under my hand on this *tenth* day of *June*, A. D. 1899.

Abraham Kent, Justice of the Peace.

(b) By Posting Copy at Defendant's Residence.

aa. IN GENERAL.

1. *Virginia*. — Code (1887), § 3207.

See also, generally, *supra*, note 1, p. 33.

Form No. 18462.¹

(Commencing as in Form No. 18460, and continuing down to *) the said *George Smith* or his wife, or any person over *sixteen* years of age, a member of his family, at the usual place of abode of said *George Smith*, affiant posted a copy of the within notice at the front door of the said place of abode.

Given under my hand on this *tenth* day of *June*, A. D. 1899.

Abraham Kent, Justice of the Peace.

bb. AND DEPOSITING A COPY IN POST-OFFICE.

Form No. 18463.¹

(Commencing as in Form No. 18459, and continuing down to *) by affixing a copy of said summons and of said order to the outer door (or other door, specifying it) of the residence of the said defendant, at No. 10 West street, in the city of *Albany*, in the county of *Albany* and state of *New York*, deponent not being able, upon reasonable application, to obtain admittance to said residence, or to find any person of proper age at said residence who would receive said copies (state facts showing reasonable effort to obtain admittance and find a person to receive the summons).

That on said *tenth* day of *June*, 1899, at said city of *Albany*, deponent deposited another copy of said summons and of said order, properly enclosed in a postpaid wrapper, addressed to said defendant at his said place of residence, in the post-office at said city of *Albany*.

(Signature and jurat as in Form No. 8805.)

(2) UPON ATTORNEY OF DEFENDANT.

(a) By Depositing Copy in Letter-box at Attorney's Office.

Form No. 18464.¹

(Commencing as in Form No. 18468, and continuing down to *) by depositing the same between the hours of *six* o'clock in the morning and *nine* o'clock in the evening of said day, enclosed in a sealed wrapper, directed to the said *Oliver Ellsworth*, in his office letter-box, at the door of his office, No. 10 State street, in said city of *Albany*, there being no person in charge of said office and said office not being open.

(Signature and jurat as in Form No. 8805.)

(b) By Leaving Copy at Residence of Attorney.

- | | |
|---|--|
| 1. <i>Virginia</i> . — Code (1887), § 3207.
See also, generally, <i>supra</i> , note 1, p. 33. | 3. <i>New York</i> . — Code Civ. Proc., § 797.
See also, generally, <i>supra</i> , note 1, p. 33. |
| 33. 2. <i>New York</i> . — Code Civ. Proc., §§ 435, 436, 437. | |

Form No. 18465.¹

(Commencing as in Form No. 18468, and continuing down to *) by leaving the same at the residence of the said *Oliver Ellsworth*, at No. 10 West street, in said city of *Albany*, between the hours of six o'clock in the morning and nine o'clock in the evening of said day, with a person of suitable age and discretion, to wit, *Jane Ellsworth*, the wife of the said *Oliver Ellsworth*; that immediately preceding the said service as aforesaid, this deponent called at the office of the said *Oliver Ellsworth*, at No. 10 State street, in said city of *Albany*, for the purpose of serving said (*specifying paper*), but said office was not open so as to admit of such service, and there was no office letter-box at said office.

(Signature and jurat as in Form No. 8805.)

(c) By Leaving Copy with Clerk or Person in Charge of Office of Attorney.

Form No. 18466.¹

(Commencing as in Form No. 18468, and continuing down to *) by delivering the same, between the hours of six o'clock in the morning and nine o'clock in the evening of said day, to *William West*, at the office of the said *Oliver Ellsworth*, at No. 10 State street, in said city of *Albany*, and leaving the same with him, the said *William West* being the clerk (or the person having charge of the office) of the said *Oliver Ellsworth*, the said *Oliver Ellsworth* being at the time absent from his said office.

(Signature and jurat as in Form No. 8805.)

(d) By Leaving Copy in a Conspicuous Place in Office of Attorney.

Form No. 18467.¹

(Commencing as in Form No. 18468, and continuing down to *) by leaving the same, between the hours of six o'clock in the morning and nine o'clock in the evening of said day, in a conspicuous place, to wit, (*specifying place*) in the office of the said *Oliver Ellsworth*, at No. 10 State street, in the city of *Albany*, there being no person save deponent in said office and deponent finding the door of said office open.

(Signature and jurat as in Form No. 8805.)

(e) By Depositing Copy in Post-office, Addressed to Attorney.

Form No. 18468.¹

(Title of court and cause, and venue as in Form No. 8805.)

Samuel Short, being duly sworn, on oath says:

1. New York. — Code Civ. Proc., See also, generally, *supra*, note 1, p. 33.
§ 797.

That he is the managing clerk of *Jeremiah Mason*, the attorney for the plaintiff in this action.

That said attorney resides at the city of *Albany*, in said county of *Albany*.

That on the *tenth* day of *June*, 1899, this deponent served (*Here designate the paper served*), a copy of which is annexed hereto, upon *Oliver Ellsworth*, attorney for *Richard Roe*, the defendant herein,* by depositing said (*specifying paper*), properly enclosed in a postpaid wrapper, in the post-office at said city of *Albany*, before the hour of *nine o'clock A. M.* on said day, directed to the said *Oliver Ellsworth*, at No. *10 West* street, in the city of *Albany*, in the county of *Albany* and state of *New York*, that being the address within this state designated by the said *Oliver Ellsworth* for that purpose upon the preceding papers in this action (or *the said Oliver Ellsworth having made no designation, upon the preceding papers in this action, of the place where papers herein are to be served upon him, and that being his place of residence or place where he then kept an office*).

(*Signature and jurat as in Form No. 8805.*)

II. RETURN OF OFFICER.¹

1. In Civil Cases.

a. Of Service of Writ or Summons.

(1) PERSONAL SERVICE.

(a) *In General.*

aa. BY DELIVERING COPY.

1. Requisites of Return, Generally. — The return must show on its face what the officer has done and that the service has been according to law and the command in the process. *Southern Bldg., etc., Assoc. v. Hallum*, 59 Ark. 583; *Ex p. Cross*, 7 Ark. 44; *Sanford v. Pond*, 37 Conn. 588; *Metcalf v. Gillet*, 5 Conn. 400; *Botsford v. O'Conner*, 57 Ill. 72; *Bosley v. Farquar*, 2 Blackf. (Ind.) 61; *Hakes v. Shupe*, 27 Iowa 465; *Russ v. Gilman*, 16 Me. 209; *Wellington v. Gale*, 13 Mass. 483; *Brown v. Williams*, 39 Mich. 755; *Rankin v. Dulaney*, 43 Miss. 197; *Moore v. Coats*, 43 Miss. 225; *Williams v. Monroe*, 125 Mo. 574; *Madison County Bank v. Suman*, 79 Mo. 527; *Gregor Grocer Co. v. Carlson*, 67 Mo. App. 179; *Newlove v. Woodward*, 9 Neb. 502; *Gardner v. Small*, 17 N. J. L. 162; *State v. Cohen*, 13 S. Car. 198; *Union Bank v. Barnes*, 10 Humph. (Tenn.) 244; *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496;

O'Leary v. Durant, 70 Tex. 409; *Shannon v. McMullin*, 25 Gratt. (Va.) 211; *Hopkins v. Baltimore, etc., R. Co.*, 42 W. Va. 535.

The return must be sufficient in itself, and nothing must be left to supposition or inference based on something outside of the return. *Underhill v. Lockett*, 20 Tex. 130; *Overseers of Poor v. Overseers of Poor*, 3 Vt. 349.

Must be in Writing. — The return of the officer must be in writing. *Jones v. Goodbar*, 60 Ark. 182; *State v. Reed*, 50 La. Ann. 170.

Date of Receipt and Return. — Unless required by statute, the officer is not obliged to state in his return the date of the receipt or of the return of the process. *Chickering v. Failes*, 26 Ill. 507; *Cobb v. Newcomb*, 7 Iowa 43; *Spengler v. O'Shea*, 65 Miss. 75.

Competency of Person Executing Process. — The return must show that the process was executed by a person who

was competent to perform the office. Galveston, etc., *R. Co. v. Ware*, 74 Tex. 47.

Compliance with Statute — Generally.— Every act required by the statute must be set out in the return. *Dawson v. State Bank*, 3 Ark. 505; *Noleman v. Weil*, 72 Ill. 502; *Russell v. Grant*, 122 Mo. 161; *Strong v. Barnhart*, 6 Oregon, 93; *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496; *Graves v. Robertson*, 22 Tex. 130; *Roberts v. Stockslager*, 4 Tex. 307; *Wynn v. Wyatt*, 11 Leigh (Va.) 612.

Substantial Compliance Sufficient.— Where the return complies substantially with the statute, it is sufficient. *Du Val v. Johnson*, 39 Ark. 182; *Noleman v. Weil*, 72 Ill. 502; *Pigg v. Pigg*, 43 Ind. 117; *Macklot v. Hart*, 12 Iowa 428; *Presley v. Anderson*, 42 Miss. 274; *Betts v. Boyd*, 31 Neb. 815; *Graves v. Drane*, 66 Tex. 658; *Clark v. Wilcox*, 31 Tex. 322. And the exact language of the statute need not be followed. *Collins v. Walling*, 6 La. Ann. 702. But where the statute prescribes a particular manner of return the direction in the statute should be strictly followed. *Womack v. Slade*, (Tex. Civ. App. 1893) 23 S. W. Rep. 1002.

Must Show Service.— The return must show either a personal or a constructive service according to the statute. *Doll v. Smith*, 32 Cal. 476; *Snyder v. Snyder*, 25 Ind. 399; *Williams v. Monroe*, 125 Mo. 574; *Newlove v. Woodward*, 9 Neb. 502.

Certainty Required.— If legal execution of the process is shown with reasonable certainty, it is sufficient. *Dawson v. State Bank*, 3 Ark. 505; *Cairo*, etc., *R. Co. v. Holbrook*, 92 Ill. 297; *McNab v. Young*, 81 Ill. 11; *Bacon v. Bevan*, 44 Miss. 293; *Dunham v. Wilfong*, 69 Mo. 355; *Wells v. Turner*, 14 Neb. 445; *Pendexter v. Cate*, 66 N. H. 270.

Where the facts set out in the return construed most favorably to the officer show a legal execution of the process with reasonable certainty, the return is sufficient. *Whittlesey v. Starr*, 8 Conn. 134; *Gibson v. Robinson*, 90 Ga. 756; *Cairo*, etc., *R. Co. v. Holbrook*, 92 Ill. 297; *Hale v. Talbott*, 86 Ind. 447; *Scott v. Scott*, 85 Ky. 385; *Davis v. Jacksonville Southeastern Line*, 126 Mo. 69; *Brown v. Hudson*, 14 Tex. Civ. App. 605; *Pond v. Baker*, 55 Vt. 400; *Drake v. Mooney*, 31 Vt. 617.

Manner of Service Prescribed by Statute.— Where the statute prescribes the

manner of service, the return must show compliance with the statute. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Hochlander v. Hochlander*, 73 Ill. 618; *Greenwood v. Murphy*, 131 Ill. 604; *Maher v. Bull*, 26 Ill. 348; *Holsinger v. Dunham*, 11 Ind. 346; *Rankin v. Dulaney*, 43 Miss. 197; *York v. Crawford*, 42 Miss. 508; *Newlove v. Woodward*, 9 Neb. 502; *Ross v. Ward*, 16 N. J. L. 23; *Robbins v. Clemmens*, 41 Ohio St. 285; *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496; *Hendley v. Baccus*, 32 Tex. 328; *Stevens v. Price*, 16 Tex. 572; *Schramm v. Gentry*, 64 Tex. 143; *Brown v. Marqueze*, 30 Tex. 77; *Vaughan v. State*, 29 Tex. 273; *Graves v. Robertson*, 22 Tex. 130; *Willie v. Thomas*, 22 Tex. 175. And must set forth facts from which it will appear that legal service has been made. *Botsford v. O'Conner*, 57 Ill. 72; *Ball v. Shattuck*, 16 Ill. 299; *Wilson v. Greathouse*, 2 Ill. 174; *Clemson v. Hamm*, 2 Ill. 176; *Hakes v. Shupe*, 27 Iowa 465; *Farris v. Powell*, 10 Iowa 553; *Wellington v. Gale*, 13 Mass. 483; *Moore v. Coats*, 43 Miss. 225; *Roy v. Heard*, 38 Miss. 544; *Madison County Bank v. Suman*, 79 Mo. 527; *Crisman v. Swisher*, 28 N. J. L. 149; *Wheeler v. Lampman*, 14 Johns. (N. Y.) 481; *Continental Ins. Co. v. Milliken*, 64 Tex. 46; *Henry v. Tilson*, 19 Vt. 447; *Marshfield v. Montpelier*, 4 Vt. 284.

"Executed."— A return of the process as "executed" is, in some jurisdictions, held sufficient. *Snelgrove v. Branch Bank*, 5 Ala. 205; *Mayfield v. Allen*, *Minor (Ala.)* 274; *Harper v. Lexington*, etc., *R. Co.*, 2 Dana (Ky.) 227; *Stephens v. Frazier*, 2 B. Mon. (Ky.) 250; *Semmes v. Patterson*, 65 Miss. 6; *Heirmann v. Stricklin*, 60 Miss. 234; *Benson v. Holloway*, 59 Miss. 358; *Doe v. Bradley*, 6 Smed. & M. (Miss.) 485; *Backsdale v. Neal*, 16 Gratt. (Va.) 314. But where the officer sees fit to state the particulars of the service it must appear that the law has been complied with. *Semmes v. Patterson*, 65 Miss. 6; *Faison v. Wolf*, 63 Miss. 24; *Thomas v. State*, 62 Miss. 184; *Burrus v. Burrus*, 56 Miss. 92; *Gamble v. Warner*, 16 Ohio 371.

"Served."— Where the officer returned the process as "served," it has been held sufficient. *Colerick v. Hooper*, 3 Ind. 316; *Strayhorn v. Blacklock*, 92 N. Car. 292.

In *New Jersey*, it is held that what a sheriff adds in his return to the statutory return, served or summoned, may

be rejected as surplusage. *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442.

Name of Person Upon Whom Personal Service is Made—*Generally*.—Where the return is otherwise sufficient, it will not be vitiated by failure to state the name of the person upon whom the service was made. *Cardwell v. Sabichi*, 59 Cal. 490; *Florence v. Paschal*, 50 Ala. 28. Especially where there is but one defendant. *Cobb v. Newcomb*, 7 Iowa 43; *Robison v. Miller*, 57 Miss. 237.

Several Defendants.—Where there are several defendants and service is not made upon all of them, the return must show upon which of the defendants service was made. *Richardson v. Thompson*, 41 Ill. 202; *Graves v. Hughes*, 4 Bibb (Ky.) 84; *Grider v. Payne*, 9 Dana (Ky.) 188; *Woodliffe v. Connor*, 45 Miss. 552; *Thompson v. Griffiths*, 19 Tex. 115; *Rape v. Heaton*, 9 Wis. 328.

Surname.—An officer's return on the back of a summons that he served the same "on C., one of the defendants herein," is sufficient evidence of service on J. C., who was named in the writ as a defendant. *Gate City Abstract Co. v. Post*, 55 Neb. 742.

Where process issues against A. S. and A. L., setting out their names at length, and is returned executed on S., merely stating his surname, it will be intended that he is the person of that name designated in the process. *Snelgrove v. Branch Bank*, 5 Ala. 295.

Christian Name.—Where the initials of the christian name are used in the return, it is sufficient. *Davis v. Burt*, 7 Iowa 56; *German Ins. Co. v. Frederick*, 57 Neb. 538; *Johnson v. Jones*, 2 Neb. 126.

A summons directing the sheriff to serve the same on Harrison Johnson, which is returned served on "the within named H. Johnson," is sufficient. *Johnson v. Jones*, 2 Neb. 126. And it has been held that where the process is against A. J. Veasey, a return showing service on "Jack Veasey, the defendant," is sufficient. *Veasey v. Brigman*, 93 Ala. 548.

Abbreviations.—Where abbreviations are used, if from other parts of the return or of the writ itself it appears what was intended, the return will be sufficient; thus, the return of an officer showing that execution was "by delivering a true copy of the within writ to Dr. Peter Brugman, President of the O. F. B. A.," was held sufficient,

where the writ showed that such letters referred to the Odd Fellows Building Association. *Odd Fellows Bldg. Assoc. v. Hogan*, 28 Ark. 261.

Copy on Several Defendants.—Where the process is to be served on several defendants, the return must show that a copy was delivered to each of such defendants. *Woodliffe v. Connor*, 45 Miss. 552; *New Haven v. Vergennes*, 3 Vt. 89; *Overseers of Poor v. Overseers of Poor*, 2 Vt. 200.

In *Texas*, it is held that under the statute the return must show that a copy of the process was delivered to each of the defendants. *Holliday v. Steele*, 65 Tex. 388; *Schramm v. Gentry*, 64 Tex. 143; *King v. Goodson*, 42 Tex. 152; *Swilley v. Reliance Lumber Co.*, (Tex. Civ. App. 1898) 46 S. W. Rep. 387.

Where the return shows that a copy was delivered to more than one person, it will be presumed that a copy was delivered to each of the defendants. *Isley v. Boon*, 113 N. Car. 249; *McDonald v. Carson*, 94 N. Car. 497. And where the return shows service upon all of the defendants, naming them, it will be inferred that a copy was delivered to each defendant. *Turner v. Jenkins*, 79 Ill. 228; *Greenman v. Harvey*, 53 Ill. 386; *Barnes v. Hazleton*, 50 Ill. 429.

Where the return states that the summons was served upon A on the first day of May, and upon B on the second day of May, by delivering to and leaving with them a certified copy thereof, it sufficiently shows that a copy was delivered to each of the defendants. *Keith v. Stiles*, 92 Wis. 15.

To Whom Read—*Generally*.—The return should show to whom the process was read. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Pardon v. Dwire*, 23 Ill. 572; *Belingall v. Gear*, 4 Ill. 575; *Boker v. Chapline*, 12 Iowa 204; *Bain v. Galyear*, 10 Iowa 585. And see *Holsinger v. Dunham*, 11 Ind. 346, and *Chandler v. Miller*, 11 Ind. 382, holding that it is a better practice to state to whom the process was read, although in those cases the return failed to show such fact and was held sufficient.

In *Shaw v. Moser*, 3 Mich. 71, the return by a constable, "personally served true copies of the within by reading," without showing to whom the process was read, was held sufficient.

In *Hunter v. Stoneburner*, 92 Ill. 75, a return as follows, "I have executed

the within writ on the within named (naming the defendants) by reading, this 13th day of October, A. D. 1851," was held sufficient to show a valid service on the defendants by reading the process to them.

To Defendant. — The return should show that the reading was to the defendant, and "by reading the same in the presence and hearing of the within named" is defective. *Hynek v. Englest*, 11 Iowa 210.

Time of Service. — The return must show with reasonable certainty the time of service. *Gilbreath v. Kuykendall*, 1 Ark. 50; *Dick v. Moore*, 85 Ill. 66; *Botsford v. O'Conner*, 57 Ill. 72; *Ball v. Schattuck*, 16 Ill. 299; *Hakes v. Shupe*, 27 Iowa 465; *Stedford v. Ferris*, 4 N. J. L. 120; *Stewart v. Smith*, 17 Wend. (N. Y.) 517; *Texas State Fair, etc.*, 5 Lyon, 5 Tex. Civ. App. 382; *Williams v. Downes*, 30 Tex. 51; *Graves v. Robertson*, 22 Tex. 130; *Willie v. Thomas*, 22 Tex. 175; *Wendel v. Durbin*, 26 Wis. 390.

Place of Service. — Generally. — It is not necessary that the officer state in his return that he executed the process in his own county. The law requires him to state how, but not where, he executed it. If he states that he executed it, the presumption is that he executed it within his own county. *Ex p. St. Louis, etc.*, R. Co., 40 Ark. 141; *Henry v. Ward*, 4 Ark. 150; *Elliott v. State Bank*, 4 Ark. 437; *McNabb v. State Bank*, 4 Ark. 555; *Crane v. Brannan*, 3 Cal. 192; *Baltimore, etc.*, R. Co. v. *Brant*, 132 Ind. 37; *Williams v. Sill*, 12 Iowa 511; *Richardson v. Smith*, 1 Allen (Mass.) 541; *Johnson v. Gilkeson*, 81 Mo. 55; *Gilbert v. Brown*, 9 Neb. 90; *Beach v. Baker*, 25 N. Y. App. Div. 9; *Lyles v. Haskell*, 35 S. Car. 391; *Hays v. Byrd*, 14 Tex. Civ. App. 24; *Guarantee Co. v. Lynchburg First Nat. Bank*, 95 Va. 480; *State v. Campbell*, 42 W. Va. 246.

Where the return fails to state the place where service is made, the defect is cured by a statement, after the signature of the officer, of the place of service. *Wilson v. Call*, 49 Iowa 463.

Where the return shows a service on defendant "at her residence," it will be presumed that the service was in the county of the venue, where it appears that the summons was lodged with the sheriff of that county and was served by his deputy. *Lyles v. Haskell*, 35 S. Car. 391.

Where the certificate of service had

its venue laid in the county of Wayne, and the city of Detroit, and was signed by "John B. Kendall, sheriff," without specifying of what county and certifying to a personal service on the defendant in "said county of St. Clair," it was held to be insufficient. *Clark v. Lichtenberg*, 33 Mich. 307.

In State. — That the service was made in the state need not be stated. The court will take judicial notice that the county in which the process is served is situated in the state. *Zwickey v. Haney*, 63 Wis. 464; *Lewis v. Hartel*, 24 Wis. 504.

Signature. — Generally. — The return must be signed by the officer making it. *Sheppard v. Hill*, 5 Ark. 308; *Long v. Montgomery*, 6 Bush (Ky.) 394; *Sommers v. Hinas*, (Mich. 1894) 58 N. W. Rep. 66; *Bennett v. Vinyard*, 34 Mo. 216; *Thomas v. Goodman*, 25 Tex. Supp. 446; *Watson v. Bondurant*, 21 Wall. (U. S.) 123.

In Name of Sheriff. — In some jurisdictions, the return must be signed in the name of the sheriff, although executed by a deputy. *Briggs v. Greenlee*, Minor (Ala.) 123; *St. Louis, etc.*, R. Co. v. *Barnes*, 35 Ark. 95; *Reinhart v. Lugo*, 86 Cal. 395; *Thomas v. Colorado Nat. Bank*, 11 Colo. 511; *Gibbens v. Pickett*, 31 Fla. 147; *Johnson v. Johnson*, 23 Fla. 413; *Glencoe v. People*, 78 Ill. 382; *O'Conner v. Wilson*, 57 Ill. 226; *Gray v. Wolf*, 77 Iowa 630; *Dennison v. Story*, 1 Oregon 272; *Bolard v. Mason*, 66 Pa. St. 138; *Emley v. Drum*, 36 Pa. St. 123; *Mitchell v. Com.*, 89 Va. 826; *Barksdale v. Neal*, 16 Gratt. (Va.) 314.

In other jurisdictions, the return by a deputy in his own name is sufficient. *Bean v. Haffendorfer*, 84 Ky. 685; *Stoll v. Padley*, 98 Mich. 13; *Allen v. Hazen*, 26 Mich. 142; *Wheeler v. Wilkins*, 19 Mich. 78; *Miller v. Alexander*, 13 Tex. 497; *Towns v. Harris*, 13 Tex. 507; *Eastman v. Curtis*, 4 Vt. 616.

It has been held, however, in those jurisdictions where the return must be signed in the name of the principal by his deputy, that the order in which the names appear is immaterial. *Briggs v. Greenlee*, Minor (Ala.) 123; *Zepp v. Hager*, 70 Ill. 223.

Official Title. — Failure of the deputy to attach the official title of his superior will not invalidate the return. *Martin v. Aultman*, 80 Wis. 150.

Of What County Sheriff. — The officer, in making his return, is not required to state of what county he is

Form No. 18469.¹

Sheriff's Office,
County of *Los Angeles*. } ss.

I hereby certify that I received the within summons on the *first* day of *March*, A. D. 1900, and personally served the same on the *second* day of *March*, A. D. 1900, upon *Richard Roe* and *Samuel Short*, the defendants therein named, by delivering to each of said defendants, personally, in the county of *Los Angeles* and state of *California*, a copy of said summons attached to a true copy of the complaint in the action therein named.

Simon Stevenson, Sheriff.

Dated this *tenth* day of *March*, A. D. 1900.
Sheriff's fees, \$3.50.

Form No. 18470.²

Office of Sheriff,
County of *Shoshone*, } ss.
State of *Idaho*.

I hereby certify that I received the within summons on the *sixteenth* day of *October*, A. D. 1898, and personally served the same on the *seventeenth* day of *October*, A. D. 1898, upon *Richard Roe*, he being the defendant named in said summons, by delivering to said defendant, personally, in the said county of *Shoshone*, a copy of said summons.

James Martin, Sheriff.

By *William Cook*, Deputy Sheriff.

Form No. 18471.³

(*Venue*.)

I have summoned the within named defendant, as within I am commanded, by showing to him the within original writ, and delivering to him a true copy thereof.

The answer of *John Lynch*, Sheriff.

sheriff. *Snelgrove v. Branch Bank*, 5 Ala. 295; *Higgins v. Bullock*, 66 Ill. 37; *Davis v. Burt*, 7 Iowa 56; *Flengel v. Lards*, 108 Mich. 682; *Stoll v. Padley*, 98 Mich. 13; *Marooney v. McKay*, 3 Oregon 372.

Precedents.—In *Alexander v. McDow*, 108 Cal. 25, the return upon the summons was as follows:

"I hereby certify that I received the within summons on the *14th* day of —, A. D. 189—, and personally served the same on the *16th* day of *October*, A. D. 1893, on *L. D. McDow*, defendant therein named, by delivering to each of said defendants personally, in the town of *Susanville*, county of *Lassen*, a copy of said summons, and upon defendant *L. D. McDow*, personally, in the town of *Susanville*, county of *Lassen*, a copy of said sum-

mons attached to a copy of the complaint in the action therein named."

It was held that the addition of the terminal letter *n* to the name of the defendant did not invalidate the return, which was otherwise sufficient.

In *Fitzhugh v. Hall*, 28 Tex. 558, the return was as follows:

"Came to hand *March 10*, 1860. Executed by leaving with the defendant, *William Fitzhugh*, in person, a copy of this citation, together with a certified copy of the petition accompanying this writ.

March the 15th, 1860.

J. Dud. Doak, Sheriff C. C.

By *Y. H. Foster*, Deputy Sheriff."

1. *California*. — Code Civ. Proc. (1897), §§ 225, 726.

See also, generally, *supra*, note 1, p. 37.

2. See, generally, *supra*, note 1, p. 37.

Form No. 18472.¹

(Miss. Anno. Code (1892), § 3428.)

(Venue.)

I have this day executed the within writ personally, by delivering to the within named defendant, *Richard Roe*, a true copy of this writ.

This the *tenth* day of *June*, A. D. 1899.

John Lynch, Sheriff.

Form No. 18473.¹

(Venue.)

June 10, 1899. I have summoned the within named *Richard Roe* by giving him an attested copy of this writ.

(Fees.)

John Lynch, Deputy Sheriff.

bb. BY READING.

Form No. 18474.¹

(Venue.)

June 10, 1899. I have summoned the within named *Richard Roe* by reading to him this writ.

(Fees.)

John Lynch, Deputy Sheriff.

(b) Upon Corporation.²

aa. DOMESTIC CORPORATION.

1. See, generally, *supra*, note 1, p. 37.

2. Corporation, Generally. — Where service is made upon a corporation, the manner in which the service is made must be stated. *Frazier v. Kanawha*, etc., R. Co., 40 W. Va. 224; *Taylor v. Ohio River R. Co.*, 35 W. Va. 328; *Kanawha*, etc., R. Co. v. *Ryan*, 31 W. Va. 364.

In an action against a private corporation, the return must show that service was made upon the officers or an agent of the corporation specified in the statute. *Mars v. Oro Fino Min. Co.*, 7 S. Dak. 605.

Conditions Authorizing Service. — Where service is authorized upon certain officers only, in the absence of the chief officers of the corporation, the existence and conditions authorizing the service must be shown by the return. *Arkansas Coal*, etc., Co. v. *Haley*, 62 Ark. 144; *Eel River R. Co. v. State*, 143 Ind. 231; *Hoen v. Atlantic*, etc., R. Co., 64 Mo. 561; *Glines v. Supreme Sitting*, etc., (Supreme Ct. Spec. T.) 22 Civ. Proc. (N. Y.) 437.

Where the return, after setting forth the delivery of the copy at the office of the corporation to the person in charge,

states that the president, or other chief officer, was not found in the county, it is sufficient; this statement being equivalent to the statement of the absence of such chief officer at the time of the service. *Story v. American Cent. Ins. Co.*, 61 Mo. App. 534.

Where the return states that the return was made upon the party named in the absence of the president, or chief officer of the corporation, it is not sufficient, the inference being that such officer was absent from his office and not from the county. *Hoen v. Atlantic*, etc., R. Co., 64 Mo. 561.

Where service is made upon a corporation and a copy left at the office or usual place of business of such corporation with the person having charge thereof, the return must show that the chief officer of the corporation could not be found, and that none of the specified officers, either chief or subordinate, could be found in the county. *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563.

Officer Served. — The return should show that the person upon whom the process was served is an officer of the corporation upon whom service may be made. *O'Brien v. Shaw's Flat*, etc.,

Form No. 18475.¹

State of California, }
 County of Los Angeles. } ss.

I hereby certify that on the *tenth* day of *October*, A. D. 1899, I served the within summons and annexed complaint upon the within named defendant corporation by delivering to *Richard Roe*, the president of said corporation, personally, in the said county of *Los Angeles*, copies of said summons and complaint, and leaving the same with him.

John Lynch, Sheriff.

Dated this *tenth* day of *October*, A. D. 1899.

Sheriff's fees, \$3.50.

Canal Co., 10 Cal. 343; Aiken v. Quartz Rock Mariposa Gold Min. Co., 6 Cal. 186; Hargis v. East Tennessee, etc., R. Co., 90 Ga. 42; Cairo, etc., R. Co. v. Holbrook, 92 Ill. 297; Grand Tower Min., etc., Co. v. Schirmer, 64 Ill. 106; Northern Cent. R. Co. v. Rider, 45 Md. 24; Kirby Carpenter Co. v. Trombley, 101 Mich. 447; Haley v. Hannibal, etc., R. Co., 80 Mo. 112; Farmer v. Medcap, 19 Mo. App. 250; Willamette Falls Canal, etc., Co. v. Williams, 1 Oregon 112; Willamette Falls Canal, etc., Co. v. Clark, 1 Oregon 113; Dale v. Blue Mountain Mfg. Co., 167 Pa. St. 402; Central R. Co.'s Appeal, 102 Pa. St. 38; Mars v. Oro Fino Min. Co., 7 S. Dak. 605; Mariner v. Waterloo, 75 Wis. 438.

That the person upon whom service is made is an officer of the corporation must be stated, and the return of service upon A., "as secretary," is bad. Chicago Planing Mill Co. v. Merchants' Nat. Bank, 86 Ill. 587; Mathias v. White Sulphur Springs Assoc., 17 Mont. 542. And the return of service upon C., "a trustee," is not sufficient. Mathias v. White Sulphur Springs Assoc., 17 Mont. 542.

Name of agent upon whom process is served must be stated. Singer v. Singer Mfg. Co., 2 Pa. Co. Ct. 578. But the full name of such agent need not be given. Cincinnati, etc., R. Co. v. McDougall, 108 Ind. 179.

Character of agency of person served must be shown. Dickerson v. Burlington, etc., R. Co., 43 Kan. 702; Union Pac. R. Co. v. Pillsbury, 29 Kan. 652; Kirby Carpenter Co. v. Trombley, 101 Mich. 447; Tallman v. Baltimore, etc., R. Co., 45 Fed. Rep. 156. But see Patton v. American Mut. Ins. Co., 1 Phila. (Pa.) 196, 9 Leg. Int. (Pa.) 124, holding that the use of the word "agent" in the sheriff's return is sufficient, and it is not necessary to de-

scribe further what kind of an agent the person was.

A return of service "on the defendant by handing a copy to the station agent at *Sault Ste. Marie*, and delivering to him a copy thereof at the city of *Sault Ste. Marie*, within the said county," is sufficient, and implies that the station agent was the agent of the defendant. Talbot v. Minneapolis, etc., R. Co., 82 Mich. 66.

Precedents.—In Cook v. Imperial Bldg. Co., 152 Ill. 638, this return was held sufficient:

"Served this writ on the within named, the *Imperial Building Company*, by delivering a copy thereof to *F. S. Eames*, vice-president of said company, the *19th* day of *June*, 1890, the president not found in my county.

Canute R. Matson, Sheriff,
 By *W. A. Johnson*, Deputy."

It was further held that the vice-president of the corporation was an agent within the meaning of the statute.

In Missouri, etc., R. Co. v. Crowe, 9 Kan. 496, the return was as follows:

"Sheriff's Office,
Lyon County, Kansas.

I received this summons on the *twenty-fourth* day of *March*, 1871, at 10 o'clock a. m., and executed the same in my county by leaving a true and certified copy thereof, with all the indorsements thereon, with *John A. Watson*, at the depot of the within named defendant, he being in charge of the same, and ticket agent thereof, on the *thirty-first* day of *March*, 1871; no person being by said defendant designated in said county upon whom summons can be served, and the chairman of the board of directors or trustees, or other chief officer, is not to be found in my county.

E. H. Coats, Sheriff of *Lyon Co.*"

It was held that this return was good.

1. See, generally, *supra*, note 2, p. 42.

bb. FOREIGN CORPORATION.

(aa) *Where Person is Designated by Corporation on Whom Process may be Served.*Form No. 18476.¹State of *New York*, }
County of *Suffolk*. } ss.

I hereby certify that on the *tenth* day of *October*, A. D. 1899, I served the within summons and annexed complaint upon the defendant named in said summons, personally, in the town of *Huntington*, in said county, by delivering to *Richard Roe*, the person designated by said corporation on whom process issued by the authority of or under the law of this state may be served, a copy of said summons and complaint personally.

John Lynch, Sheriff.(bb) *Where No Person is Designated by Corporation on Whom Process may be Served.*Form No. 18477.¹State of *New York*, }
County of *Suffolk*. } ss.

I hereby certify that I have been unable to find any officer of the within named defendant on whom to make service of the within summons, and said defendant having failed to designate some person in this county upon whom process against said defendant may be served, I served the within summons upon the within named defendant, on the *tenth* day of *June*, 1900, in said county of *Suffolk*, by delivering to *Richard Roe* a copy thereof personally, and leaving the same with him, the said *Richard Roe*, at the time of such delivery, acting as agent of (or *doing business for*) said defendant within this state.

John Lynch, Sheriff.(cc) *Upon Stockholder of Corporation.*Form No. 18478.¹(Precedent in *Colorado Iron Works v. Sierra Grande Min. Co.*, 15 Colo. 501.)²

State of *Colorado*, *Arapahoe* county, ss.: I do hereby certify that I have duly executed the within summons on this *13th* day of *November*, A. D. 1886, by delivering a true copy of the same to *Samuel Alsop*, a stockholder of the within named defendant, the *Sierra Grande Mining Company*, personally, at the city of *Denver*, in the county of *Arapahoe*, and state of *Colorado*. I further certify that said corporation keeps no principal office in any county in the state of *Colorado*, and there is no county in which the principal business of said corporation is carried on, and that no president, or other head of said corporation, or vice-president, secretary, treasurer, cashier, general agent, general

1. See, generally, *supra*, note 2. p. 42. 2. It was held that this service was sufficient.

superintendent or agent thereof, could then be found, or was then or can now be found, or is now in the county of *Arapahoe*, state of *Colorado*, but each and every officer was then, and is now, absent from said county; and I further certify that, at the same time and place, I delivered to said *Alsop* a copy of the complaint herein.

Frederick Cramer, Sheriff.

By *J. M. Chivington*, Under Sheriff.

(c) *Upon Infant Under Fourteen Years of Age.*

Form No. 18479.¹

State of *New York*, }
County of *Suffolk*. } ss.

I hereby certify that on the *tenth* day of *June*, 1900, at the town of *Huntington*, in the said county of *Suffolk*, I served the within summons and annexed complaint upon *Richard Roe*, the within named minor defendant, by delivering copies thereof to him personally and leaving the same with him, and also at the same time and place by delivering like copies personally to and leaving the same with *John Roe*, the father (or *Rachel Roe*, the mother or guardian, or *Samuel Short*, the person having the care and control of such minor, or *Samuel Short*, the person with whom said minor resided, or the person in whose service said minor was then employed, said minor having no father, mother or guardian within this state).

John Lynch, Sheriff.

(d) *Upon Lunatic and His Committee.*

Form No. 18480.¹

State of *New York*, }
County of *Suffolk*. } ss.

I hereby certify that on the *tenth* day of *June*, 1900, at the town of *Huntington*, in said county of *Suffolk*, I served the within summons and annexed complaint upon the defendant within named, by delivering to him personally and leaving with him copies thereof, and also by delivering, at the same time and place, like copies personally to *Samuel Roe*, the committee of said defendant, and leaving the same with him.

John Lynch, Sheriff.

(2) SUBSTITUTED SERVICE.²

1. See, generally, *supra*, note 1, p. 37.

2. **Substituted Service, Generally.**—The only authority for a substituted service being the statute, the facts which justify such service must appear affirmatively in the return. *Le Grand v. Fairall*, 86 Iowa 211; *Kendrick v. Kendrick*, 19 La. 36; *Bustamente v. Bescher*, 43 Miss. 172; *Bell v. Moran*, 25 N. Y. App. Div. 461; *Caro v. Oregon*, etc., R. Co., 10 Oregon 510; *Carter v. Shin-*

del, 21 Pa. Co. Ct. 126; *Taylor v. Brown*, 13 Pa. Co. Ct. 655; *Settlemier v. Sullivan*, 97 U. S. 444.

Compliance with Statute.—A return showing substituted service must show that the requirements of the statute have been strictly pursued. *Parks v. Weems*, 9 Ark. 439; *Ex p. Cross*, 7 Ark. 44; *Piggott v. Snell*, 59 Ill. 106; *Friend v. Green*, 43 Kan. 167; *Hammond v. Olive*, 44 Miss. 543; *Gamasche v. Smythe*, 60 Mo. App. 161; *Ballinger*

(a) *By Leaving Copy at Residence of Defendant.*¹

v. Sherron, 14 N. J. L. 144; *Sperry v. Reynolds*, 65 N. Y. 179.

Defendant Cannot be Found.—Where the statute provides for service upon the defendant by reading the process to him and giving him a copy, if demanded, and, if the defendant be not found, by leaving a copy of the process at his usual place of residence with some member of his family, the return must show the inability to find the defendant. *Clark v. Little*, 41 Iowa 497; *Bonsall v. Isett*, 14 Iowa 309; *Sidles v. Reed*, 10 Iowa 589; *Eikenburg v. Barrett*, 10 Iowa 593; *Nosler v. Githens*, 9 Iowa 295; *Wheeler v. Wilkins*, 19 Mich. 78; *Mullins v. Sparks*, 43 Miss. 129; *Glenn v. Wragg*, 41 Miss. 654; *Williams v. Monroe*, 125 Mo. 574; *Gardner v. Small*, 17 N. J. L. 162; *Cooper v. Roberts*, 16 N. J. L. 353; *Sperry v. Reynolds*, 65 N. Y. 179; *Hass v. Sedlak*, 9 Oregon 462; *Trullenger v. Todd*, 5 Oregon 36; *Mitchell, etc., Co. v. O'Neil*, 16 Wash. 108; *Matteson v. Smith*, 37 Wis. 333; *Knox v. Miller*, 18 Wis. 397; *Settlemier v. Sullivan*, 97 U. S. 444. But see *contra*, that the return need not show that the defendant could not be found, *Vaule v. Miller*, 64 Minn. 485; *Goener v. Woll*, 26 Minn. 154.

Diligence used to find defendant need not be shown. *Lewis v. Hartel*, 24 Wis. 504.

Retention of Writ.—Where the statute requires the officer to retain the writ a certain number of days, his return must show that he retained the writ in his hand and made diligent search for the defendant during the time in which personal service might have been made. *Bargh v. Ermeling*, 110 Mich. 164; *Brown v. Williams*, 39 Mich. 755.

1. Requisites of Return, Generally.—See *supra*, note 2, p. 45.

At Defendant's Place of Abode—Generally.—By statute, in some states, the return must show that the process was left at the dwelling-house or usual place of abode of the defendant. *Vaughn v. Brown*, 9 Ark. 20; *Piggott v. Snell*, 59 Ill. 106; *Bletch v. Johnson*, 35 Ill. 542; *Boylard v. Boyland*, 18 Ill. 551; *Dohms v. Mann*, 76 Iowa 723; *Clark v. Little*, 41 Iowa 497; *Tavenor v. Reed*, 10 Iowa 416; *Wheeler v. Wilkins*, 19 Mich. 78; *Robison v. Miller*, 57 Miss. 237; *Bustamente v. Bescher*, 43 Miss. 172; *Laney v. Garbee*, 105 Mo. 355; *Brown v. Lang-*

lois, 70 Mo. 226; *Hewitt v. Weatherby*, 57 Mo. 276; *Polhemus v. Perkins*, 15 N. J. L. 435; *Penny v. Harrison*, 14 N. J. L. 24; *Mitchell, etc., Co. v. O'Neil*, 16 Wash. 108; *Midkiff v. Lusher*, 27 W. Va. 439; *McConkey v. McCraney*, 71 Wis. 576.

"Residence."—That service was made at the defendant's "residence" shows that the service was made at his usual place of abode. *Du Val v. Johnson*, 39 Ark. 182; *Pigg v. Pigg*, 43 Ind. 117; *Smithson v. Briggs*, 33 Gratt. (Va.) 180.

"Dwelling-house."—At the "dwelling-house" sufficiently complies with the statutory requirement that the process should be left at the last and usual place of abode of the defendant. *Bruce v. Cloutman*, 45 N. H. 37.

"Home."—The word "home" is synonymous with the words "at his usual place of abode." *Fowler v. Mosher*, 85 Va. 421.

"Store."—That service was made at the "store" of the defendant is not sufficient unless it be shown that such place was his usual place of abode. *Harris v. Wells*, 10 Iowa 587; *Lehman v. Broussard*, 45 La. Ann. 346.

"Place of Business."—A return of the officer serving the process "by leaving a true copy at his place of business" is not sufficient where the statute requires that the copy must be left at his usual place of residence. *Lambert v. Sample*, 25 Ohio St. 336.

Name of person with whom copy was left need not be stated. *Vaule v. Miller*, 64 Minn. 485; *Robison v. Miller*, 57 Miss. 237. And the omission of the christian name of the person with whom the copy is left is immaterial. *Wilson v. Call*, 49 Iowa 463; *Morehead v. Chaffe*, 52 Miss. 161.

On the other hand, it has been held that the return should show with whom the copy was left. *Montgomery v. Brown*, 7 Ill. 581; *Clark v. Little*, 41 Iowa 497; *Boker v. Chapline*, 12 Iowa 204; *Tavenor v. Reed*, 10 Iowa 416; *Lehman v. Broussard*, 45 La. Ann. 346; *Barnet v. Concord*, 4 Vt. 564.

With Member of Defendant's Family.—Under the statutes, in some states, the return must show that the process was left with a white person over a certain age and a member of the family of the defendant. *Parks v. Weems*, 9 Ark. 439; *Ringgold v. Randolph*, 4 Ark.

Form No. 18481.¹

(Miss. Anno. Code (1892), § 3428.)

(Venue.)

I have this day executed the within writ on *Richard Roe*, the within named defendant, by leaving a true copy of the same at his usual place of abode in my county with *Rachel Roe*, his wife (or son, daughter or other person, as the case may be), a member of his family above the age of sixteen years and willing to receive such copy. The said defendant not found in my county.

This the tenth day of June, A. D. 1899.

John Lynch, Sheriff.

Form No. 18482.¹

(Venue.)

June 10, 1899. I have summoned the within named *Richard Roe* by leaving at his abode an attested copy of this writ.

(Fees.)

John Lynch, Deputy Sheriff.

(b) By Posting Copy on Door of Defendant's Residence.

Form No. 18483.¹

(Miss. Anno. Code (1892), § 3428.)

I have this day executed the within writ on *Richard Roe*, the within named defendant, by posting a true copy of the same on a door of defendant's usual place of abode in my county. The said defendant could not be found in my county, nor could I find any member

428; *Wells v. Stumph*, 88 Ill. 56; *Mack v. Brown*, 73 Ill. 295; *Fischer v. Fischer*, 54 Ill. 231; *Dohms v. Mann*, 76 Iowa 723; *Lyon v. Thompson*, 12 Iowa 183; *Bustamente v. Bescher*, 43 Miss. 172.

With Person of Legal Age.—The return must show that a copy of the process was left with a person of the required age. *Barnett v. State*, 35 Ark. 501; *Bruce v. Arrington*, 22 Ark. 362; *Ringgold v. Randolph*, 4 Ark. 428; *Miller v. Mills*, 29 Ill. 431; *Davis v. Burt*, 7 Iowa 56; *Glenn v. Wragg*, 41 Miss. 654; *Laidlaw v. Morrow*, 44 Mich. 547; *Bustamente v. Bescher*, 43 Miss. 172; *Sperry v. Reynolds*, 65 N. Y. 179; *Proctor v. Whitcher*, 15 N. Y. App. Div. 227; *Bailey v. Jefferson Tp.*, 21 Pa. Co. Ct. 20; *Pollard v. Wegener*, 13 Wis. 569; *Mayer v. Griffin*, 7 Wis. 82; *Blythe v. Hinckley*, 84 Fed. Rep. 228.

Receiver Informed of Contents.—By statute, in some states, it is required

that the return should show that the person with whom the process is left was informed of the contents of the copy. *Mack v. Brown*, 73 Ill. 295; *Thompkins v. Whiltberger*, 56 Ill. 385; *Sperry v. Reynolds*, 65 N. Y. 179; *Pollard v. Wegener*, 13 Wis. 569.

Precedent.—In *Carland v. Heineborg*, 2 Oregon 75, the following return was held sufficient:

"I hereby certify that I served this bill and notice, by leaving two copies of said bill and notice at the dwelling-house of *Daniel Carland* in Douglas county with a young white man, residing with the family, over the age of fourteen years, with a request that he hand them to Mr. *Carland* and Mrs. *Carland*.

October 29, 1861.

John Fullerton, Sheriff."

1. See, generally, *supra*, note 1, p. 46.

of said defendant's family over the age of *sixteen* years willing to receive the same at his usual place of abode.

This the *tenth* day of *June*, A. D. 1899.

John Lynch, Sheriff.

b. Of Paper Other than Writ or Summons.¹

Form No. 18484.²

Sheriff's Office,
City and County of *San Francisco*, } ss.
State of *California*.

I hereby certify that I served the (*naming the paper*), by delivering a true copy thereof to *Richard Roe*, personally, on the *tenth* day of *June*, 1899, at his office, No. 10 *State* street, in said *city and county* of *San Francisco*, and leaving the same with him.

John Lynch, Sheriff.

By *Daniel Smith*, Deputy Sheriff.

Dated the *tenth* day of *June*, 1899.

Form No. 18485.²

State of *Idaho*, }
County of *Shoshone*. } ss.

I hereby certify that I have served the foregoing notice by delivering a true copy thereof to *John Doe* and *Richard Roe*, the persons named therein, personally, at *Blank* precinct, and county of *Shoshone*, this *tenth* day of *June*, A. D. 1899.

John Lynch, Constable.

Fees, \$1.80.

Form No. 18486.¹

Return of Original Notice.

John Doe, plaintiff,
against

Richard Roe, defendant.

The within notice came into my hands on the *tenth* day of *June*, 1899, and on said day I served the same on the within named defendant, *Richard Roe*, by reading the within notice to him and delivering to him a true copy thereof; all done within *Harrison* county.

1. **Precedent.**—In *Bliss v. Paine*, 11 Mich. 92, the return was as follows:

"State of *Michigan*, County of *Saginaw*, ss. I do hereby return that, on the *19th* day of *February*, 1859, I served on the within named *Solomon B. Bliss* a declaration, of which the within

is a copy, and upon which was indorsed a notice, of which the notice herein is a copy, by delivering the same to him.

J. W. Turner, Sheriff."

This was held sufficient.

2. See, generally, *supra*, note 1, p. 37.

	Fees.	
Services.....		\$1 00
Copies.....		60
Mileage.....		40

\$2 00

John Lynch, Sheriff, Harrison County, Iowa.
By *Daniel Smith, Deputy.*

c. Where Defendant Evades Service.¹Form No. 18487.²

State of *New York*, }
County of *Suffolk*. } ss.

I hereby certify that *Richard Roe*, the defendant in the within summons and annexed complaint named, is a resident of said county of *Suffolk*; that I have made proper and diligent effort to serve said summons and annexed complaint upon said defendant, but that he avoids and evades such service, so that service cannot be made personally upon him by such proper diligence and effort.

John Lynch, Sheriff.

d. Defendant Not Found.³

Form No. 18488.

(Venuc.)

The within named defendant is not found in my county.

The answer of

John Lynch, Sheriff.

e. One Defendant Served, Other Defendant Not Found.

Form No. 18489.²

(Venuc.)

I have summoned the within named *Richard Roe*, as within I am commanded, by showing to him the within original writ and delivering to him a true copy thereof; but the within named *Samuel Short* is not found in my county.

The answer of

John Lynch, Sheriff.

1. **Evasion of Service.**—A return by an officer that he had "served the summons on the defendant by offering to read the same to him, but he would not stay to hear it," is sufficient. *Slaght v. Robbins*, 13 N. J. L. 340.

2. See, generally, *supra*, note 1, p. 37.

3. **Inability to Serve Process.**—Where the process cannot be executed, the officer should make return to that effect. *Chase v. People*, 2 Colo. 528; *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill. 415; *Chickering v. Failes*, 26 Ill. 507; *Macklot v. Hart*, 12 Iowa 428; *Isabelle v.*

Iron Cliffs Co., 57 Mich. 120; *Brundred v. Egbert*, 164 Pa. St. 615.

Nil Habet.—This is the appropriate return to a writ of scire facias and is the more comprehensive return, but to a writ of summons non est is proper. *Brundred v. Egbert*, 164 Pa. St. 615.

Non Est.—This is proper upon the nonservice of process, it being equal to an averment that the defendant has not appeared in the bailiwick. *Sherer v. Easton Bank*, 33 Pa. St. 134.

Non Est Inventus.—This is said to be proper to a capias only. *Sherer v. Easton Bank*, 33 Pa. St. 134.

2. In Criminal Cases.**a. Arrest of Defendant.****Form No. 18490.***(Venue.)*

I have taken the within named defendant and have his body here before the court in my custody, as within I am commanded.

John Lynch, Sheriff.

b. Arrest and Commitment to Jail.**Form No. 18491.***(Venue.)*

I have taken the within named defendant and have committed him to the common jail of the county of *Suffolk*.

John Lynch, Sheriff.

c. Arrest and Rescue.**Form No. 18492.***(Venue.)*

By virtue of the within writ, I arrested the within named defendant, as in said writ I am commanded, but on the *tenth* day of *June*, 1899, in the town of *Windsor*, in the county of *Windsor*, and before he could be conveyed to jail, the said defendant forcibly rescued himself and escaped out of my custody and since said escape said defendant is not found in my county.

Dated this *twentieth* day of *June*, 1899.

John Lynch, Sheriff of the County of Windsor.

d. Defendant Committed for Want of Bail.**Form No. 18493.***(Venue.)*

I have taken the within named defendant, *Richard Roe*, as within I am commanded, and have him imprisoned in the common jail in the county of *Windsor*, in my custody, for want of bail, after having given him reasonable time in which to procure bail.

John Lynch, Sheriff.

e. Defendant Not Found.**Form No. 18494.***(Venue.)*

The within named defendant cannot be found in my county.

John Lynch, Sheriff.

f. One Defendant Found, Other Defendant Not Found.**Form No. 18495.***(Venue.)*

I have taken the within named defendant *Richard Roe* and have him now here before the court in my custody, but the within named defendant *Samuel Short* cannot be found in my county.

John Lynch, Sheriff.

III. CERTIFICATE OF OFFICER ON COPY OF PAPER OR PROCESS.

Form No. 18496.

State of *North Dakota*, } In *District Court*.
County of *Richland*. } ss. *Fourth Judicial District.*
John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

I, John Lynch, sheriff of Richland county, North Dakota, hereby certify that the copy of (*specifying paper*), which is hereto attached, is a true copy of the original (*specifying paper*) duly issued in the above entitled action and now in my hands for service.

Dated this *tenth* day of *June*, 1899.

John Lynch,
Sheriff of Richland County, State of North Dakota.
By Daniel Sherry, Deputy.

Form No. 18497.

State of *Oregon*,
County of *Multnomah*. } ss.

I hereby certify that the above is a true and correct copy of the original execution.

John Lynch, Sheriff of Multnomah County, Oregon.

Form No. 18498.

Office of the Sheriff of *Spokane* County, }
State of *Washington*. }

I certify that the within is a true and correct copy of the original execution left in my office for service.

Dated at *Spokane*, *Spokane* county, *Washington*, the *tenth* day of *October*, 1898.

*John Lynch, Sheriff of Spokane County, Washington.
By Daniel Sherwin, Deputy.*

IV. APPOINTMENT BY COURT OF INDIFFERENT PERSON TO SERVE PROCESS.

Form No. 18499.

Being satisfied, by due proof, that the within process will not be executed for want of an officer to be had in time to execute the same, I hereby empower and appoint *William West*, of *East Las Vegas, New Mexico*, to execute the said process, and all the authority of a constable in relation thereto is hereby conferred upon him.

Abraham Kent, Justice of the Peace.

V. APPOINTMENT BY OFFICER OF SPECIAL DEPUTY TO SERVE PROCESS.

Form No. 18500.

Know all men by these presents that I, *John Lynch*, sheriff of the county of *Mercer*, do hereby constitute and appoint *John Ketcham*

my deputy for me and on my behalf as such sheriff of the county of *Mercer* to serve the within process.

In witness whereof I set my hand this *tenth* day of *June*, 1902.

John Lynch, Sheriff of the County of *Mercer*.

Form No. 18501.

I hereby depute and appoint *John Ketcham* to execute the within writ.

In witness whereof I set my hand this *tenth* day of *June*, 1902.

John Lynch, Sheriff of the County of *Mercer*.

VI. ACCEPTANCE OF SERVICE.¹

Form No. 18502.²

(Precedent in *Lindsey v. Delano*, 73 Iowa 352.)

I hereby accept due service of the within notice on me at *Plymouth* county, *Iowa*, this *first* day of *July*, 1880, and waive the delivery of a copy thereof to me.

Edmund Lindsey.

1. Compliance with Statute.—Where service of process is acknowledged by the defendant, such acknowledgment must be in accordance with the requirements of the statute under which it is made. *Godwin v. Monds*, 106 N. Car. 443.

Time of acceptance must be stated. *Trolan v. Fagan*, (Supreme Ct. Spec. T.) 48 How. Pr. (N. Y.) 240; *Heatherly v. Hadley*, 4 Oregon 1. *Contra*, that time of acceptance need not be stated, *Nicholson v. Cox*, 83 N. Car. 44.

Place of acceptance must be stated. *Trolan v. Fagan*, (Supreme Ct. Spec. T.) 48 How. Pr. (N. Y.) 240; *Heatherly v. Hadley*, 4 Oregon 1. *Contra*, that the place need not be stated, *Alderson v. Bell*, 9 Cal. 315; *Nicholson v. Cox*, 83 N. Car. 44; *Stoddard Mfg. Co. v. Matrice*, 10 S. Dak. 253.

Acceptance by Attorney.—Acceptance of service by attorney is sufficient when the acceptance is signed by the attorney's name as attorney for the defendant. *Sullivan v. Susong*, 40 S. Car. 154; *Reed v. Reed*, 19 S. Car. 543; *Day v. Mertlock*, 87 Wis. 577. But the attorney must have authority to act for the defendant. *Lawrence v. Rutherford*, 1 Pearson (Pa.) 555; *Reed v. Reed*, 19 S. Car. 551.

Precedents.—In *Lillienthal v. Caravita*, 15 Oregon 339, the following acknowledgment of service was held sufficient:

"State of Oregon,)
County of *Multnomah*, } ss.

Service of the within notice by certified copy is hereby admitted in *Portland, Oregon*, June 1, 1887.

Alex. Bernstein,

Attorney for Defendants."

In *Kennedy v. McCoy*, 46 Tex. 220, the acceptance was as follows:

"State of Texas,)
Harrison County, }

I accept service of the above and foregoing petition, and waive copy of the same and the notice required by law, this *January 10*, 1876.

J. M. Kennedy."

In *Battle v. Eddy*, 31 Tex. 368, the following acknowledgment was held sufficient:

"I, *D. B. Arnold*, one of the within-named defendants, do hereby waive a certified copy of this petition and writ of citation, and accept service, this *21st* day of *August*, 1866.

Witness: *D. B. Arnold*.

M. D. Herwing."

In *Laird v. Thomas*, 22 Tex. 276, this acknowledgment was held sufficient:

"*Gonzales, March 12*, 1857.

I hereby acknowledge service on me of the within petition, and waive further service and the issuance of process against me in this case.

L. E. Laird,
H. C. Laird."

2. See *supra*, note 1, this page.

Volume 17.

Form No. 18503.¹

Supreme Court of New York, County of New York.

John Doe, plaintiff, }
 against
Richard Roe, defendant. }

Service of a copy of the within notice and annexed affidavit, at said county of New York, this tenth day of June, 1899, is hereby admitted.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 18504.¹

Receipt of a copy and due service hereof admitted this tenth day of June, 1899.

Oliver Ellsworth, Attorney for Defendant.

SERVICES.

See the title WORK AND LABOR.

1. See, generally, *supra*, note 1, p. 52.

SET-OFF, COUNTERCLAIM AND RECOUPMENT.

BY HAROLD N. ELDRIDGE.

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CROSS-REFERENCES.

For a Form of Counterclaim for Negligence in Transportation of Goods, see the title CARRIERS, vol. 4, Form No. 5009.

For a Form of Counterclaim for Fraud in Obtaining Judgment, see the title JUDGMENTS AND DECREES, vol. 10, Form No. 12225.

I. SET-OFF.¹

1. **At common law**, a set-off is entirely unknown. It is wholly a creation of statute. *Lang v. Waters*, 47 Ala. 624; *Brower v. Nellis*, 6 Ind. App. 323; *Robinson v. Safford*, 57 Me. 163; *Call v. Chapman*, 25 Me. 128; *Folsom v. Carli*, 6 Minn. 420; *Houston v. Smith*, 2 Smed. & M. (Miss.) 597; *Raymond v. Green*, 12 Neb. 215; *McClenahan v. Cotten*, 83 N. Car. 332.

In *Folsom v. Carli*, 6 Minn. 420, the court says: "At common law, independently of statutes, a set-off of cross demands, unconnected with each other, was not allowed. A defendant could claim, by way of deduction, all just allowances or demands accruing to him, or payments made by him, in respect of the same transaction or account which formed the ground of the action, but could go no further. This was remedied by the 2 Geo. II, ch. 22, sec. 13, where mutual debts were allowed to be set off against each other. 1 Chit. Plead. 569-70-71. The demand must have been in the nature of a debt, and a set-off was excluded in all actions arising *ex delicto*. Id. 571-2. The general features of the English statutes

of set-off are embodied in our own. Comp. Stat., 503, § 44."

Statutes relating to set-off, generally, exist as follows:

Alabama. — Civ. Code (1896), § 3728 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), § 5722 *et seq.*

Connecticut. — Gen. Stat. (1888), §§ 876, 1016 *et seq.*

Delaware. — Rev. Stat. (1893), p. 793, c. 220, § 21 *et seq.*

District of Columbia. — Comp. Stat. (1894), c. 55, §§ 11, 18.

Florida. — Rev. Stat. (1892), § 1069 *et seq.*

Georgia. — 2 Code (1895), §§ 3745 *et seq.*, 5084 *et seq.*

Illinois. — Starr & C. Anno. Stat. (1896), c. 110, par. 30.

Indiana. — Horner's Stat. (1901), § 347 *et seq.*

Kansas. — Gen. Stat. (1897), c. 95 § 94 *et seq.*

Maine. — Rev. Stat. (1883), c. 82, § 55 *et seq.*

Maryland. — Pub. Gen. Laws (1888), art. 75, § 12 *et seq.*

1. Answer or Plea of.¹

a. In General.

Massachusetts. — Rev. Laws (1902), c. 174, § 1 *et seq.*

Michigan. — Comp. Laws (1897), § 10075 *et seq.*

Mississippi. — Anno. Code (1892), § 687 *et seq.*

Nebraska. — Comp. Stat. (1899), § 5693 *et seq.*

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 223, § 7.

New Jersey. — Gen. Stat. (1895), p. 3109, § 1 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 5070 *et seq.*

Oklahoma. — Stat. (1893), § 3972 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 668, § 1 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 239, § 10 *et seq.*

Tennessee. — Code (1890), § 4639 *et seq.*

Vermont. — Stat. (1894), § 1156 *et seq.*

Virginia. — Code (1887), § 3298 *et seq.*

West Virginia. — Code (1899), c. 126, § 4 *et seq.*

Wisconsin. — Stat. (1898), § 4258 *et seq.*

Wyoming. — Rev. Stat. (1887), § 2457 *et seq.*

United States. — Rev. Stat. (1878), §§ 1059, 1061, 5073.

In *Mississippi*, a special plea of set-off is unknown to the statutes. *Houston v. Smith*, 2 Smed. & M. (Miss.) 597.

Pleaded as Counterclaim. — In *Wisconsin*, it is provided by statute that, in courts of record, a set-off shall be pleaded as a counterclaim and regulated by the rules of pleading and practice applicable to counterclaims. *Wis. Stat.* (1898), § 4264; *Schumacher v. Sieger*, 65 *Wis.* 394; *Lawrence v. Vilas*, 20 *Wis.* 381.

1. Requisites of Answer or Plea — Generally. — For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS in CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Character and Certainty. — A plea or answer of set-off is in the nature of a declaration or complaint. It must, therefore, contain the substantial requisites of such a pleading, and the averment of those requisites must be made with the same certainty and precision. *Robinson v. Mace*, 16 *Ark.* 97; *Bernard v. Mullott*, 1 *Cal.* 368; *Conn. Gen. Stat.* (1888), § 876; *Stockton v. Graves*, 10 *Ind.* 294; *Breen v. Sullivan*, 5 *Ill.* App.

449; *Johnson v. Tyler*, 1 *Ind. App.* 387; *Bennett v. McCrocklin*, 3 *Met. (Ky.)* 322; *Coleman v. Coleman*, 3 *Bibb (Ky.)* 14; *Mass. Rev. Laws* (1902), c. 174, § 8; *Kershaw v. Merchants' Bank*, 7 *How. (Miss.)* 386; *Staab v. Ortiz*, 3 *N. Mex.* 53; *Concord v. Pillsbury*, 33 *N. H.* 310; *Benkard v. Babcock*, (*N. Y. Super. Ct. Gen. T.*) 17 *Abb. Pr. (N. Y.)* 421.

In *Kennedy v. Richardson*, 70 *Ind.* 524, the court says, "a set-off, strictly speaking, is not a defense to the action in which it may be filed. It is simply a cross action, and as such it must state facts sufficient to constitute, not a defense to the action in which it may be filed, but a cause of action against the opposite party." And see, to the same effect, *O'Brien v. Anniston Pipe-Works*, 93 *Ala.* 582; *Sledge v. Swift*, 53 *Ala.* 110. This latter case holds, however, while the set-off must contain the substance at least of a declaration, the certainty and formality requisite in a declaration is not necessary.

Aided by Complaint. — In *Castleman v. Jeffries*, 60 *Ala.* 380, it is held that it is not necessary that facts averred in the complaint should be repeated in the plea of set-off.

Several Set-offs. — The defendant may set forth in his answer as many grounds of set-off as he has. Each ground, however, must be separately stated and numbered, and must refer in an intelligible manner to the cause of action which it is intended to answer. *Sand. & H. Dig. Ark.* (1894), § 5722; *Horner's Stat. Ind.* (1901), § 347; *Kan. Gen. Stat.* (1897), c. 95, § 94 *et seq.*; *Neb. Comp. Stat.* (1899), § 5694; *Bates' Anno. Stat. Ohio* (1897), § 5071; *Okl. Stat.* (1893), § 3972; *Wyo. Rev. Stat.* (1887), § 2458.

Answering Whole Complaint. — An answer of set-off will not be bad because it purports to answer the whole complaint and only answers a part thereof. *Stotsenburg v. Fordice*, 142 *Ind.* 490; *Kennedy v. Richardson*, 70 *Ind.* 524; *Law v. Vierling*, 45 *Ind.* 25; *Mullen-dore v. Scott*, 45 *Ind.* 113; *Myers v. State*, 45 *Ind.* 160; *Curran v. Curran*, 40 *Ind.* 473 (*overruling Blew v. Hoover*, 30 *Ind.* 450); *McClintic v. Cory*, 22 *Ind.* 170; *Conklin v. Waltz*, 3 *Ind.* 396.

But see *Kershaw v. Merchants' Bank*, 7 *How. (Miss.)* 386, to the effect that a plea of set-off to the whole action is bad

when it offers to set off a less amount against a greater.

Nature and Items of Demand. — The nature of the defendant's demand must be set forth. *Sledge v. Swift*, 53 Ala. 110; *Finch v. Ives*, 28 Conn. 115; *Pusey v. Peck*, 67 Ill. 98; *Fugit v. Ewing*, 9 Ind. 345; *Elsev v. Stamps*, 10 Lea (Tenn.) 709; *Vt. Stat.* (1894), § 1769. And when the demand consists of items of an account, such items must be specified. *Doughty v. Jones*, 3 N. J. L. 233; *Walton v. Lippincott*, 2 N. J. L. 149.

Mutuality — Generally. — That there is mutuality between the demand sued for by the plaintiff and the demand sought to be set off against it by the defendant must be shown, or facts must be alleged setting up an equitable reason for dispensing with such showing. *Howard v. Shores*, 20 Cal. 277; *Rush v. Thompson*, 112 Ind. 158; *Proctor v. Cole*, 104 Ind. 373; *Harris v. Rivers*, 53 Ind. 216; *Dodge v. Dunham*, 41 Ind. 186; *Brower v. Nellis*, 6 Ind. App. 323; *Brooks v. Stackpole*, 168 Mass. 537; *Lovell v. Nelson*, 11 Allen (Mass.) 101; *Baker v. Kinsey*, 41 Ohio St. 403; *Hamilton v. Van Hook*, 26 Tex. 302; *Hilliard v. Johnson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 100.

Effect of Insolvency. — Where a defendant sued upon a separate demand pleads in set-off a joint demand against the plaintiff and other parties, strangers to the suit, he may rely upon their insolvency to take the case out of the general rule requiring mutuality of demands, provided his plea of set-off names the parties liable upon his demand and avers their insolvency. *Hamilton v. Van Hook*, 26 Tex. 302.

In *Howard v. Shores*, 20 Cal. 277, it was held that to justify the allowance of a set-off of a joint debt due from the plaintiff and another against the individual claim of the plaintiff, upon equitable grounds, it is not sufficient to show that the joint debtors owe a considerable amount and that their property is incumbered by judgments, mortgages and attachments, without showing that they are insolvent or that the defendants are in danger of losing their demand.

Assigned Demand. — Where the demand set off by the defendant is due him as an assignee, this fact must be alleged; and it must be further alleged that the demand was due the assignor before the assignment. *Dilley v. Roman*, 17 Md. 337.

Partnership Demand. — A demand against the plaintiff and his partner may be set off by the defendant, where it is alleged that the plaintiff assumed the debts of the firm. *Hilliard v. Johnson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 100.

Where Co-defendants are Sureties. — In *Indiana*, by reason of statute, it is held that, in an action upon a promissory note against two or more defendants as the makers thereof, a demand in favor of one of the defendants may be pleaded by him as a set-off, where he alleges that he is the principal in the promissory note sued on and that his co-defendants are sureties therein. *Lynn v. Crim*, 96 Ind. 89; *Harris v. Rivers*, 53 Ind. 216; *Dodge v. Dunham*, 41 Ind. 186.

Demand Liquidated — Generally. — That the defendant's demand is liquidated must be shown, where statutes only allow a set-off in case the basis thereof is for liquidated damages. *Roberts v. Donovan*, 70 Cal. 108; *West v. Hayes*, 104 Ind. 251; *Hearn v. Cullin*, 54 Md. 533; *Montague v. Boston*, etc., Iron Works, 97 Mass. 502; *Green v. Willard Improved Barrel Co.*, 1 Mo. App. 202; *May v. Kellar*, 1 Mo. App. 381; *Robinson v. Gilman*, 43 N. H. 485; *Frick v. White*, 57 N. Y. 103; *Braithwaite v. Akin*, 3 N. Dak. 365; *Hilliard v. Johnson*, (Tex. Civ. App. 1894) 28 S. W. Rep. 100.

Effect of Insolvency. — Where insolvency of the plaintiff is shown, the defendant is entitled to an equitable set-off, notwithstanding the demand is shown to be unliquidated. *Forbes v. Cooper*, 88 Ky. 285; *Doyscher v. Adams*, (Ky. 1895) 29 S. W. Rep. 348; *Trotter v. Heckscher*, 40 N. J. Eq. 612; *Spofford v. Rowan*, 124 N. Y. 108; *Cumings v. Morris*, 3 Bosw. (N. Y.) 560; *Jennings v. Webster*, 8 Paige (N. Y.) 503; *Braithwaite v. Akin*, 3 N. Dak. 365.

Nonresidence of Plaintiff. — It has been held that where nonresidence of the plaintiff is shown, the defendant is entitled to set off an unliquidated claim. *Forbes v. Cooper*, 88 Ky. 285; *Doyscher v. Adams*, (Ky. 1895) 29 S. W. Rep. 348. But see *contra*, to the effect that nonresidence merely does not authorize an equitable set-off, *Braithwaite v. Akin*, 3 N. Dak. 365.

Demand Due and Unpaid — At Time of Set-off. — That the demand set off against the plaintiff was due and unpaid at the time of such set-off must be alleged. *Robinson v. Mace*, 16 Ark.

Form No. 18505.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 489.)

(Commencing as in Form No. 15203) the said *John Doe*, before and at the time of the commencement of this suit, to wit, at (*Here state place*), aforesaid, was and still is indebted to him, the said *Richard Roe*, in a large sum of money, to wit, the sum of *one hundred pounds*, of lawful money of *Great Britain*,* for (*Here state the subject-matter of the set-off according to the facts*),† which said sum (or *sums*) of money, so due and owing from the said *John Doe* to the said *Richard Roe* as aforesaid, exceeds (or *exceeds*) the damages sustained by the said *John Doe* by reason of the nonperformance by him, the said *Richard Roe*, of the said several supposed promises and undertakings in said declaration mentioned, and out of which said sum (or *sums*) of money, so due and owing from the said *John Doe* to the said *Richard Roe*, he, the said *Richard Roe*, is ready and willing, and hereby offers to set off and allow to the said *John Doe* the full amount of the said damages, according to the form of the statute in such case made and provided. And this (*concluding as in Form No. 15213*).

Form No. 18506.²

(Ala. Civ. Code (1896), § 3353, No. 37.)

(*Venue and title of court and cause as in Form No. 15215.*)

The defendant, as a defense to the action of the plaintiff, saith that, at the time said action was commenced, the plaintiff was in-

97; *McCord v. Crooker*, 83 Ill. 556; *Lemon v. Stevenson*, 36 Ill. 49; *Johnson v. Tyler*, 1 Ind. App. 387.

At Commencement of Suit.—It must also be alleged that the demand set off against the plaintiff was due and unpaid when the action in which the set-off was filed was commenced. *Sledge v. Swift*, 53 Ala. 110; *Robinson v. Mace*, 16 Ark. 97; *Henry v. Butler*, 32 Conn. 140; *Robinson v. Safford*, 57 Me. 163; *Houghton v. Houghton*, 37 Me. 72; *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 145; *Hogan v. Kirkland*, 64 N. Car. 250.

Prayer.—Where the defendant pleads a set-off, and desires to obtain a judgment in his favor for the balance of his demand, above the demand of the plaintiff, he must ask for such a judgment in his plea. *Finch v. Ives*, 28 Conn. 115.

Precedents.—In *Lang v. Waters*, 47 Ala. 624, the second plea, which was in set-off, was as follows:

"2d. Defendant says, as a defense to the action of plaintiff, that at the time said summons was sued out, the plaintiff was indebted to him in the sum of \$15,000, by an unliquidated demand amounting to \$15,000, stated above, the 1st day of March, 1863, and

due at that date to the defendant, which he hereby offers to set off against the demand of the plaintiff, and he claims the judgment for the residue."

There was a third plea, identical with the second, except that the demand offered to be set off was stated to be "liquidated." A demurrer to the pleas was overruled. The court said, "such pleas * * * are according to the form of pleas prescribed in the code. This is enough."

See also similar pleas in *Finney v. Denny*, 122 Ala. 449.

A plea averring that plaintiff was at the commencement of the action, and still is, indebted to defendant in a much larger sum of money, due by note, than the amount due from the defendant to the plaintiff, and that said sum of money so due and owing by plaintiff, to wit, the sum of twelve hundred dollars, is unpaid, is not a good plea; because there is no statement of the date of the note, its terms, or time of payment, and the court might, therefore, treat it as a nullity. *Harris v. Snider*, 9 Humph. (Tenn.) 743.

1. See, generally, *supra*, note 1, p. 56.

2. *Alabama.*—Civ. Code (1896), § 3728.

debted to him in the sum of *one hundred dollars* by note (*liquidated or unliquidated demand, as the case may be, describing it by its date, amount, when and to whom payable*) which he hereby offers to set off against the demand of the plaintiff, and he claims judgment for the excess (*if the set-off exceeds the plaintiff's demand*).

(*Signature and verification as in Form No. 15215.*)

Form No. 18507.¹

(Conn. Prac. Act, p. 226, No. 427.)

(*Title of court and cause as in Form No. 12216.*)

Set-off.

At the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of \$1,000, for the following cause: (*Here state the cause of action relied on as a set-off*).

The defendant offers to set off said debt against the plaintiff's demand, if any should be found to exist, and claims judgment for such balance as may be found to be due him from the plaintiff, on said account.

(*Signature as in Form No. 12216.*)

Form No. 18508.¹

(Dist. of Col. Comp. Stat. (1894), c. 55, § 12.)

(*Commencing as in Form No. 15217*) that the plaintiff, at the commencement of the suit, was, and still is, indebted to the defendant in the sum of *two hundred dollars*, for (*Here state the cause of set-off*), as appears by the particulars of said debt, hereto annexed; and he is willing that the same may be set off against the plaintiff's demand.

(*Signature as in Form No. 15217.*)

Form No. 18509.³

(Fla. Rev. Stat. (1892), § 1075, No. 6.)

(*Commencing as in Form No. 15218*) that the plaintiff, at the commencement of this suit, was and still is indebted to the defendant in an amount equal to the plaintiff's claim, for (*Here state the cause of set-off as in a declaration*), which amount the defendant is willing to set off against the plaintiff's claim.

(*Signature and verification as in Form No. 15218.*)

Form No. 18510.⁴

(Tenn. Code (1896), § 4661.)

(*Title of court and cause as in Form No. 15228.*)

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

1. *Connecticut*. — Gen. Stat. (1888), §§ 876, 1016.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

2. *District of Columbia*. — Comp. Stat. (1894), c. 55, § 11 *et seq.*

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

3. *Florida*. — Rev. Stat. (1892), § 1069.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

4. *Tennessee*. — Code (1896), § 4639 *et seq.*

See also list of statutes cited *supra*,

The defendant for plea says that at the time the plaintiff's action was commenced the plaintiff was indebted to him in the sum of *one hundred dollars*, by note, dated the *tenth day of May, 1900*, and due the *tenth day of July, 1900* (*account, bond, or as the case may be, and describing it by date, amount, and when and to whom payable*), which he hereby offers to set off against the plaintiff's demand, (*and he claims judgment for the residue, as the case may be*).

(Signature and verification as in Form No. 15228.)

b. Account.¹

(1) IN GENERAL.

Form No. 18511.²

Second District Court of Jersey City, before John Garrick, Esquire, Judge.

Hudson County, ss.

John Birch
ads. } On Contract — Set-off.
Thomas Carey. }

The said defendant claims of the said plaintiff, by way of set-off, seven dollars and fifty cents upon the following account:

2 bbls. of potatoes, at \$2.50.....	\$5 00
1 bbl. of parsnips, at \$2.50.....	2 50
	\$7 50

John Birch, by
Bedle, Muirheid & McGee, Attys.

(2) BOOK ACCOUNT.

Form No. 18512.³

(Aikens' Prac. F. (Supp.), No. 76.)

(Title of court and cause as in Form No. 15229.)

And now the said Richard Roe, defendant in the above entitled suit, comes, and, according to the form of the statute in such case

note 1, p. 55; and, generally, *supra*, note 1, p. 56.

1. **Requisites of Answer or Plea, Generally.** — See *supra*, note 1, p. 56.

Itemized Statement. — The account must state distinctly the nature of the set-off and the several items thereof. Miss. Anno. Code (1892), § 688; Curry v. Kurtz, 33 Miss. 24.

Account must be Filed. — When the set-off is founded on an account, the account or a copy thereof must be filed with the pleading. Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 32; Howe v. Frazer, 117 Ill. 191; Biddle v. Reed, 33 Ind. 529; Fugit v. Ewing, 9 Ind. 345; Iowa Code (1897), § 3623; Farwell v. Tyler, 5 Iowa 535; Chambers v.

Games, 2 Greene (Iowa) 320; Miss. Anno. Code (1892), § 688; Bates' Anno. Stat. Ohio (1897), § 5085; Bell v. Crawford, 8 Gratt. (Va.) 110; Rice v. Annatt, 8 Gratt. (Va.) 557. And if not so filed the reason for the omission must be stated in the pleading. Bates' Anno. Stat. Ohio (1897), § 5085.

2. **New Jersey.** — Gen. Stat. (1895), p. 3109, § 1 *et seq.*

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, this page.

3. **Vermont.** — Stat. (1894), § 1169.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, this page.

made and provided, declares against the said *John Doe*, in a plea that the said *John Doe* render to him, the said *Richard Roe*, the sum of *ninety* dollars, which the said *Richard Roe* saith is justly due from the said *John Doe*, to balance book account between them, as by the said *Richard Roe's* original book, ready to be produced in court, may appear. Now the said *Richard Roe* saith, that the said *John Doe*, though often requested, hath ever refused and still doth refuse to settle and adjust the account of the said *Richard Roe*, or to pay to the said *Richard Roe* the balance thereon due; which is to the damage of the said *Richard Roe*, as he says, the sum of *ninety* dollars, and which sum the said *Richard Roe* prays may be offset against the demand of the said *John Doe* in his said suit against the said *Richard Roe* mentioned and declared upon.

By his attorney, *Jeremiah Mason*.

c. Bond.

Form No. 18513.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 493.)

(Commencing as in Form No. 18505) upon and by virtue of a certain writing obligatory, made by the said *John Doe* heretofore, to wit, on (*stating time*), at (*stating place*), aforesaid, and sealed with his seal, and now shown to the court of our said lord the King, before the King himself, the date whereof is the same day and year last aforesaid, whereby he, the said *John Doe*, became held and firmly bound unto the said *Richard Roe* in the penal sum of *two hundred* pounds of like lawful money, to be paid to the said *Richard Roe* when he, the said *John Doe*, should be thereunto afterwards requested, which said writing obligatory was and is conditioned for the payment of a certain sum of money, to wit, the sum of *one hundred* pounds, at a certain time therein mentioned, and which had elapsed before the commencement of this suit, and which said writing obligatory at the time of the commencement of this suit was and still is in full force and effect, not released, paid off, satisfied, cancelled, or otherwise made void, and at the time of the commencement of this suit there was and still is due and owing from the said *John Doe* to the said *Richard Roe*, upon the said writing obligatory, by the condition thereof, a certain sum of money, to wit, the said sum of *two hundred* pounds, to wit, at (*stating place*) aforesaid, (*concluding as in Form No. 18505, from †*).

d. Commercial Paper.

(1) BILL OF EXCHANGE.

(a) Accepted by Plaintiff.

Form No. 18514.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 494.)

(Commencing as in Form No. 18505, and continuing down to *) upon and by virtue of a certain bill of exchange, bearing date the *tenth* day of

1. See, generally, *supra*, note 1, p. 56.

May, A. D. 1800, heretofore, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, made and drawn by the said *Richard Roe*, upon and then and there accepted by the said *John Doe*, whereby he, the said *Richard Roe*, requested the said *John Doe*, two months after the date thereof, to pay to him, the said *Richard Roe*, or his order, the sum of *fifty* pounds, for value received, (*concluding as in Form No. 18505, from †*).

(b) *Indorsed by Plaintiff.*

Form No. 18515.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 494.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain bill of exchange, bearing date the *tenth* day of May, A. D. 1800, heretofore, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, made and drawn by the said *John Doe*, upon one *Samuel Jones*, whereby he, the said *John Doe*, requested the said *Samuel Jones*, two months after the date thereof, to pay to him, the said *John Doe*, or his order, the sum of *twenty* pounds, for value received, which said bill of exchange the said *John Doe* afterwards, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, indorsed and delivered to the said *Richard Roe*; and which said bill of exchange, when the same became due and payable, according to the tenor and effect thereof, to wit, on (*stating time*), at (*stating place*), aforesaid, was presented and shown to the said *Samuel Jones* for payment thereof, but the said *Samuel Jones* then and there neglected and refused to pay the said sum of money in the said bill of exchange specified, whereof the said *John Doe* afterwards, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, had notice, (*concluding as in Form No. 18505, from †*).

(2) PROMISSORY NOTE.

(a) *Made by Plaintiff.*

Form No. 18516.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 495.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain promissory note in writing, bearing date the *tenth* day of May, A. D. 1800, heretofore, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, made by the said *John Doe*, and whereby he, the said *John Doe*, then and there promised to pay two months after the date thereof to the said *Richard Roe*, or his order, the sum of *forty* pounds, for value received, (*concluding as in Form No. 18505, from †*).

(b) *Indorsed by Plaintiff.*

Form No. 18517.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 495.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain promissory note in writing, bearing date

1. See, generally, *supra*, note 1, p. 56.

the *tenth* day of *May*, A. D. 1800, heretofore, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, made by one *Samuel Jones*, and whereby he, the said *Samuel Jones*, then and there promised to pay, *two* months after the date thereof, to the said *John Doe*, or his order, the sum of *forty* pounds, for value received, and which said promissory note he, the said *John Doe*, afterwards, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, indorsed and delivered to the said *Richard Roe*, and which said promissory note, when the same became due and payable, according to the tenor and effect thereof, to wit, on (*stating time*), at (*stating place*), aforesaid, was presented and shown to the said *Samuel Jones* for payment thereof, but the said *Samuel Jones* then and there neglected and refused to pay the said sum of money in the said promissory note specified, whereof the said *John Doe* afterwards, to wit, on the day and year last aforesaid, at (*stating place*), aforesaid, had notice, (*concluding as in Form No. 18505, from †*).

e. Common Counts.¹

Form No. 13518.²

(Precedent in *Breen v. Sullivan*, 5 Ill. App. 449.)³

[(*Venue, title of court and cause as in Form No. 15219.*)]

1. Precedent. — In *Ford v. Burchard*, 130 Mass. 424, the defendant filed the following set-off: "And the defendant says that the said parties made a contract in writing, a copy whereof is hereto annexed, and the defendant fully performed all his part of said contract, excepting only as he was prevented and hindered from so doing by the plaintiff; but the plaintiff did not perform his part of said contract, but wrongfully broke the same by refusing and neglecting to make the payments therein stipulated, and so prevented the defendant from completing the building mentioned in said contract. And the defendant specifies that the second and third payments stipulated in said contract became due and payable according to the terms of said contract; that he duly demanded the same, but the plaintiff neglected and refused to pay the same or either of them, and the defendant was thereby prevented from proceeding further with said work, and from completing said contract. And the defendant says that by reason of said breach he hath the right to have and recover from the plaintiff the fair price and value of the labor and materials furnished by him to the plaintiff for and on account of the building mentioned in said contract; and he says that he so furnished labor and materials, as set forth in the account thereof hereto annexed, and that the plaintiff owes him \$557.89, according to said ac-

count (and he says that said account is exclusive of labor and materials furnished by him, for which the plaintiff paid)." The court said, "the defendant's declaration in set-off states with unnecessary particularity the facts that the parties made a contract, that the plaintiff broke it, that the defendant was thereby prevented from performing it, and that, by reason thereof, the defendant had the right to recover the value of the materials furnished and services done by him; all this is stated as inducement to the gist of the count, which is that the defendant furnished labor and materials to the plaintiff, as set forth in the account annexed, and that plaintiff owes him \$557.89, according to said account. This cannot be construed as a count for unliquidated damages for a breach of the contract. Rejecting as surplusage the unnecessary averments, there remains a good count on an account annexed for labor and materials furnished. The declaration therefore sets out a claim which the defendant is entitled to avail himself of under our statutes of set-off."

2. *Illinois*. — *Starr & C. Anno. Stat.* (1896), c. 110, par. 30.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

3. A judgment sustaining a demurrer to this plea of set-off was reversed.

(*First plea.*)]¹

And for a further plea in this behalf, the defendant says *actio non*, because he says that the plaintiff was before and at the time of the commencement of this suit and still is indebted to him, the defendant, in the sum of *fifteen thousand* dollars, for the use and occupation of certain rooms and furniture of the defendant, before that time used and enjoyed by plaintiff at his request; and for the meat, drink, washing, lodging, attendance and other necessities and goods before that time found and provided by the defendant for the plaintiff, at his request; and for money paid at the request of the plaintiff, by the defendant, for medical services and attendance, advice and medicines before that time given and provided by the defendant for the plaintiff at his request, and for nursing, care and attention, and other necessities furnished to the plaintiff by the defendant, at the request of the plaintiff, during divers times of the sickness of said plaintiff before that time, and for divers large sums of money had before that time paid out by the defendant for the use and benefit of the plaintiff, at his request, for taxes on, and for expenses concerning divers pieces of land, belonging to plaintiff for a long period of time, to wit: from the year 1855 to 1861, both inclusive, amounting in all to a large sum, to wit: the sum of \$15,000, and for the necessary clothes and wearing apparel of the plaintiff before that time found and provided by the defendant for the plaintiff, at his request, which said sum of money so due from the plaintiff to the defendant as aforesaid exceeds the damages sustained by the plaintiff by reason of the non-performance by the defendant of the said several supposed promises, in the said declaration mentioned, and out of which sum of money the defendant is ready and willing, and hereby offers, to set off and allow to the plaintiff to the full amount of said damages, and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him.

[*Jeremiah Mason, Attorney for Defendant.*]²

f. Goods Sold and Delivered.

Form No. 18519.³

(Sand. & H. Dig. Ark. (1894), p. 1637, No. 72.)

Pulaski Circuit Court.

Richard Roe, plaintiff, }
 against } Answer
John Doe, defendant. }

The defendant, *John Doe*, admits that he owes the debt in the complaint mentioned, but he states that the plaintiff is indebted to him in the sum of *four hundred and twenty* dollars, for *twenty-one* cattle sold and delivered by him to the plaintiff, at the price of *twenty* dollars per head, which debt remains unpaid; wherefore, he prays

1. The matter to be supplied within [] will not be found in the reported case.

2. The matter enclosed by [] will not be found in the reported case.

3. *Arkansas*. — Sand. & H. Dig. (1894), §§ 5722, 5725, 5729.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, p. 56.

judgment for the set-off of his debt against the debt in the complaint mentioned, and for judgment for the remainder of his debt, and for other relief.

John Doe.

(*Verification.*)

g. Judgment.

Form No. 18520.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 491.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain judgment, which he, the said *Richard Roe*, heretofore, to wit, in *Trinity Term*, in the *fifty-first* year of the reign of our said Lord the King, in the court of our said Lord the King, before the King himself, recovered against the said *John Doe*, in a certain plea of trespass on the case upon promises, whereby it was considered and adjudged that the said *Richard Roe* should recover against the said *John Doe* the said sum of *one hundred* pounds for his damages which he had sustained, as well by reason of the not performing of certain promises and undertakings before then made by the said *John Doe* to the said *Richard Roe*, as for his costs and charges by him about his suit in that behalf expended, whereof the said *John Doe* was convicted, as by the record and proceedings thereof remaining in the said court of our said Lord the King, before the King himself, more fully appears, which said judgment still remains in full force and effect, not reversed, annulled, discharged, satisfied, or made void, and which he, the said *Richard Roe*, is ready to verify by the said record, (*concluding as in Form No. 15214*).

h. Recognizance.

Form No. 18521.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 492.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain recognizance, he, the said *John Doe*, having before the commencement of this suit, to wit, in the *Trinity Term*, of the *fiftieth* year of the reign of our said Lord the King, come in his own proper person in the court of our said Lord the King, before the King himself, the said court then and still being holden at *Westminster*, in the county of *Middlesex*, and then and there in the said court acknowledged himself to owe to the said *Richard Roe* the sum of *one hundred* pounds, lawful money of *Great Britain*, to be paid to the said *Richard Roe*, when he, the said *John Doe*, should be thereunto afterwards requested, which said sum of *one hundred* pounds he, the said *John Doe*, for himself and his heirs, then and there consented and granted to be made of his and their lands, goods and chattels, and should be levied to the use and behoof of the said *Richard Roe*, and which said recognizance is still in full force, strength and effect, not paid off, annulled or satisfied; as by the said recognizance

1. See, generally, *supra*, note 1, p. 56.

remaining of record in said court of our said Lord the King, before the King himself, will fully appear, and which he, the said *Richard Roe*, is ready to verify by the said record, (*concluding as in Form No. 15214*).

1. Rent Due on Lease.

Form No. 18522.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 492.)

(*Commencing as in Form No. 18505, and continuing down to **) upon and by virtue of a certain indenture of lease, made heretofore, to wit, on (*stating time*), at (*stating place*), aforesaid, between the said *Richard Roe* of the one part, and the said *John Doe* of the other part (the counterpart of which said indenture, sealed with the seal of the said *Richard Roe*, the said *Richard Roe* now brings here into court, the date whereof is the day and year last aforesaid), whereby the said *Richard Roe* demised certain tenements, with the appurtenances therein mentioned, to the said *John Doe* for a certain term of years therein mentioned, to wit, for the term of *twenty* years, from (*stating time*), yielding and paying, during the said term, the yearly rent or sum of *ten* pounds on certain days therein mentioned, to wit, on (*stating days*), and in and by which said indenture he, the said *John Doe*, covenanted with the said *Richard Roe* to pay him the said rent of *ten* pounds on the days aforesaid, of which said rent afterwards, to wit, on (*stating time*), a large sum of money, to wit, the said sum of *ten* pounds for *one* year of the said term then elapsed, became, and was, and still is in arrear and unpaid, from the said *John Doe* to the said *Richard Roe*, to wit, at (*stating place*), aforesaid, (*concluding as in Form No. 18505, from †*).

2. Notice of Set-off Accompanying Plea.²

a. In General.

1. See, generally, *supra*, note 1, p. 56.

2. **Notice Authorized.** — In several states, it is expressly provided by statute that instead of a plea of set-off a notice of set-off may be given under the general issue. *Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 30; Mich. Comp. Laws (1897), § 10076; Miss. Anno. Code (1892), § 688; N. H. Pub. Stat. & Sess. L. (1901), c. 223, § 11.*

In *Maine* and *Rhode Island*, a statement of the defendant's demand sought to be set off must be filed with the plea. *Me. Rev. Stat. (1888), c. 82, § 55; R. I. Gen. Laws (1896), c. 239, § 12.*

In *New Jersey*, the statute provides for notice in writing of the set-off, annexed to the plea. *Gen. Stat. (1895), p. 3109, § 2.*

Requisites of Notice, Generally. — For the formal parts of a notice in a par-

ticular jurisdiction see the title NOTICE OF DEFENSE, vol. 13, p. 193.

Nature of Demand. — The notice of set-off, like the plea of set-off, is in the nature of a cross-action by the defendant against the plaintiff, and, like a declaration, must state the nature of the defendant's demand, so that the matter thereof can be fully understood and fully litigated. *Patterson v. Steele, 36 Ill. 272.*

Certainty Required — Generally. — The demand sought to be set off must be described with reasonable certainty. *Perrine v. Warren, 3 Stew. (Ala.) 151; Lewis v. Culbertson, 11 S. & R. (Pa.) 48; Gogel v. Jacoby, 5 S. & R. (Pa.) 117; Beatty v. Smith, 4 Yeates (Pa.) 102.* But the same strictness, either as to form or substance, essential to a special plea is not necessary to a notice of set-off. *Perrine v. Warren, 3 Stew. (Ala.)*

Form No. 18523.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 490.)

In the *King's Bench* (or *Common Pleas* or *Exchequer*).

Between	{	<i>John Doe</i> , plaintiff,
		and
		<i>Richard Roe</i> , defendant.

Mr. *Jeremiah Mason*, Attorney for Plaintiff,

Take notice, that the above named defendant on the trial of this cause will give in evidence, and insist that the above named plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendant in the sum of *one hundred pounds*, of lawful money of *Great Britain*, for (*Here state the subject-matter of the set-off, as precisely as in a plea of set-off, except that, instead of the names of the parties, insert the words plaintiff and defendant, and proceed as follows:*) and that the said defendant will set off, and allow to the said plaintiff on the said trial, so much of the said sum of *one hundred pounds*, so due and owing from the said plaintiff to the said defendant, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.

Dated this *tenth* day of *May*, A. D. 1800.

Yours, etc.,

Oliver Ellsworth, Defendant's Attorney.

b. Certificate of Deposit.

Form No. 18524.²(Precedent in *Lord v. Favorite*, 29 Ill. 150.)³[[*Venue and title of court and cause as in Form No. 18525.*]To the above named plaintiffs:]⁴

Take notice, that the above named defendants, on the trial of this cause, will give in evidence, and insist that, at the time when the

151. It is sufficient if the notice of set-off fairly apprise the plaintiff of the true grounds and substance of the defense, and matters of mere form need not be stated. *Merrill v. Everett*, 38 Conn. 40.

Certainty of a Declaration.—Although it has been held that notice of set-off need not be as certain and formal as a declaration. *Lewis v. Culbertson*, 11 S. & R. (Pa.) 48. Yet it should contain the substance, at least, of the latter pleading. *Brady v. Hill*, 1 Mo. 315. And in some states it is provided by statute that the statement of demand must be in substance as certain as a declaration. *Me. Rev. Stat.* (1883), c. 82, § 55; *Boyd v. Bartlett*, 54 Me. 496; *Gragg v. Frye*, 32 Me. 283; *N. H. Pub. Stat. & Sess. L.* (1901), c. 223, § 11;

Concord v. Pillsbury, 33 N. H. 310; *R. I. Gen. Laws* (1896), c. 239, § 12.

Balance Due Defendant.—A notice of set-off need not expressly claim a balance in the defendant's favor in order to warrant his recovering one. *People v. Judges*, 4 Cow. (N. Y.) 21.

1. See, generally, *supra*, note 1, p. 56.

2. *Illinois.*—*Starr & C. Anno. Stat.* (1896), c. 110, par. 30.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 2, p. 66.

3. On account of a refusal to admit evidence to prove the facts set forth in this notice of set-off, a judgment for plaintiff was reversed.

4. The matter enclosed by and to be supplied within [] will not be found in the reported case.

note sued upon in this cause became due and payable, and for a long time before, and for a long time thereafter, it was the property of *Francis A. Hoffman, Otto Gelpcke, and Alexander Siller*, doing business in the city of *Chicago*, under the name and style of *Hoffman & Gelpcke*, and in their actual possession and control; and on the day of payment of said note, and while the same was still owned and possessed by the said *Hoffman & Gelpcke*, the said defendants then being, and for a long time before having been, the owners, and having the actual possession of a certain paper, commonly called a certificate of deposit, in words and figures substantially as follows, to wit:

"\$740.37. *Chicago, April 22, 1861. No. 27291.*

Buell, Hill & Granger have deposited with us *seven hundred and forty and thirty-seven one-hundredths* dollars, in currency, payable on return hereof to the order of *J. H. Lester.*

Hoffman & Gelpcke."

Indorsed as follows:

"Pay *Buell, Hill & Granger*, or order.

J. H. Lester.

Pay *Lord & Smith*, or order.

Buell, Hill & Granger."

Under and by virtue of which said certificate, and the said indorsements, the said defendants were entitled to have and demand of said *Hoffman & Gelpcke* the said sum of \$740.37, and that sum being then and there due to said defendants, from the said *Hoffman & Gelpcke*, the said defendants then and there applied to the said *Hoffman & Gelpcke*, and showed them the said certificate, so as aforesaid indorsed, and offered and demanded to surrender the same to them, and apply the same, or so much thereof as might be necessary to pay the said note, which the said *Hoffman & Gelpcke* refused to allow. And these defendants will further prove, that the said plaintiff took or procured the said note from the said *Hoffman & Gelpcke* long after the same became due and payable, and after the right of said defendants had accrued; and that the said *Hoffman & Gelpcke* now do, and have ever since that time, owed the said sum of \$740.37 to the said defendants, which sum is still due and unpaid, and that the said defendants will set off and allow, on the trial of this cause, so much of the said sum of \$740.37, against the said demand of the said plaintiff on said note, as will be sufficient to satisfy and discharge the same, according to the form of the statute in such case made and provided.

And the said plaintiff will take further notice, that on the trial of this cause, the said defendants will prove and insist, that whatever right the said plaintiff has in said note, if he has any right therein, was acquired after the same became due; and at the time when the same so became due, and while the same was the property of *Hoffman & Gelpcke*, through whom the said plaintiff procured the same, the said *Hoffman & Gelpcke* were, and ever since have been, and still are, indebted to the said defendant in the further sum of \$740.37, upon a certain certificate, commonly called a certificate of deposit, becoming due the 22d day of *April, 1861*, and payable in currency,

on the return of said certificate to the order of *J. H. Lester*, and duly indorsed to the said defendant before the day of the payment of said note; and that the said defendant will set off and allow, on the trial hereof, so much of the said sum as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.

[(*Date and signature of attorney as in Form No. 18526.*)]¹

c. Common Counts.²

Form No. 18525.³

State of *Illinois*, } ss. In the *Circuit Court of Cook County*.
Cook County.

John Doe }
against } Notice of Set-off.
Richard Roe. }

The plaintiff in the above entitled cause will take notice, that on the trial of this cause, under the general issue above pleaded, the defendant will give in evidence, and insist, that the plaintiff was before and at the time of the commencement of this suit, and still is, indebted to the defendant in the sum of *one hundred dollars and fifty cents*, for money before that time lent and advanced to said plaintiff by said defendant, at said plaintiff's request; and also, in the like sum, for money before that time paid, laid out and expended for said plaintiff by the said defendant, at the like special instance and request

1. The matter to be supplied within [] will not be found in the reported case.

2. Precedent. — In *Van Buren v. Digges*, 11 How. (U. S.) 461, is set out the following notice of set-off:

"*Wm. H. Digges v. W. H. Van Buren*. — Notice of Set-off.

Take notice that the above named defendant, on the trial of this cause, will give in evidence, and insist, that the above plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the said defendant in the sum of *seven hundred and seven dollars* for divers materials and other necessary things made, done, furnished, used, and applied in and about a certain building that the plaintiff had undertaken and contracted to build for the defendant; at the county of *Washington*, in the *District of Columbia*, and which said materials and things were so used, applied, done, and finished on account of, and in behalf of, at the special instance and request of, the plaintiff; and also in the sum of *seven hundred and seven dollars* for money by the defendant before that time paid, laid out, and expended for the plaintiff by the defendant, on account of and on

the behalf of the said plaintiff, under his contract as aforesaid, and by his special instance and request; and that the said defendant will set off and allow to the said plaintiff on the said trial so much of the said several sums of *seven hundred and seven dollars*, so due and owing from the said plaintiff to the said defendant, against any demand of the said plaintiff, to be proved on the said trial, as will be sufficient to satisfy and discharge such demand, according to the form of the statute in such case made and provided.

Dated this — day of *April*, 1847.

H. May, Defendant's Attorney.

To *Wm. H. Digges*, Present.

Memo. — A particular account of the above set-off is hereto annexed.

H. May, Defendant's Attorney."

The supreme court of the United States held that the notice of set-off in this case was proper and that the circuit court erred in refusing to admit evidence to prove the allegations.

3. *Illinois*. — *Starr & C. Anno. Stat.* (1896), c. 110, par. 30.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 2, p. 66.

of said plaintiff; and, in the like sum, for money before that time had and received by said plaintiff to and for the use of said defendant; and also, in the like sum, for goods, wares and merchandise before that time sold and delivered by said defendant to said plaintiff, at the like special instance and request; and also, in the like sum, for the labor, care and diligence of said defendant before that time done and performed by said defendant for said plaintiff, and at the like special instance and request of said plaintiff; and also, in the like sum, for other money before that time and then due and owing the said defendant for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from the said plaintiff to the said defendant; and also, in the like sum, then and there found to be due and owing from said plaintiff to said defendant on an account stated between them; and the said defendant will on such trial offset and allow the said several sums of money so due and owing from said plaintiff to said defendant against any sum the said plaintiff may claim and prove in this action to be due him, and will ask the court for a judgment against the said plaintiff for the balance, if any there be, due said defendant, together with costs, etc.

Oliver Ellsworth, Defendant's Attorney.

d. Damages for Negligence in Construction of Bridge.

Form No. 18526.¹

(Precedent in *Kaskaskia Bridge Co. v. Shannon*, 6 Ill. 19.)²

[[*Venue and title of court and cause as in Form No. 18525.*]]³

Take notice, that on the trial of this cause the said defendants, the *Kaskaskia Bridge Company*, will give in evidence and insist that, before and at the time of the commencement of this suit, the bridge theretofore erected by the said plaintiffs for the defendants across the *Kaskaskia* river, opposite to the town of *Kaskaskia*, and for the building and erecting of which by the said plaintiffs for the said defendants, the said several drafts or orders sued on in this case, and in the said plaintiffs' declaration mentioned, were made and executed, was so unskilfully and in so unworkmanlike a manner and defectively done, performed and erected, that the same became and was wholly useless and valueless to the said defendants, and that through the negligence, unskilfulness, carelessness, and improper conduct of the plaintiffs, in the building and erecting by them of the said bridge, which they, the said plaintiffs, had theretofore undertaken and contracted to build and erect in a good, substantial, skilful and workmanlike manner for the said defendants, the said bridge became and was lost, and of no use or value to the said

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 110, par. 30.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 2, p. 66.

2. It was held that the matter contained in this notice of set-off, being a

claim for unliquidated damages, arising *ex contractu*, constituted a good claim of set-off under the statute.

3. The matter to be supplied within [] will not be found in the reported case.

defendants; whereby and by reason of the negligence, unskilfulness, carelessness and improper conduct of the said plaintiffs in and about the building and erecting of the said bridge, the said defendants have sustained a large amount of damages, to wit, *ten thousand* dollars, which damages, or so much thereof as will be sufficient for that purpose, the said defendants will set off against any demand of the said plaintiffs to be proved on the trial of this cause, according to the statute in such case made and provided.

David J. Baker, Att'y for the said *Kaskaskia Bridge Company* and the defendants above named.

August 19, 1842.

To Messrs. *Shannon & Schofield*, the pl'ffs above named.

3. Replication to.¹

a. Nil Debet.

Form No. 18527.²

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 652.)

(Commencing as in Form No. 17803, and continuing down to *) because he says that he, the said *John Doe*, was not nor is indebted to the said *Richard Roe* in the said sum of *three hundred* pounds, or any part thereof, in manner and form as the said *Richard Roe* hath above in that part of his said plea in that behalf alleged, and this he, the said *John Doe*, prays may be inquired of by the country, etc.

b. Nul Tiel Record.

Form No. 18528.²

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 653.)

(Commencing as in Form No. 17803, and continuing down to *) because as to so much of the said plea of the said *Richard Roe* by him *secondly* above pleaded as relates to the said sum of *three hundred* pounds, therein alleged to be due and owing from the said *John Doe* to the said *Richard Roe* on the said supposed recognizance in that plea mentioned, the said *John Doe* saith that there is not any such record of the said supposed recognizance in the said plea mentioned, remaining of record in the said court of our said Lord the King, before the King himself, in manner and form as the said *Richard Roe* hath above in his said plea in that behalf alleged, and this he, the said *John Doe*, is ready to verify when, where, and in such manner as the court here shall direct and award, and because the court of our said Lord the King now here will advise themselves upon the inspection and exami-

1. Requisites of Replication, Generally. — For the formal parts of a replication in a particular jurisdiction see the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

What Matter Replied. — To a plea of set-off on simple contract, the plaintiff

may reply any matter which a defendant in an action might plead. *Stewart v. Travis*, (Supreme Ct. Spec. T.) 10 How. Pr. (N. Y.) 148 (citing 1 Chit. Pl. 502).

2. See, generally, *supra*, note 1, this page.

nation of the said record by the said *Richard Roe*, in his said plea alleged, a day is given to the parties aforesaid, before our said Lord the King, at *Westminster* aforesaid, until (*stating time*), to hear the judgment of the said court thereupon, for that the said court of our said Lord the King now here are not yet advised thereof, etc. And the said *John Doe* as to the residue of the said plea of the said *Richard Roe* saith* (*Here answer the residue of the plea*).

c. Statute of Limitations.¹

Form No. 18529.²

(2 Chit Pl. (3d Am. from 2d Lond. ed.) 653.)

(*Commencing as in Form No. 17803, and continuing down to **) because he saith that the said several supposed debts or causes of set-off in the said last plea mentioned did not nor did any or either of them arise or accrue to the said *Richard Roe* at any time within six years next before the exhibiting of the bill of him, the said *John Doe*, in this suit (or *the suing out of the original writ aforesaid*), in manner and form as the said *Richard Roe* hath above in his said last plea in that behalf alleged. And this (*concluding as in Form No. 17809*).

Form No. 18530.³

(Fla. Rev. Stat. (1892), § 1061, No. 4.)

(*Commencing as in Form No. 17819*) that the alleged set-off did not accrue within six years before this suit.

(*Signature and verification as in Form No. 17819.*)

4. Judgment on.⁴

1. **Requisites of Replication, Generally.** — See *supra*, note 1, p. 71.

Complete Bar at Commencement of Suit. — That the defendant's cause of action did not accrue within six years next before the commencement of the suit must be alleged. *Jeffries v. Castleman*, 75 Ala. 262; *Riley v. Stallworth*, 56 Ala. 481; *Heath v. Doyle*, 18 R. I. 252. And a replication stating that the defendant's cause of action did not accrue within six years next before the pleading thereof is defective. *Jeffries v. Castleman*, 75 Ala. 262; *Heath v. Doyle*, 18 R. I. 252.

2. See, generally, *supra*, note 1, this page.

3. *Florida*. — Rev. Stat. (1892), § 1061. See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 1, this page.

4. **Statutes relating to judgments on set off** are set out *supra*, note 1, p. 55.

Requisites of Judgment, Generally. — For the formal parts of a judgment in

a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

Judgment for Excess. — When a set-off established at the trial exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess. Ala. Civ. Code (1896), § 3729; Mass. Rev. Laws (1902), c. 174, § 11; Mich. Comp. Laws (1897), § 10077; Miss. Anno. Code (1892), § 687; Neb. Comp. Stat. (1899), § 6020; N. H. Pub. Stat. & Sess. L. (1901), c. 223, § 13; N. J. Gen. Stat. (1895), p. 3109, § 4; Bates' Anno. Stat. Ohio (1897), § 5329; R. I. Gen. Laws (1896), c. 239, § 12; S. Car. Code Civ. Proc. (1902), § 285; Tenn. Code (1896), § 4643; Vt. Stat. (1894), § 1165; Ballinger's Anno. Codes & Stat. (1897), § 5117; Wyo. Rev. Stat. (1887), § 2676.

Costs. — The defendant, if he prevail, is entitled to a judgment for his costs. Ala. Civ. Code (1896), § 3729; Mass. Rev. Laws (1902), c. 174, § 11; Miss.

Form No. 18531.¹

(Sand. & H. Dig. Ark. (1894), p. 1645, No. 100.)

Richard Roe, plaintiff, }
 against } Judgment.
John Doe, defendant. }

The parties appeared by their attorneys, and the defendant filed his answer, to which the plaintiff filed a reply, and thereupon the following jurors: *Harold J. Galpin*, and eleven others of the regular panel, who had previously been sworn according to law, were impaneled to try the issue (or *issues*), and, having heard the evidence, rendered the following verdict:

"We, the jury, find for the defendant *four hundred and seventy-five* dollars.

Harold J. Galpin, Foreman."

It is therefore ordered, considered and adjudged by the court that the defendant have and recover of the plaintiff *four hundred and seventy-five* dollars, and his costs herein expended.

II. COUNTERCLAIM.²

Anno. Code (1892), § 687; N. H. Pub. Stat. & Sess. L. (1901), c. 223, § 13; R. I. Gen. Laws (1896), c. 239, § 12.

1. *Arkansas*.—Sand. & H. Dig. (1894), § 5868.

See also list of statutes cited *supra*, note 1, p. 55; and, generally, *supra*, note 4, p. 72.

2. *Statutes* relating to counterclaims exist as follows:

Arizona.—Rev. Stat. (1901), §§ 1292, 1346, 1354, 1360 *et seq.*

Arkansas.—Sand. & H. Dig. (1894), § 5722 *et seq.*

California.—Code Civ. Proc. (1897), § 437 *et seq.*

Colorado.—Mills' Anno. Code (1896), § 56 *et seq.*

Connecticut.—Gen. Stat. (1888), § 876.

Idaho.—Code Civ. Proc. (1901), § 3211 *et seq.*

Indiana.—Horner's Stat. (1901), § 347 *et seq.*

Iowa.—Code (1897), § 3566 *et seq.*

Kansas.—Gen. Stat. (1897), c. 95 § 94 *et seq.*

Kentucky.—Bullitt's Civ. Code (1895), §§ 17, 96, 97, 111, 372, 387, 413, 720, 732.

Minnesota.—Stat. (1894), §§ 4993 *et seq.*, 5236 *et seq.*

Missouri.—Rev. Stat. (1899), § 604 *et seq.*

Montana.—Code Civ. Proc. (1895), § 690 *et seq.*

Nebraska.—Comp. Stat. (1899), § 5693 *et seq.*

Nevada.—Comp. Laws (1900), § 3141 *et seq.*

New Mexico.—Comp. Laws (1897), § 2685, subs. 40 *et seq.*

New York.—Code Civ. Proc., § 500 *et seq.*

North Carolina.—Clark's Code Civ. Proc. (1900), § 243.

North Dakota.—Rev. Codes (1895), § 5273 *et seq.*

Ohio.—Bates' Anno. Stat. (1897), § 5070 *et seq.*

Oklahoma.—Stat. (1893), § 3972 *et seq.*

Oregon.—Hill's Anno. Laws (1892), § 72 *et seq.*

South Carolina.—Code Civ. Proc. (1902), § 170 *et seq.*

South Dakota.—Stat. (1901), § 6120 *et seq.*

Texas.—Rev. Stat. (1895), art. 750 *et seq.*

Utah.—Rev. Stat. (1898), § 2968 *et seq.*

Washington.—Ballinger's Anno. Codes & Stat. (1897), § 4912.

Wisconsin.—Stat. (1898), § 2655 *et seq.*

Wyoming.—Rev. Stat. (1887), § 2457 *et seq.*

United States.—Rev. Stat. (1878), §§ 1059, 1061.

Character and Scope of Counterclaim—*Generally*.—A counterclaim is generally regarded as in the nature of a cross-action, and must state facts sufficient to constitute an independent cause of action in favor of the defendant and against the plaintiff or a person whom the plaintiff represents. *Rucker v. Steelman*, 73 Ind. 396; *Branham v.*

1. Answer of.¹

a. In General.

Johnson, 62 Ind. 259; Brower v. Nellis, 6 Ind. App. 323; Hutchings v. Moore, 4 Met. (Ky.) 110; Wilson v. Fairchild, 45 Minn. 203; Sylte v. Nelson, 26 Minn. 105; Reed v. Newton, 22 Minn. 541; Linn v. Rugg, 19 Minn. 181; Swift v. Fletcher, 6 Minn. 550; McPherson v. Meek, 30 Mo. 345; Babcock v. Maxwell, 21 Mont. 507; Peck v. Trumbull, 12 Neb. 133; Walker v. American Cent. Ins. Co., 143 N. Y. 167; Bates v. Rosekrans, 37 N. Y. 409; Vassear v. Livingston, 13 N. Y. 248; Merritt v. Millard, 5 Bosw. (N. Y.) 645; McKensie v. Farrell, 4 Bosw. (N. Y.) 192; Van Valen v. Lapham, 5 Duer (N. Y.) 689; Ward v. Comegys, (Supreme Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 428; Browne v. Empire Type Setting Mach. Co., 44 N. Y. App. Div. 598; Thomas v. Loaner's Bank, 38 N. Y. Super. Ct. 466; Hatzel v. Hoffman House, 2 N. Y. App. Div. 120; Blood v. Kane, 52 Hun (N. Y.) 225; Chamboret v. Cagney, 2 Sweeny (N. Y.) 378; Cragin v. Lovell, (Ct. App.) 2 Civ. Proc. (N. Y.) 128; Faucette v. Ludden, 117 N. Car. 170; Smith v. McGregor, 96 N. Car. 101; Hurst v. Everett, 91 N. Car. 399; Garrett v. Love, 89 N. Car. 205; Devries v. Warren, 82 N. Car. 356; Dove v. Hayden, 5 Oregon 500; Kauffman Milling Co. v. Stuckey, 37 S. Car. 7; Resch v. Senn, 31 Wis. 138; Matteson v. Ellsworth, 28 Wis. 254.

When the facts set up in the answer serve merely to defeat the plaintiff's cause of action, they amount to a defense and not to a counterclaim. Walker v. American Cent. Ins. Co., 143 N. Y. 167; Hatzel v. Hoffman House, 2 N. Y. App. Div. 120.

The criterion for determining whether a defense set up can be maintained as a counterclaim is to ascertain if the answer sets up a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if it does, then such a cause of action is a counterclaim. Garrett v. Love, 89 N. Car. 205.

Includes Set-off and Recoupment.—In several states, statutes defining a counterclaim are sufficiently broad to include, and do include, what were once known as set-off and a recoupment. Folsom v. Carli, 6 Minn. 420; Wilder v. Boynton, 63 Barb. (N. Y.) 547; Clinton v. Eddy, 1 Lans. (N. Y.) 61; Chamboret v. Cagney, 2 Sweeny

(N. Y.) 378; General Electric Co. v. Williams, 123 N. Car. 51; Hurst v. Everett, 91 N. Car. 399; McClenahan v. Cotten, 83 N. Car. 332; Burrage v. Bonanza Gold, etc., Min. Co., 12 Oregon 169; Dove v. Hayden, 5 Oregon 500. And includes also equitable demands. Roberts v. Donovan, 70 Cal. 108; Woodruff v. Garner, 27 Ind. 4; Brower v. Nellis, 6 Ind. App. 323.

1. Requisites of Answer, Generally.—For the formal parts of an answer in a particular jurisdiction see the title ANSWERS IN CODE PLEADING, vol. 1, p. 799.

A counterclaim is governed by the rules applicable to a complaint or petition. Brower v. Nellis, 6 Ind. App. 323; Babcock v. Maxwell, 21 Mont. 507; Hurst v. Everett, 91 N. Car. 399. And must contain a statement of such facts as would be requisite to the sufficiency of a complaint or petition. Quinn v. Smith, 49 Cal. 163; Branham v. Johnson, 62 Ind. 259; Allen v. Doughlass, 29 Kan. 412; Prichard v. Peace, 98 Ky. 99; Hutchings v. Moore, 4 Met. (Ky.) 110; Babcock v. Maxwell, 21 Mont. 507; Smith v. McGregor, 96 N. Car. 101; Garrett v. Love, 89 N. Car. 205; McKinney v. Sundback, 3 S. Dak. 106.

Ordinary and Concise Language.—The new matter constituting a counterclaim must be stated in ordinary and concise language without repetition. Sand. & H. Dig. Ark. (1894), § 5722; Horner's Stat. Ind. (1901), § 347; Kan. Gen. Stat. (1897), c. 95, § 94 *et seq.*; Minn. Stat. (1894), § 5236; Mo. Rev. Stat. (1899), § 604; Neb. Comp. Stat. (1899), § 5693; Neb. Comp. Laws (1900), § 3141 N. Mex. Comp. Laws (1897), § 2685, subs. 40; N. Y. Code Civ. Proc., § 500; Clark's Code Civ. Proc. N. Car. (1900), § 243; N. Dak. Rev. Codes (1895), § 5273; Bates' Anno. Stat. Ohio (1897), § 5070; Okla. Stat. (1893), § 3972; Hill's Anno. Laws Oregon (1892), § 72; S. Car. Code Civ. Proc. (1902), § 170; S. Dak. Stat. (1901), § 6120; Ballinger's Anno. Codes & Stat. (1897), § 4912; Wis. Stat. (1898), § 2655; Wyo. Rev. Stat. (1887), § 2457.

Facts must be Stated.—The facts constituting the defendant's right to a counterclaim must be stated, and a mere statement of conclusions of law is insufficient. Mealey v. Nickerson,

44 Minn. 430; *Peck v. Trumbull*, 12 Neb. 133; *Binghamton Trust Co. v. Clark*, 32 N. Y. App. Div. 151; *Van Valen v. Lapham*, 5 Duer (N. Y.) 689; *Talbot v. Padgett*, 30 S. Car. 167.

Designated as Counterclaim. — In several states, it is held that a counterclaim need not be designated as such; and if the facts set forth in the answer are of such a kind as to entitle the defendant to an affirmative relief by way of counterclaim such relief will be granted. *Jones v. Hathaway*, 77 Ind. 14; *Egolf v. Bryant*, 63 Ind. 365; *Harness v. Harness*, 63 Ind. 1; *Hinkle v. Margerum*, 50 Ind. 240; *Campbell v. Routt*, 42 Ind. 410; *Huber Mfg. Co. v. Busey*, 16 Ind. App. 410; *Union Nat. Bank v. Carr*, 49 Iowa 359; *Quebec Bank v. Weyand*, 30 Ohio St. 126; *Puffer v. Lucas*, 101 N. Car. 281.

In *Kentucky*, however, it is provided by statute that the caption of the answer must contain the words "answer and counterclaim." *Bullitt's Civ. Code Ky.* (1895), § 97; *Russell v. Phillips*, (Ky. 1893) 22 S. W. Rep. 220; *Arthurs v. Thompson*, 97 Ky. 218; *Nutter v. Johnson*, 80 Ky. 426; *Cason v. Cason*, 79 Ky. 558.

In *Minnesota*, a counterclaim must be pleaded as such, and this may be done by stating in the pleading that it is pleaded as a counterclaim or by a demand for affirmative relief. *Farrell v. Burbank*, 57 Minn. 395; *Townsend v. Minneapolis Cold-Storage, etc., Co.*, 46 Minn. 121; *Griffin v. Jorgenson*, 22 Minn. 92.

In *New York*, the counterclaim must be described as such when the question turns upon the want of a reply. *Acer v. Hotchkiss*, 97 N. Y. 395; *Equitable L. Assur. Soc. v. Cuyler*, 75 N. Y. 511; *Favilla v. Moretti*, (Supreme Ct. Spec. T.), 18 Civ. Proc. (N. Y.) 388; *Morris v. Chamberlin*, (Supreme Ct. Gen. T.) 14 N. Y. Supp. 702; *Wood v. Gordon*, (N. Y. City Ct. Gen. T.) 13 N. Y. Supp. 595; *Ward v. Comegys*, (Supreme Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 428. And this is the rule in *Montana*. *Babcock v. Maxwell*, 21 Mont. 507.

No particular form of words is, however, necessary to make a pleading a counterclaim, if it clearly appears from the answer that it is intended to set up a personal claim against the plaintiff; although it is said that in the former case the ordinary and most satisfactory form of giving that intention is by stating that the pleading is a counterclaim or by a prayer for relief. *Bates*

v. Rosekrans, 37 N. Y. 409; *Cable Flax Mills v. Early*, 72 N. Y. App. Div. 213.

In *Cable Flax Mills v. Early*, 72 N. Y. App. Div. 213, the answer, after denying certain allegations of the complaint "for a separate and distinct defense and by way of offset to plaintiff's claim," set forth facts showing a demand by the defendant against the plaintiff. The court said, "I am of the opinion * * * that the defendant's demand against the plaintiff is set up as a counterclaim in the answer. True it is not named therein as a counterclaim, but it is distinctly stated that it is a defense "by way of offset to plaintiff's claim," which can mean nothing other than that it is put forth as a counterclaim. The word "offset," as there used, is equivalent to counterclaim. It can mean nothing else, and the facts set forth in such answer clearly show a counterclaim within the [statutory] definition."

In *Metropolitan Trust Co. v. Tona-wanda, etc., R. Co.*, (Supreme Ct. Gen. T.) 18 Abb. N. Cas. (N. Y.) 368, it was held that there was no force in the objection that the answer did not in express terms define as a counterclaim the matter set up as such, inasmuch as it distinctly appeared by the relief demanded that it was intended as a counterclaim.

In *Wisconsin*, first by rule of court and now by statute, a counterclaim is not well pleaded unless it be pleaded as such, and be so denominated. *Wis. Stat.* (1898), § 2656; *Bacher v. Gray*, 112 Wis. 487; *Rood v. Taft*, 94 Wis. 380; *Voechting v. Grau*, 55 Wis. 312; *Stowell v. Eldred*, 39 Wis. 614.

In *California*, the Wisconsin practice has been followed. *Carpenter v. Hewel*, 67 Cal. 589; *Brannan v. Paty*, 58 Cal. 330.

Connection with Plaintiff's Demand. — Where the defendant seeks to set up a cause of action against the plaintiff as a counterclaim on the ground that such cause arises out of or is connected with the contract or transaction set forth in the complaint of the plaintiff, such ground must be shown. *Moyle v. Porter*, 51 Cal. 639; *Miller v. Roberts*, 106 Ind. 63; *Thompson v. Toohey*, 71 Ind. 296; *McMahan v. Spinning*, 51 Ind. 187; *Brower v. Nellis*, 6 Ind. App. 323; *Kansas Loan, etc., Co. v. Hutto*, 48 Kan. 166; *Jones v. Swank*, 54 Minn. 259; *Ritchie v. Hayward*, 71 Mo. 560; *Collier v. Ervin*, 3 Mont. 142; *Barr v.*

Post, 56 Neb. 608; *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552; *Boreel v. Lawton*, 90 N. Y. 293; *Rochester Distilling Co. v. O'Brien*, 72 Hun (N. Y.) 462; *Thorp v. Philbin*, 15 Daly (N. Y.) 155; *Brown v. Buckingham*, (Supreme Ct. Spec. T.) 21 How. Pr. (N. Y.) 190; *Rothschild v. Whitman*, 57 Hun (N. Y.) 135; *Hinkley v. Troy*, etc., *Horse R. Co.*, 42 Hun (N. Y.) 281; *De Forest v. Andrews*, (Supreme Ct. Spec. T.) 27 Misc. (N. Y.) 145; *Eckert v. Gallien*, (Supreme Ct. Spec. T.) 24 Misc. (N. Y.) 485; *Davison v. West Oxford Land Co.*, 121 N. Car. 146; *Russell v. Koonce*, 104 N. Car. 237; *Hartman v. Spiers*, 87 N. Car. 28; *Wait v. Wheeler*, etc., *Mfg. Co.*, 23 Oregon 297; *Sears v. Martin*, 22 Oregon 311; *Carothers v. Thorp*, 21 Tex. 358; *Sprout v. Crowley*, 30 Wis. 187.

Facts must be stated in the answer to show that the ground of counterclaim arose out of or was connected with the contract or transaction set forth in the complaint: a mere allegation to that effect is not sufficient. *Brown v. Buckingham*, (Supreme Ct. Spec. T.) 11 Abb. Pr. (N. Y.) 387.

In *Gilpin v. Wilson*, 53 Ind. 443, the court said: "The court erred in sustaining the demurrer to this counterclaim. It did not, it is true, by direct averment, * * * show that it alleged matter arising out of or connected with the cause of action, which might be the support of the action in favor of the defendant; but this sufficiently appears from the statement of facts it contains."

Mutuality — Generally. — That there is mutuality between the demand sued for by the plaintiff and the demand sought to be set off against it by the defendant must be shown, or facts must be alleged setting up an equitable reason for dispensing with such showing. *Roberts v. Donovan*, 70 Cal. 108; *Ingols v. Plimpton*, 10 Colo. 535; *McGuire v. Lamb*, 2 Idaho 346; *Spofford v. Rowan*, 124 N. Y. 108; *McCullock v. Vibbard*, 51 Hun (N. Y.) 227; *Mynderse v. Snook*, 1 Lans. (N. Y.) 488; *Perry v. Chester*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 131; *Lush v. Adams*, (N. Y. City Ct. Gen. T.) 10 Civ. Proc. (N. Y.) 60; *Rosenzweig v. McCaffrey*, (Supreme Ct. App. T.) 28 Misc. (N. Y.) 485; *Wood v. Davis*, (N. Y. Super. Ct. Spec. T.) 15 N. Y. Supp. 554.

Plaintiff an Assignee. — Where the plaintiff brings his action as assignee,

the defendant, in order to set up against the plaintiff a demand existing against the plaintiff's assignor, must allege that such demand belonged to him before he had notice of the assignment. *Venable v. Harlin*, (C. Pl. Spec. T.) 1 Civ. Proc. (N. Y.) 215.

Existence of Demand at Commencement of Action. — That the defendant's demand, which he seeks to set up as a counterclaim, existed at the commencement of the original action must be alleged. *Gannon v. Dougherty*, 41 Cal. 661; *McGuire v. Lamb*, 2 Idaho 346; *Rumsey v. Robinson*, 58 Iowa 225; *Kansas Loan, etc., Co. v. Hutto*, 48 Kan. 166; *Jones v. Swank*, 54 Minn. 259; *Rice v. O'Connor*, (Supreme Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 362; *Blood v. Kane*, 52 Hun (N. Y.) 225; *Pecke v. Hydraulic Constr. Co.*, 23 N. Y. App. Div. 393; *John Church Co. v. Clarke*, 77 Hun (N. Y.) 467; *Mayo v. Davidge*, 44 Hun (N. Y.) 342; *Clift v. Northup*, 6 Lans. (N. Y.) 330; *Moody v. Steele*, (N. Y. City Ct. Gen. T.) 11 Civ. Proc. (N. Y.) 205; *Roldan v. Power*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 480; *Hartman v. Spiers*, 87 N. Car. 28; *Brumblé v. Brown*, 71 N. Car. 513. And an allegation that the demand is now due is not equivalent to an allegation that the demand existed at the commencement of the original action. *McGuire v. Lamb*, 2 Idaho 346; *Rice v. O'Connor*, (Supreme Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 362.

In *Pecke v. Hydraulic Constr. Co.*, 23 N. Y. App. Div. 393, it was held that where a counterclaim alleged a breach of contract between March 20, 1896, and August 5, 1896, and the complaint alleged a cause of action which became due in February, 1897, both pleadings would be construed together for the purpose of showing that the defendant's cause of action existed at the commencement of the original action.

Nature of Counterclaim. — The nature of the counterclaim must be distinctly stated. *Ariz. Rev. Stat.* (1901), § 1361; *Tex. Rev. Stat.* (1895), art. 751.

Items of Demand. — The particular items of the counterclaim must be stated. *Ariz. Rev. Stat.* (1901), § 1361; *Minn. Stat.* (1894), § 4996; *Tex. Rev. Stat.* (1895), art. 751.

Waiver of Tort. — When the defendant has a demand against the plaintiff, upon which an action might be brought either in tort or in contract, the defendant may elect to waive the tort and counterclaim

the demand in contract. *Downs v. Finnegan*, 58 Minn. 112; *Berrian v. New York*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 207; *New York v. Parker Vein Steamship Co.*, (N. Y. Super. Ct. Gen. T.) 21 How. Pr. (N. Y.) 289; *Braithwaite v. Akin*, 3 N. Dak. 365. But in such a case the counterclaim must clearly show that the defendant elects to waive the tort and to stand upon the contract. *Berrian v. New York*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 207; *New York v. Parker Vein Steamship Co.*, (N. Y. Super. Ct. Gen. T.) 21 How. Pr. (N. Y.) 289; *Braithwaite v. Akin*, 3 N. Dak. 365.

Answering Whole Complaint. — It has been held that an answer setting up a counterclaim will not be bad because it purports to answer the whole complaint and answers only a part thereof. *Stotsenburg v. Fordice*, 142 Ind. 490. But see *contra* *Kneeder v. Sternbergh*, (Supreme Ct. Spec. T.) 10 How. Pr. (N. Y.) 67; *Wythe v. Myers*, 3 Sawy. (U. S.) 595.

Reference to Other Pleadings. — A counterclaim may contain all the requisite allegations within itself to make it a perfect counterclaim, or it may refer to papers annexed, or to other parts of the answer, or to the complaint; and the matters thus referred to are just as much a part of the counterclaim as if written at length therein. *Campbell v. Routt*, 42 Ind. 410; *Eldridge v. Hargreaves*, 30 Neb. 638; *Cragin v. Lovell*, 88 N. Y. 258; *Xenia Branch Bank v. Lee*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. (N. Y.) 372; *Roldan v. Power*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 480; *Boyd v. McDonald*, (Supreme Ct. Gen. T.) 12 N. Y. Supp. 356; *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391; *Rood v. Taft*, 94 Wis. 380. But where no reference is made in the counterclaim to other pleadings or papers annexed thereto they cannot be used to aid the counterclaim. *Conaway v. Carpenter*, 58 Ind. 477; *Campbell v. Routt*, 42 Ind. 410; *Brower v. Nellis*, 6 Ind. App. 323; *Babcock v. Maxwell*, 21 Mont. 507; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Roldan v. Power*, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 480; *Boyd v. McDonald*, (Supreme Ct. Gen. T.) 12 N. Y. Supp. 356; *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391; *Rood v. Taft*, 94 Wis. 380. See, however, *Graham v. Dunnigan*, 6 Duer (N. Y.) 629, where the court said: "The demurrer to the defend-

ant's counterclaim rests upon its alleged insufficiency, and in considering it we must take the facts alleged in the complaint or, at all events, those which are not inconsistent with the averments in the counterclaim as admitted."

Joinder of Defenses — Generally. — The defendant may set forth in his answer as many grounds of counterclaim as he may have. *Sand. & H. Dig. Ark.* (1894), § 5722; *Cal. Code Civ. Proc.* (1897), § 441; *Idaho Code Civ. Proc.* (1901), § 3211 *et seq.*; *Horner's Stat. Ind.* (1901), § 347; *Iowa Code* (1897), § 3566; *Kan. Gen. Stat.* (1897), c. 95, § 94 *et seq.*; *Minn. Stat.* (1894), § 5239; *Mo. Rev. Stat.* (1899), § 605; *McAdow v. Ross*, 53 Mo. 199; *Mont. Code Civ. Proc.* (1895), § 699; *Neb. Comp. Stat.* (1899), § 5694; *Nev. Comp. Laws* (1900), § 3144; *N. Mex. Comp. Laws* (1897), § 2685, subs. 41; *N. Y. Code Civ. Proc.* (1895), § 507; *Bruce v. Burr*, 67 N. Y. 237; *Miller v. Losee*, (Supreme Ct. Spec. T.) 9 How. Pr. (N. Y.) 356; *Skinner v. White*, 69 Hun (N. Y.) 82; *Pendergast v. Greenfield*, 40 Hun (N. Y.) 494; *Walker v. Shoemaker*, 4 Hun (N. Y.) 579; *Clark's Code Civ. Proc. N. Car.* (1900), § 245; *Garrett v. Love*, 89 N. Car. 205; *N. Dak. Rev. Codes* (1895), § 5274; *Bates' Anno. Stat. Ohio* (1897), § 5071; *Witte v. Lockwood*, 39 Ohio St. 141; *Okla. Stat.* (1893), § 3972; *Hill's Anno. Laws Oregon* (1892), § 73; *S. Car. Code Civ. Proc.* (1902), § 171; *S. Dak. Stat.* (1901), § 6121; *Utah Rev. Stat.* (1898), § 2972; *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4913; *Wis. Stat.* (1898), § 2657; *Wyo. Rev. Stat.* (1887), § 2458. But only such causes of action can be stated in the same answer as might have been joined in a complaint. *Woodruff v. Garner*, 27 Ind. 4.

Separate Paragraphs. — Every ground of counterclaim must be stated in a separate paragraph. *Sand. & H. Dig. Ark.* (1894), § 5722; *Idaho Code Civ. Proc.* (1901), § 3211 *et seq.*; *Horner's Stat. Ind.* (1901), § 347; *Iowa Code* (1897), § 3570; *Kan. Gen. Stat.* (1897), c. 95, § 94 *et seq.*; *Minn. Stat.* (1894), § 5239; *Mo. Rev. Stat.* (1899), § 605; *Mont. Code Civ. Proc.* (1895), § 699; *Neb. Comp. Stat.* (1899), § 5694; *Nev. Comp. Laws* (1900), § 3144; *N. Mex. Comp. Laws* (1897), § 2685, subs. 41; *N. Y. Code Civ. Proc.*, § 507; *Xenia Branch Bank v. Lee*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. (N. Y.) 372; *Spencer v. Babcock*, 22 Barb. (N. Y.) 326; *Clark's Code Civ. Proc. N. Car.* (1900), § 245;

N. Dak. Rev. Codes (1895), § 5274; Bates' Anno. Stat. Ohio (1897), § 5071; Okla. Stat. (1893), § 3972; Hill's Anno. Laws Oregon (1892), § 73; S. Car. Code Civ. Proc. (1902), § 171; S. Dak. Stat. (1901), § 6121; Utah Rev. Stat. (1898), § 2972; Ballinger's Anno. Codes & Stat. (1897), § 4913; Wyo. Rev. Stat. (1887), § 2458.

Numbered Paragraphs. — Every paragraph of the counterclaim must be numbered. Sand. & H. Dig. Ark. (1894), § 5722; Horner's Stat. Ind. (1901), § 347; Kan. Gen. Stat. (1897), c. 95, § 94 *et seq.*; Mo. Rev. Stat. (1899), § 605; Neb. Comp. Stat. (1896), § 5694; N. Y. Code Civ. Proc., § 507; Clark's Code Civ. Proc. N. Car. (1900), § 245; Bates' Anno. Stat. Ohio (1897), § 5071; Okla. Stat. (1893), § 3972; Wyo. Rev. Stat. (1887), § 2458.

Defense and Counterclaim. — A single paragraph in an answer cannot perform the double function of a defense to a complaint and of a counterclaim. They must be stated in separate paragraphs. Rucker v. Steelman, 73 Ind. 396; Blakely v. Boruff, 71 Ind. 93; Thompson v. Toohey, 71 Ind. 296; Toledo Agricultural Works v. Work, 70 Ind. 253; Douthitt v. Smith, 69 Ind. 463; Hadley v. Prather, 64 Ind. 137; Wilson v. Carpenter, 62 Ind. 495; Schee v. McQuilken, 59 Ind. 269; Indiana State Board of Agriculture v. Gray, 54 Ind. 91; McMannus v. Smith, 53 Ind. 211; Campbell v. Routt, 42 Ind. 410; Huber Mfg. Co. v. Bussey, 16 Ind. App. 410.

The same facts may constitute a defense to a claim made by the plaintiff and at the same time entitle the defendant to an affirmative judgment against the plaintiff in excess of the claim made by the plaintiff; and, when such is the case, the defendant may plead such facts, both as a defense and as a counterclaim. Delafield v. De Grauw, 9 Bosw. (N. Y.) 1; Nollman v. Evenson, 5 N. Dak. 344. But the defense and the counterclaim must be set up in separate paragraphs in the answer, one as a defense and the other as a counterclaim. Equitable L. Assur. Soc. v. Cuyler, 12 Hun (N. Y.) 247.

Damages — *Generally.* — That the defendant sustained substantial damages must be alleged, and a counterclaim which shows that the defendant is entitled to nominal damages only is insufficient. Levy v. Sayle, 52 Ark. 246; Hitchcock v. Turnbull, 44 Minn. 475; Pecke v. Hydraulic Constr. Co., 23 N. Y. App. Div. 393.

Special. — The grounds upon which special damages are claimed must be specifically pleaded. Roldan v. Power, (N. Y. Super. Ct. Spec. T.) 14 Misc. (N. Y.) 480.

Concluded by Amount Claimed. — A defendant is as much concluded by the amount of damages which he claims in his counterclaim as a plaintiff would be by the damages claimed in his complaint. Blake v. Krom, 128 N. Y. 64; Annis v. Upton, 66 Barb. (N. Y.) 370.

Exhibits — *Account.* — When the counterclaim is founded on an account, the original account or a copy thereof must be filed with the pleading. Campbell v. Routt, 42 Ind. 410; Fugit v. Ewing, 9 Ind. 345; Bates' Anno. Stat. Ohio (1897), § 5085. And if this is not done the reason for the omission must be stated. Bates' Anno. Stat. Ohio (1897), § 5085.

Written Instrument. — When a counterclaim is founded on a written instrument, the original instrument or a copy thereof must be filed with the pleading. Patton v. Camplin, 63 Ind. 512; Campbell v. Routt, 42 Ind. 410; Fugit v. Ewing, 9 Ind. 345; Nosler v. Hunt, 18 Iowa 212; Bates' Anno. Stat. Ohio (1897), § 5085. Or the reason for the omission must be stated. Bates' Anno. Stat. Ohio (1897), § 5085.

Prayer — *Generally.* — It has been held in several cases that the defendant must have such relief, though not specifically demanded in the counterclaim, as the facts proved within its allegations show him to be entitled to. Germania Bank v. Osborne, 81 Minn. 272; Wilson v. Fairchild, 45 Minn. 203; Dempsey v. Rhodes, 93 N. Car. 120. See, however, Hurst v. Everett, 91 N. Car. 399, which holds, contrary to Dempsey v. Rhodes, 93 N. Car. 120, that the counterclaim must contain a prayer for proper relief. And Cox v. Frazer, (Ky. 1899) 52 S. W. Rep. 796, where the court says that "on a counterclaim where no issue is made the defendant is not entitled to any relief which he does not specifically demand."

In *Connecticut*, by statute, the defendant must demand judgment according to his counterclaim. Gen. Stat. (1888), § 876₄.

In *New York*, by statute, if the defendant deems himself entitled to affirmative judgment against the plaintiff by reason of the counterclaim interposed by him, he must demand the judgment in his answer. N. Y. Code Civ. Proc., § 509; Lawrence v.

Form No. 18534.¹

(Conn. Prac. Act, p. 233, No. 445.)

(Title of court and cause as in Form No. 17873.)

Answer and Counterclaim.

1. *(Here state defense relied upon.)*

By way of counterclaim:

1. The goods mentioned in the complaint were, with the privity of the plaintiff, sold and delivered to the defendant by one *John Doe*, in his own name, as the sole owner, and as and for his own goods.

2. Said *Doe* was in fact the agent and factor of the plaintiff in respect to said goods.

3. The plaintiff did not appear, and was not known by the defendant, at or before the time of the sale and delivery, to be the owner of the goods, or in anywise interested therein.

4. The defendant bought and accepted the goods of and from said *Doe*, as the true and sole owner and seller; and credit for the goods was given to the defendant by him.

5. Said *Doe*, before and at the time of the sale and delivery of the goods, was, and still is, indebted to the defendant by his demand note, dated *June 1st, 1879*, for \$500.

The defendant claims, by way of equitable counterclaim, a set-off of said \$500 note, against the plaintiff's demand.

*(Signature of attorney as in Form No. 17873.)***d. To Recover Damages Occasioned by False Warranty in Sale of Sheep Which Were Diseased.**Form No. 18535.²

(Conn. Prac. Act, p. 231, No. 441.)

(Title of court and cause as in Form No. 17873.)

Answer and Counterclaim.

1. Said note was given for sheep purchased by the defendant of the plaintiffs.

2. The plaintiffs, in making said sale, warranted that the sheep, so sold, were sound and free from disease.

3. The defendant was ignorant of the disease called foot-rot; and he purchased said sheep, relying upon said representations of the plaintiffs.

4. In fact the sheep were not sound, but were diseased with the foot-rot, as the plaintiffs well knew.

5. By reason of said disease, said sheep were wholly worthless.

By way of counterclaim:

1. All the foregoing statements in this answer are made part of this counterclaim.

2. Said disease is contagious.

1. *Connecticut*. — Gen. Stat. (1888), § 876.

See also list of statutes cited *supra*, note 2, p. 73; and, generally, *supra*, note 1, p. 74.

2. *Connecticut*. — Gen. Stat. (1888), § 876.

See also list of statutes cited *supra*, note 2, p. 73; and, generally, *supra*, note 1, p. 74.

3. The defendant was then the owner of *five hundred* other sheep, with which he allowed those purchased to run.

4. Before he had any knowledge that the sheep so purchased were diseased, and while they were running with his other sheep, the latter became diseased with said foot-rot, from their so running together.

5. He has been thereby compelled to expend \$500 in their cure and endeavoring to cure them, and damaged, by reason of allowing said sheep to run with his other sheep, to the amount of \$2,000.

The defendant claims \$2,500 damages.

(Signature of attorney as in Form No. 17873.)

e. To Recover Damages Occasioned by the Wasting of Mortgaged Premises of Which the Defendant was First Mortgagee and the Plaintiff was Second Mortgagee.

Form No. 18536.¹

Supreme Court, Westchester County.

Jacob Carpenter, plaintiff,
against

The Manhattan Life Insurance Company
of the City of New York, defendant.

The defendant above named answering the amended complaint of the plaintiff herein through *Martin J. Keogh*, its attorney.

I, II, III, IV. (*The first and second paragraphs admitted, and the third and fourth denied, the allegations in the complaint.*)

V. And the defendant further answering the amended complaint of the plaintiff herein, for a separate and distinct answer, defense and counterclaim to the cause of action set forth in said amended complaint, alleges:

First. That on the *28th* day of *September*, 1871, one *George W. Markham*, then the owner in fee of the premises mentioned in the complaint, executed and delivered to the defendant a bond, and with *Emily*, his wife, a mortgage on the said premises to secure the payment to the defendant of the sum of \$45,000, with interest, which mortgage was recorded in *Westchester* County Register's Office, in liber 551 of mortgages, page 361; that thereafter, in default of payment of the said sum of \$45,000, with interest as aforesaid, the defendant foreclosed the said mortgage, and that the said premises were sold under judgment and decree in foreclosure in favor of the defendant in this action on the *16th* day of *January*, 1879, by a

1. *New York*, — Code Civ. Proc., § 501.

See also list of statutes cited *supra*, note 2, p. 73; and, generally, *supra*, note 1, p. 74.

This is the form of answer in *Carpenter v. Manhattan L. Ins. Co.*, 93 N. Y. 552, and is copied from the records. It was admitted by the plaintiff that the facts alleged in the counterclaim showed a cause of action against the

plaintiff, but he claimed that such cause of action did not arise out of the transaction set forth in the complaint, which was conversion of the wood, nor was it connected with the subject of the action so set forth. The court held that the counterclaim did not arise out of the transaction set forth in the complaint, but that it was connected with the subject of the action, and was therefore properly set up.

referee duly appointed by the court for that purpose, and that at such sale the defendant became the purchaser of said premises, and obtained on said day from said referee a deed of conveyance of the same, and was on the 23d day of *January*, 1879, in lawful possession of the same as the owner thereof; that over and above the price paid for the said premises at such sale by the defendant there was a deficiency, accrued interest and costs of foreclosure of said interest, amounting to the sum of \$17,128.65, for which sum judgment was entered and docketed against the said *George W. Markham*, one of the defendants in the action of foreclosure, which remains unpaid.

Second. And this defendant further answering alleges, on information and belief, that the said *George W. Markham* is now, and was at the time of said foreclosure and sale and had been for *three* years prior thereto, wholly insolvent, and that the plaintiff in this action knew him to be so, and that the said premises were an insufficient security for this defendant's claim aforesaid against the said *George W. Markham*, which the plaintiff also knew; that knowing that the said premises were insufficient security for the defendant's claim as aforesaid, the plaintiff being a second mortgagee of the said premises, and in possession of the same, between the 7th day of *November*, 1877, and the 23d day of *January*, 1879, wrongfully, fraudulently, and with intent to cheat and defraud this defendant, and with intent to reduce the defendant's security for its claim against the said *Markham* aforesaid, and to deprive it of such security, cut or caused to be cut from the said premises the wood mentioned in the said complaint, thereby wasting the said premises and lessening and reducing the security of this defendant for its claim aforesaid, to the defendant's damage in the sum of *five hundred* dollars.

Wherefore the defendant demands judgment against the plaintiff for the sum of *five hundred* dollars, together with the costs of this action.

Dated *May 15th*, 1879.

Martin J. Keogh, Defendant's Attorney,
Office and P. O. address, *New Rochelle, N. Y.*

(*Verification.*)

f. To Recover Money Paid for Goods Which were Unsatisfactory.

Form No. 18537.¹

(Conn. Prac. Act, p. 220, No. 416.)

(*Commencement as in Form No. 18535.*)

1. The plaintiffs have brought this action to recover a balance claimed to be due for mirrors and other articles furnished to, and for work done for, the defendant by the plaintiffs, between *May 1st*, 1878, and *June 1st*, 1879; and the total amount of the account for said mirrors and other articles, and said work, as made out and presented by the plaintiffs, was \$650.

2. The defendant paid to the plaintiffs from time to time various

1. *Connecticut*. — Gen. Stat. (1888),
§ 876.

See also list of statutes cited *supra*,
note 2, p. 73; and, generally, *supra*,
note 1, p. 74.

sums of money, on account of said mirrors and other articles, and work, amounting in all to \$500, and redelivered to them certain of said articles.

By way of counterclaim:

1. All the foregoing statements of this answer are made part of this counterclaim.

2. It was agreed between the defendant and the plaintiffs, that all mirrors furnished should be perfect and true, and in every way satisfactory to the defendant; and that if any of them, upon trial, should prove to be untrue or imperfect, the same should be called for and taken back by the plaintiffs, and others substituted in their stead.

3. Among the articles furnished by the plaintiffs to the defendant under said agreement, and included in said account, were *one* pier-glass, *three* mantel mirrors, and *four* gilt cornices, which were charged in gross, in said account, at the price of \$500.

4. Said *three* mantel mirrors proved, upon examination and trial, to be untrue and imperfect; and were entirely unsatisfactory to the defendant.

5. He notified the plaintiffs on *June 15th*, 1879, of the deficient and unsatisfactory quality and character of said mirrors, and requested them to take them away, and replace them with true and perfect mirrors; but they have never done so, though the defendant has at all times been, and still is, ready to redeliver said mirrors to them.

6. These mirrors, if true, perfect and satisfactory, would have been worth about \$400, at the price such mirrors were to have been furnished under said agreement.

7. They were worth at least \$250 less, on account of their deficient character.

The defendant claims to recoup said sum of \$250 for such deficiency, to the extent of the balance claimed by plaintiffs, and asks judgment against the plaintiffs for the excess.

(*Signature of attorney as in Form No. 17873.*)

g. To Recover Money Retained by Plaintiff, Who was Custodian of a Fund, and Also Excess of Commissions Paid Plaintiff for His Services in Procuring a Loan.

Form No. 18538.¹

County Court of Westchester County.

Richard E. Slade, plaintiff,
against

James H. Moran, impleaded with
another, defendant.

} Answer of James H. Moran

1. *New York*. — Code Civ. Proc., § 501.

See also list of statutes cited *supra*, note 2, p. 73; and, generally, *supra*, note 1, p. 74.

This is the form of answer, containing three counterclaims, in the case of

Slade v. Montgomery, 53 N. Y. App. Div. 343, and is copied from the records. The first and third counterclaims were held properly pleaded and the second counterclaim was held improperly pleaded.

The defendant, *James H. Moran*, separately answering the complaint herein by *Henry C. Henderson*, his attorney, respectfully shows to this court:

First. (*Here was set out a paragraph admitting certain allegations of the complaint.*)

Second. (*Here was set out a paragraph denying certain allegations of the complaint.*)

Third. For a separate and distinct defense, and by way of counterclaim to the cause of action alleged in the complaint herein, defendant alleges: That between *August, 1894*, and *July, 1897*, the plaintiff was the duly authorized custodian of cash belonging to the defendant. That at various intervals during the said period plaintiff exhibited to defendant statements of the account between them, and in answer to defendant's inquiries plaintiff stated and alleged that said accounts were correct in all particulars and were true statements of all the moneys of defendant received and disbursed by plaintiff; in said accounts, items occasionally occurred of payments made by plaintiff to himself, and upon defendant's requesting an explanation of the payment of any portion of defendant's money to plaintiff, plaintiff replied that the accounts showed the true amount of cash received, and as the balance on hand, together with the disbursements stated in the account, were short of the amount received, he had charged deficit to himself, as he must have received the money. Defendant alleges, on information and belief, that the aggregate amount of defendant's moneys paid by plaintiff to himself at various intervals as above alleged and which the plaintiff was not entitled to receive, but which should have been paid to the defendant, amounts in the aggregate to \$300; that said amount of \$300 is now due and owing from plaintiff to defendant, and defendant has demanded payment of said sums, but plaintiff has refused to pay said sum or any part thereof, but has converted the money to his own use.

Fourth. (*Here was set out a second counterclaim, which was held improperly pleaded.*)

Fifth. Defendant further answering the complaint herein, and as a separate and distinct defense hereto, by way of further counterclaim alleges: That about *August, 1896*, *John H. Leed*, of *New York City*, promised and agreed to procure a loan for defendant in stocks and bonds of the *N. Y., White Plains and Elmsford Railway Company* of \$55,000, for which defendant agreed to pay said *Leed* 5 per cent. commission. That defendant, at plaintiff's request and for the said *Leed*, paid plaintiff \$2,750 to be paid by plaintiff forthwith to said *Leed* in full of said *Leed's* commission. That said *Leed* failed to procure or pay to defendant on account of said loan more than \$53,000; that defendant demanded of plaintiff the return to defendant of \$100, being 5 per cent. on \$2,000, which amount defendant never received out of the agreed loan of \$55,000, promised to defendant by said *Leed*. That plaintiff has refused to return or pay to defendant said sum of \$100, although hereto often demanded, [but has converted said sum to his own use,]¹ and defendant further alleges, upon information

1. It was held that the matter within brackets was surplusage.

and belief, that plaintiff never paid the sum of \$100 or any part of it to the said *John H. Leed*.

Wherefore, defendant demands judgment against the plaintiff: That the complaint herein be dismissed and defendant receive judgment against the plaintiff herein for the sum of \$3,150, with interest and costs and disbursements of this action.

Dated *New York, February 21st, 1899.*

Henry C. Henderson,
100 Broadway, New York City.

(Verification.)

2. Admission of, by Plaintiff.

Form No. 18539.¹

(Title of court and cause as in Form No. 18538.)

John Doe, the plaintiff in the above entitled action, hereby admits the claim set out by the defendant in his answer of counterclaim to the demand set out by plaintiff in his complaint.

Jeremiah Mason, Plaintiff's Attorney,
24 Main Street, Huntington, N. Y.

3. Demurrer to Answer of.²

Form No. 18540.³

Supreme Court of New York.

Edward V. B. Kissam, plaintiff, }
against
John B. Bremerman, defendant. }

1. *New York*. — Code Civ. Proc., § 512.

2. **Requisites of Demurrer, Generally.** — For the formal parts of a demurrer in a particular jurisdiction see the title DEMURRERS, vol. 6, p. 294.

Must Specify Counterclaim. — Where there are several counterclaims, the demurrer must point specifically to the counterclaim at which it is aimed. *Kinney v. Miller*, 25 Mo. 576.

Must Specify Objections. — Statutes in several states provide that the demurrer shall distinctly specify the objections taken to the counterclaim. The mode of specifying objections is the same as where a demurrer is taken to a complaint. *Mont. Code Civ. Proc.* (1895), § 715; *N. Y. Code Civ. Proc.*, § 496; *Utah Rev. Stat.* (1898), § 2978; *Wis. Stat.* (1898), § 2661. But in *New York* the statute requiring a specifying of objections does not apply to a demurrer to a counterclaim on the ground that the counterclaim is insufficient in law upon the face thereof. *N. Y. Code Civ. Proc.*, §§ 494, 496.

Precedent. — The following demurrer,

which was sustained, is copied from the records in *Schaefer v. Empire Lithographing Co.*, 28 N. Y. App. Div. 469.

"The plaintiff in the above entitled action demurs to the second further separate and distinct defense contained in the amended answer of the defendant herein, which is also designated in said amended answer as a counterclaim to the plaintiff's cause of action and which is contained in the paragraphs of said amended answer numbered XIII, XIV, XV, XVI, XVII and XVIII, both in so far as the same is alleged as a defense consisting of new matter, and in so far as the same is alleged as a counterclaim, upon the ground and for the reason that the same is insufficient in law upon the face thereof.

Wherefore plaintiff demands judgment that the said alleged defense and counterclaim may be dismissed and for his costs and disbursements herein."

3. *New York*. — Code Civ. Proc., §§ 494, 495.

See also list of statutes cited *supra*,

forth in the answer herein and the issue of law arising thereon having been duly tried at *special* term, held at the court-house in the borough of *Brooklyn*, county of *Kings*, on the *3d* day of *April*, 1899, Honorable *Burr Mattice*, justice presiding, and said court having duly rendered a decision thereon overruling said demurrer with costs to the defendant and with leave to the plaintiff to withdraw his demurrer to said counterclaim and to serve a reply to said counterclaim on judgment of the costs awarded to the defendant on said demurrer, within *ten* days after service of a copy of the order and the judgment to be entered herein, and the defendant's costs having been duly taxed at the sum of \$98.96:

Now, on motion of *Charles S. Simpkins*, attorney for the defendant herein, it is adjudged that the said demurrer of the plaintiff to the counterclaim set forth in the answer herein is overruled with costs to defendant, and that the plaintiff have leave to withdraw his demurrer to said counterclaim and to serve a reply thereto on payment of the costs to defendant's said attorney so awarded and taxed at \$98.96, within *ten* days after service of a copy of the judgment, and that the defendant have execution for said sum of *ninety-eight* dollars and *ninety-six* cents against the plaintiff.

Joseph H. Sutphin, Clerk.

b. Sustaining Demurrer.

Form No. 18542.¹

The Supreme Court, Queens County.

William E. Schaefer, plaintiff,
against

The Empire Lithographing Co., defendant. }

The issue of law in the above entitled action raised by the demurrer of the plaintiff to the *second* separate defense contained in the amended answer, which is also therein designated as a counterclaim to the plaintiff's cause of action, having come duly on for trial at a *special* term of the Supreme Court held by Hon. *Samuel T. Maddox*, one of the justices of said court in and for the county of *Queens*, at the county court-house, in *Long Island City*, on the *16th* day of *November*, 1897, and the same having been duly tried, and said justice having duly made and filed his decision in writing sustaining said demurrer, and directing that an interlocutory judgment be entered to the following effect, and the costs and disbursements herein having been duly taxed.

Now, on motion of *Miles & Johnson*, attorneys for the plaintiff, it is:

Adjudged and decreed, that said demurrer be and the same hereby is sustained, and said second and distinct defense claimed in said amended answer and therein designated as a counterclaim to the plaintiff's cause of action, be and the same hereby is stricken out, and

1. *New York*. — Code Civ. Proc., §§ 494, 495.

See also list of statutes cited *supra*, note 2, p. 73.

This is the form of judgment sus-

taining a demurrer to the counterclaim in *Schaefer v. Empire Lithographing Co.*, 28 N. Y. App. Div. 469, and is copied from the records. No objection was made to its sufficiency.

that the plaintiff *William E. Schaefer* recover of the defendant *The Empire Lithographing Co.*, the sum of *seventy-nine and 68-100 (\$79 68-100)* dollars, his costs and disbursements herein, as taxed, and that said plaintiff have execution therefor.

Judgment signed and entered this *26th* day of *November*, 1897.

John H. Sutphin, Clerk.

5. Reply to Answer of.¹

a. Infancy.

Form No. 18543.²

(Conn. Prac. Act, p. 235, No. 447.)

(*Title of court and cause as in Form No. 17873.*)

First defense.

Every paragraph of said counterclaim is denied.

Second defense.

At the time when said horse is alleged in said counterclaim to have been hired, the plaintiff was an infant, aged only *nineteen* years.

(*Signature as in Form No. 17873.*)

b. Son Assault Demesne.

Form No. 18544.³

(Conn. Prac. Act, p. 236, No. 451.)

(*Title of court and cause as in Form No. 17873.*)

1. The plaintiff denies that the assault and striking by the defendant was in self-defense, as alleged in paragraph first of the answer.

2. By way of answer to the counterclaim:

The plaintiff denies that he struck the defendant otherwise than as herein admitted. The defendant first beat the plaintiff as stated in paragraph first of the complaint, and the plaintiff thereupon, in order to protect himself from the defendant's attack, struck the plaintiff with a whip, using no more force than was necessary to his self-defense.

(*Signature of attorney as in Form No. 17873.*)

6. Judgment on Answer of.³

Form No. 18545.⁴

(*Title of court and cause as in Form No. 11868.*)

1. For other forms of replies see the title REPLICATIONS AND REPLIES, vol. 16, Forms Nos. 17880, 17883, 17884, 17888, 17891, 17892, 17893.

Statutes relating to counterclaim are set out *supra*, note 2, p. 73.

Requisites of Reply, Generally. — For the formal parts of a reply in a particular jurisdiction see the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

2. *Connecticut*. — Gen. Stat. (1888), § 876.

3. Requisites of Judgment, Generally.

— For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

Judgment for Residue. — If the amount of the counterclaim duly established is less than the plaintiff's demand, the plaintiff shall have judgment for the residue. Minn. Stat. (1894), § 4997; Mont. Civ. Code (1895), § 693; N. Y. Code Civ. Proc., § 503.

4. *New York*. — Code Civ. Proc., § 512.

The defendant not having by his answer denied the claim of the plaintiff for *one thousand* dollars set forth in the complaint, and having set up a counterclaim in the said answer for the sum of *four hundred* dollars, amounting to less than the plaintiff's claim by *six hundred* dollars, and the plaintiff having filed with the clerk of the county of *Suffolk* an admission of the said counterclaim:

It is hereby adjudged, pursuant to the statute in such case made and provided, that the plaintiff, *John Doe*, do have and recover of and from the defendant, *Richard Roe*, the sum of *six hundred* dollars, said amount being the excess of the claim of the plaintiff set forth in the complaint over the counterclaim of the defendant set up in the answer, together with the sum of *forty* dollars costs, amounting in all (*concluding as in Form No. 11868*).

III. RECOUPMENT.¹

See also list of statutes cited *supra*, note 2, p. 73; and, generally, *supra*, note 3, p. 88.

1. Definition. — A defense, by way of recoupment, denies the validity of the plaintiff's cause of action to so large an amount as he claims. It is not an independent cross-claim, like a separate and distinct debt or item of account due from the plaintiff, but is confined to matters arising out of or connected with the contract or transaction which forms the basis of the plaintiff's action. It goes only in abatement or reduction of the plaintiff's claim, and can be used as a substitute for a cross-action only to the extent of the plaintiff's demand. No judgment can be obtained by the defendant for any balance in his favor. *McHardy v. Wadsworth*, 8 Mich. 349.

The defense of recoupment was one in which the defendant was permitted, in an action upon a contract, to show that, by reason of some failure of the plaintiff on his part to perform his cross-obligations under the contract, the defendant had suffered damage, which he was permitted to discount, keep back, cut off or recoup to the extent of his damage, but not exceeding the demand of the plaintiff on the same contract. This defense was allowed at law, usually, but not always, by virtue of some statutory provision; its object being to avoid circuity of action. *Roberts v. Donovan*, 70 Cal. 108.

Exists at Common Law. — Recoupment as a defense existed at common law. *McHardy v. Wadsworth*, 8 Mich. 349; *Sterling Organ Co. v. House*, 25 W. Va. 64.

Included in Counterclaim. — In

Schweichhart v. Stuewe, 71 Wis. 1, the court says: "That which was recoupment in New York and some other states before the codes is now a counterclaim under the statute."

Set-off and Recoupment. — In *Georgia*, in consequence of certain statutes, set-off and recoupment are substantially alike and do not differ in their effects on the result of the suit. For this reason, matter which is technically proper for one of these defenses may be pleaded as the other, and when so pleaded may be proved by evidence competent to support either form of plea. *Fontaine v. Baxley*, 90 Ga. 416.

Statutes relating to recoupment exist as follows:

Alabama. — Civ. Code (1896), §§ 2674, 3733, 3734.

Georgia. — 2 Code (1895), § 3756 *et seq.*

Michigan. — Comp. Laws (1897), §§ 10081, 10082.

Requisites of Answer or Plea, Generally.

— For the formal parts of an answer or a plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799, PLEAS, vol. 13, p. 918.

Nature and Certainty. — A plea or notice of recoupment is in the nature of a cross-action by the defendant against the plaintiff, and should be as certain and definite in its substantial allegations as is a declaration. *Merrill v. Everett*, 38 Conn. 40; *Atlanta Glass Co. v. Noizet*, 88 Ga. 43; *Watkins v. Ford*, 69 Mich. 357; *Delaware, etc., Canal Co. v. Roberts*, 72 Mich. 49.

Facts must be Stated. — The facts upon which the defendant bases his right must be stated, and not conclusions from those facts. *Atlanta Glass Co. v. Noizet*, 88 Ga. 43.

1. For Damages for Breach of Warranty in Sale of Goods.¹Form No. 18546.²

(Conn. Prac. Act, p. 226, No. 426.)

(Title of court and cause as in Form No. 12216.)

Recoupment.

1. Said goods were sold and delivered in the piece or package, and without an opportunity for the defendants to examine the same.

2. At the time of the sale, it was represented and agreed by said [seller] that the goods were and should be free from any defect or injury, and should be marketable.

3. A portion of said goods, being the dry goods and hosiery in the package marked A, were unmarketable, defective and injured.

4. Said defects were unknown to the defendants at the time of the sale and delivery.

5. The defendants sustained \$100 damage thereby, being the amount of the price of the goods so injured or defective.

The defendants claim that said last mentioned amount shall be deducted from any amount that may be proved against them on the trial of this action.

(Signature as in Form No. 12216.)

Identifying Contract Sued On.—The defendant must, by appropriate allegations, identify the contract sued on as a part of the contract described in the plea of recoupment. *Fontaine v. Baxley*, 90 Ga. 416.

Nature of Demand.—The nature of the defendant's demand must be alleged. *Sinker v. Diggins*, 76 Mich. 557. And the defendant is confined to the demand specified in his pleading. *McKevitte v. Feige*, 57 Mich. 374.

Stating Breach.—Where the defendant seeks to recoup damages, on the ground that the contract sued on was broken by the plaintiff, to his damage, he must point out in what respect it has been broken to his damage. *Fontaine v. Baxley*, 90 Ga. 416; *Atlanta Glass Co. v. Noizet*, 88 Ga. 43; *Kerr v. Bennett*, 109 Mich. 546; *Sinker v. Diggins*, 76 Mich. 557; *Watkins v. Ford*, 69 Mich. 357; *Ritter v. Daniels*, 47 Mich. 617; *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340.

Where Facts Show Defense or Recoupment.—In *Springer v. Dwyer*, 50 N. Y. 19, the court held that where the answer alleges facts sufficient to constitute a defense of want of consideration or a recoupment of damages, it is not necessary for the defendant to state which he will rely upon; and if he so states he will not be precluded from insisting upon any defense which the facts

alleged will justify. This case is cited with approval in *Chatfield v. Simonson*, 92 N. Y. 209.

Damages.—That the defendant suffered damages must be alleged. *Fontaine v. Baxley*, 90 Ga. 416; *Maltby v. Plummer*, 71 Mich. 578; *Watkins v. Ford*, 69 Mich. 357; *Ritter v. Daniels*, 47 Mich. 617; *Roethke v. Philip Best Brewing Co.*, 33 Mich. 340.

A notice of recoupment which alleges that, by reason of the plaintiff's failure to deliver logs in sufficient quantities to keep the defendant's mill constantly supplied for sawing purposes, the defendant was compelled to shut down said mill a large number of times and keep a large number of men idle, whereby he was prevented from putting his lumber on the market and from filling his orders and performing his contracts, and lost great gains and profits, states the defendant's claim for damages in no other than the most speculative way, and fails to present a fact to be tried as to damages. *Maltby v. Plummer*, 71 Mich. 578.

1. Breach of warranty in the sale of personal property may be given in evidence, when specially set up in the defendant's answer by way of recoupment. *Wentworth v. Dows*, 117 Mass. 14.

2. See, generally, *supra*, note 1, p. 89.

2. For Principal and Interest on Bonds Becoming Due by Reason of Failure to Pay Interest.

Form No. 18547.

(Precedent in Galena, etc., R. Co. v. Barrett, 95 Ill. 471.)¹

[(*Venue and title of court and cause as in Form No. 15219.*)
(*First, second and third pleas.*)]²

And for a further plea in this behalf as to the said first count, said defendant says *actio non*, because he says that the terms of said supposed contract of subscription on the part of said plaintiffs with said defendant were, that on the payment of each and every sum of \$650 in cash they would deliver to said defendant *five* shares of stock, and one of their first mortgage bonds of \$1,000, in and by each one of which said bonds in the sum of \$1,000 in gold coin of the United States, which they promised to pay to the bearer in *twenty* years from the date of said bond, with interest thereon at the rate of seven per cent. per annum, payable semi-annually in gold coin of the United States, on the *first* day of *April* and *October* of each and every year, upon the presentation and surrender of the coupons annexed thereto, as they became severally due, and which bonds were covered by a further agreement on the part of said plaintiffs, that if they should fail to pay any of said interest, when the same became due and payable according to the tenor and effect thereof, and should remain in such default for the space of *ninety* days, then, and in that case, the principal of said bonds should become immediately due, payable and collectible. That in part compliance with said supposed subscription, the said defendant, on, to wit, the *15th* day of *June*, A. D. 1877, paid to said plaintiffs the sum of \$650 in cash, and received therefor from said plaintiffs *five* shares of their stock and one of their said first mortgage bonds, No. 352, pursuant to said supposed subscription, bearing date the day and year last aforesaid, with interest coupons annexed thereto as aforesaid, the first thereof becoming due on, to-wit, the *first* day of *April*, A. D. 1878; and in the further compliance with said supposed subscription the said defendant, on, to-wit, the *15th* day of *June*, A. D. 1877, paid said plaintiffs a further sum of \$650 in cash, and received therefor from said plaintiffs, pursuant to said supposed subscription, another *five* shares of their stock and another of their said first mortgage bonds, No. 395, bearing date the day and year last aforesaid, with interest coupons annexed thereto as aforesaid, the first thereof becoming due on the *first* day of *April*, A. D. 1878, which said *two* bonds and the interest coupons thereto respectively annexed, the said defendant owned and possessed from the day of the date thereof ever since; and said defendant avers that the said plaintiffs did not pay said interest on either of said bonds, or any part thereof, when the same became due and payable, or at any other time whatever, according to the tenor and effect thereof, or in any other manner whatever, but wholly failed therein, and was default in the payment of said interest on

1. This plea was held sufficient.

[] will not be found in the reported case.

2. The matter to be supplied within

each one of said bonds for more than *ninety* days before the commencement of this suit, whereby the whole principal sum of each of said bonds became and was due and payable to said defendant, as was also the interest thereon, as therein promised, before the day of the commencement of said suit, to-wit, at the county aforesaid, and the said plaintiffs have not paid said *two* bonds, nor either one of them, nor any part thereof, to said defendant, or otherwise however, nor performed in any manner their said part of said supposed contract subscription, but have wholly failed, neglected and refused so to do, to the great damage of said defendant, to-wit, in the sum of \$3,000, which sum exceeds the said damages sustained by said plaintiffs by reason of the nonperformance by said defendant of the other part of said supposed contract of subscription in said first count mentioned, and the said defendant is entitled, and hereby offers to recoup so much of the said damages sustained by said defendant as shall equal the said damages sustained by said plaintiffs by reason of the matters set forth in said first count. And this the said defendant is ready to verify; wherefore he prays judgment [(concluding as in Form No. 15216).]¹

1. The matter to be supplied within [] will not be found in the reported case.

SETTLED CASE.

See the title APPEALS, vol. 1, p. 890.

SETTLEMENT OF DECEDENTS' ESTATES.

See the titles PROBATE AND ADMINISTRATION, vol. 14, p. 238; *WILLS*.

SEVERANCE.

BY HAROLD N. ELDRIDGE.

I. OF ACTION AS TO PARTIES, 93.

1. *Plaintiffs, Where Several Unite in One Petition to Recover Separate Claims*, 93.
 - a. *Notice of Motion*, 94.
 - b. *Order*, 94.
2. *Defendants*, 94.
 - a. *Where Several have been United in One Action to Recover Lands Which They Severally Occupy*, 94.
 - (1) *Notice of Motion*, 94.
 - (2) *Order*, 95.
 - b. *Where Judgment has been Entered Against One of Several Defendants Severally Liable*, 95.

II. OF ACTION AS TO CLAIM SUED UPON, WHERE PART OF THE CLAIM IS ADMITTED, 96.

1. *Notice of Motion*, 96.
2. *Order*, 96.

CROSS-REFERENCES.

For Forms in Proceedings to Obtain Separate Trial, see the title SEPARATE TRIAL, vol. 16, p. 1062.

I. OF ACTION AS TO PARTIES.

1. *Plaintiffs, Where Several Unite in One Petition to Recover Separate Claims.*

a. Notice of Motion.¹Form No. 18548.²

(Commencing as in Form No. 14254, and continuing down to †) an order authorizing the petitioners, named in said petition of *James Wood* and others, to sever their petition and to serve separate petitions for the vacation or reduction of the assessment on their lots, as mentioned in said petition, and for such other and further relief (concluding as in Form No. 14254).

b. Order.³

Form No. 18549.

(Precedent in Matter of Mehrbach, 33 Hun (N. Y.) 136.)⁴[(Commencement as in Form No. 14697.)]⁵

Ordered, that the petitioners named in said petition of *James Wood* and others be, and they are, hereby authorized and granted leave to sever their petitions, and to serve separate petitions for the vacation or reduction of the above entitled assessment on their lots, as mentioned in said petition of *James Wood* and others, and containing the allegations now in said petition.

[(Signature and date as in Form No. 14697.)]⁵

2. Defendants.

a. Where Several have been United in One Action to Recover Lands Which They Severally Occupy.

(1) NOTICE OF MOTION.¹Form No. 18550.⁴

(Title of court and cause as in Form No. 14254.)

Please take notice that upon the verified answer herein, the undersigned will move this court at a *special* term thereof to be held at the county court-house, in the village of *Riverhead*, on the *twenty-first* day of *March*, 1900, at *ten o'clock* in the *forenoon* (or at the opening of court), or as soon thereafter as counsel can be heard (or will move before *Honorable John Marshall*, a justice of the Supreme Court, at chambers in *Riverhead*, on the *twenty-first* day of *March*, 1900, at *ten o'clock* in the *forenoon*), for an order that this action be divided into two several actions, the first of which shall be in favor of the plain-

1. For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. This is substantially the form of motion in Matter of Mehrbach, 97 N. Y. 601, 33 Hun (N. Y.) 136. The motion was granted.

3. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

4. It was held in Matter of Mehrbach, 97 N. Y. 601, that the court had power to make this order of severance.

5. The matter to be supplied within [] will not be found in the reported case.

6. *New York*.—Code Civ. Proc., § 1516.

tiff, *John Doe*, and against the defendant, *Richard Roe*, for the recovery of that parcel of land which is alleged in said answer to be occupied by the said *Richard Roe* in severalty; and the second of which shall be in favor of the plaintiff, *John Doe*, and against the defendant, *Samuel Short*, for the recovery of that parcel of land which is alleged in said answer to be occupied by the said *Samuel Short* in severalty, and for such other (concluding as in Form No. 14254).

(2) ORDER.¹Form No. 18551.²

(Title of court and cause as in Form No. 14696.)

On reading and filing (enumerating all motion papers), together with satisfactory proof of service of said notice of motion and papers upon *Joseph Story*, Esq., attorney for the defendant above named, and after hearing *Jeremiah Mason*, Esq., of counsel for plaintiff, in support of said motion, and *Joseph Story*, Esq., of counsel for defendant, in opposition, and after due deliberation thereon, and it appearing satisfactorily to the court by said verified answer that the defendant, *Richard Roe*, occupies in severalty a separate parcel of the lands sought to be recovered by this action, and that the defendant, *Samuel Short*, occupies in severalty another separate parcel of said lands; now, on motion of *Jeremiah Mason*, attorney for plaintiff,

Ordered, that this action be divided into two several actions, the first of which shall be in favor of the plaintiff, *John Doe*, and against the defendant, *Richard Roe*, for the recovery of said parcel occupied by him, the said *Richard Roe*, and hereinafter referred to as parcel *A*, with such other and further relief as may be proper, and the second of which shall be in favor of the plaintiff, *John Doe*, and against the defendant, *Samuel Short*, for the recovery of said parcel occupied by him, the said *Samuel Short*, and hereinafter referred to as parcel *B*, and for such other and further relief as may be proper.

(Here insert the description of the parcels.)

Enter:

(Signature as in Form No. 14696.)

b. Where Judgment has been Entered Against One of Several Defendants Severally Liable.¹Form No. 18552.³

(Title of court and cause as in Form No. 14696.)

It appearing in this action that a summons has issued against the defendants, *Richard Roe* and *Samuel Short*, and that due service of said summons has been made upon the said defendants, as appears by the affidavit of *Samuel Short*, hereto annexed, and it further appearing that the said defendants are alleged in the complaint to

1. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. *New York*.—Code Civ. Proc., § 1516.

3. *New York*.—Code Civ. Proc., § 456.

be severally liable, and that the plaintiff has taken judgment against one of them, to wit, *Richard Roe*, by virtue of the fact that the plaintiff would have been entitled to judgment against said *Richard Roe* if the action had been against him alone; now, on motion of *Jeremiah Mason*, attorney for the plaintiff,

Ordered, that the action be severed, and that the plaintiff may proceed against the defendant, *Samuel Short*, as if the action had been against him alone.

(Signature and date as in Form No. 17174.)

II. OF ACTION AS TO CLAIM SUED UPON, WHERE PART OF THE CLAIM IS ADMITTED.

1. Notice of Motion.¹

Form No. 18553.²

(Title of court and cause as in Form No. 6954.)

Please take notice that upon the pleadings on file in this cause a motion will be made by the undersigned at a *special* term of the above entitled court, to be held at the court-house in the village of *Riverhead*, in said county, on the *tenth* day of *September*, 1900, at *ten o'clock* in the forenoon of said day, or as soon thereafter as counsel can be heard (or before the Honorable John Marshall, a justice of the Supreme Court, at chambers in the village of *Riverhead*, in said county, on the *tenth* day of *September*, 1900, at *ten o'clock* in the forenoon), for an order that a judgment be entered in this action for the plaintiff, for the sum of *one hundred* dollars, the amount admitted by the defendant in his answer herein to be due the plaintiff, and that this action be severed and, if the plaintiff so elect, be continued as to the remainder of the claim stated in said complaint, with like effect as to all subsequent proceedings as if it had been originally brought for the remainder of said claim, with costs of this motion and for such other and further relief as may be just.

(Signature and office address of attorney, and address as in Form No. 6954.)

2. Order.³

Form No. 18554.²

(Commencement as in Form No. 6957.)

Ordered, that this action be severed; that judgment be entered for the plaintiff for (Here state the proper relief under the admission),

1. Necessity of Notice. — It is a better practice to require a notice to be given. *Shaw v. Coleman*, 54 N. Y. Super. Ct. 3.

For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. New York. — Code Civ. Proc., § 511.

3. Requisites of Order, Generally. — For

the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Time of Election. — The time of the plaintiff's election must be prescribed. N. Y. Code Civ. Proc., § 511.

Manner of Election. — The manner of the plaintiff's election must be prescribed. N. Y. Code Civ. Proc., § 511.

and, if the plaintiff so elects, within *ten* days after this order is entered and a notice of such election is duly served by the plaintiff upon the attorney of the defendant within such time, that this action be continued with like effect as to the subsequent proceedings as if it had been originally brought for the remainder of said claim in the complaint of plaintiff stated and not admitted by defendant.

And if the plaintiff do not elect to continue this action as to that part of the claim for which judgment is not entered said action shall be dismissed as to said part with costs and disbursements as upon a final judgment, together with *thirty* dollars, costs of this motion.

Enter:

J. M., J. S. C.

17 E. of F. P. — 7.

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Volume 17.

SHAM AND FRIVOLOUS PLEADINGS.¹

BY HAROLD N. ELDRIDGE.

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CROSS-REFERENCES.

For Forms relating to Proceedings to Strike Out Impertinent Matter in Pleadings, see the title IMPERTINENCE, vol. 9, p. 554.

For Forms relating to Proceedings to Strike Out Redundant and Irrelevant Matter in Pleadings, see the title REDUNDANT AND IRRELEVANT MATTER, vol. 15, p. 906.

I. SHAM PLEADINGS.²

1. Joinder, Generally.—An application to have one or more defenses stricken out as sham and an application for a judgment on the remaining defenses as frivolous may be united in a single motion. *Kay v. Whittaker*, 44 N. Y. 565; *People v. McCumber*, 18 N. Y. 315; *Bailey v. Lane*, (Supreme Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 354; *Adams v. McPartlin*, (Supreme Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 369.

Specifying Ground.—In *Bailey v. Lane*, (Supreme Ct. Gen. T.) 13 Abb. Pr. (N. Y.) 354, it was held that "the objection that the motion is noticed to strike out several answers as frivolous, and also as sham, without specifying which answer is moved as sham and which as frivolous, cannot prevail since the decision in *People v. McCumber* (18 N. Y. 315)," although "it is the better practice to state in the notice on what ground the party applies." But see *contra* *Maury v. Van Arnum*, 1 Hill (N. Y.) 370, which was decided prior to *People v. McCumber*, 18 N. Y. 315,

and which holds that the ground must be stated.

2. Statutes relating to sham pleadings exist as follows:

Arizona.—Rev. Stat. (1901), § 1355.
California.—Code Civ. Proc. (1897), § 453.

Colorado.—Mills' Anno. Code (1896), § 60.

Idaho.—Code Civ. Proc. (1901), § 3224.

Indiana.—Horner's Stat. (1901), § 382.

Iowa.—Code (1897), § 3618.

Kentucky.—Bullitt's Civ. Code (1895), § 113, subs. 8.

Minnesota.—Stat. (1894), § 5240.

Montana.—Code Civ. Proc. (1895), § 742.

Nevada.—Comp. Laws (1900), § 3152.

New York.—Code Civ. Proc., § 538.

North Carolina.—Clark's Code Civ. Proc. (1900), § 247.

Oregon.—Hill's Anno. Laws (1892), § 75.

1. Notice of Motion to Strike Out.¹Form No. 18555.²

(Commencing as in Form No. 6954, and continuing down to *) for an order striking out the answer herein as sham, with costs (concluding as in Form No. 6954).

2. Motion to Strike Out.³

a. In General.

Form No. 18556.⁴

(Title of court and cause as in Form No. 6955.)

And now comes the above named plaintiff, by his attorney, *Jeremiah Mason*, and moves the court that the answer of the defendant in this action be stricken out as sham, for the reason that it appears upon the face of said answer (or from the answers of the defendant to the special written interrogatories filed with the plaintiff's reply herein) that said answer is false in fact and intended merely for delay.

Jeremiah Mason, Attorney for Plaintiff.

b. And for Judgment.⁵Form No. 18557.⁶

(Precedent in *Rhodes v. Hutchins*, 10 Colo. 259.)⁷

[[Title of court and cause as in Form No. 5450.]]⁸

And now comes the plaintiff, by *Edward O. Wolcott*, his attorney, and moves the court — First, that the answer of the defendants heretofore filed herein be stricken out, upon the ground that the same is sham and irrelevant; second, that the defendants' said answer be stricken out, upon the ground that the same is immaterial and insuf-

South Carolina. — Code Civ. Proc. (1902), § 173.

South Dakota. — Stat. (1901), § 6123.

Utah. — Rev. Stat. (1898), § 2987.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 4915.

Wisconsin. — Stat. (1898), § 2682.

Application Too Broad. — Where a part of an answer is good, an application to strike out the whole answer as sham will not be allowed. *Schmitt v. Cassilius*, 31 Minn. 7; *Jarvis v. McBride*, 18 Wis. 316; *Bachman v. Eserding*, 1 Sawy. (U. S.) 70.

In *Jarvis v. McBride*, 18 Wis. 316, a motion to strike out an answer "and every allegation and part thereof," as sham and irrelevant, was denied on the ground that part of the answer was good.

1. For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

2. *New York*. — Code Civ. Proc., § 538. See also, generally, *supra*, note 2, p. 98.

3. For the formal parts of a motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

4. *Indiana*. — Horner's Stat. (1901), § 382.

See also, generally, *supra*, note 2, p. 98.

5. **Judgment.** — It is entirely proper to move to strike out an answer and at the same time to move for judgment on the pleadings. *Steinhauer v. Colmar*, 11 Colo. App. 494.

6. *Colorado*. — Mills' Anno. Code (1896), § 60.

See also, generally, *supra*, note 2, p. 98.

7. The motion in this case was granted.

8. The matter to be supplied within [] will not be found in the reported case.

18557. SHAM AND FRIVOLOUS PLEADINGS. 18560.

ficient; third, that the plaintiff have judgment upon the pleadings against the defendants for the amount demanded in this complaint; fourth, that the plaintiff have judgment against the defendants for the amount demanded in this complaint.

[Dated the *fifth* day of *January*, 1886.

Edward O. Wolcott, Plaintiff's Attorney.]¹

3. Affidavit Supporting Motion to Strike Out.²

Form No. 18558.³

Supreme Court, County of *New York*.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }
State of *New York*, } ss.
County of *New York*. }

John Doe, being duly sworn, says:

I. That he is the plaintiff herein named.

II. That he has read the answer of the defendant, *Richard Roe*, herein named, and that the defense of (*stating defense*) in said answer set up is wholly and absolutely false (*Here state facts to show that the defense is false as alleged*).

John Doe.

Sworn to before me this *twenty-second* day of *October*, 1902.

Abraham Kent, Notary Public, *N. Y. Co.*

4. Order Granting Motion to Strike Out.⁴

Form No. 18559.⁵

(*Title of court and cause as in Form No. 17349.*)

It satisfactorily appearing to the court upon the face of the answer of the defendant herein to the complaint of the plaintiff herein (or from the answers of the defendant herein to the interrogatories of the plaintiff filed with the reply herein) that said answer is a sham in that it is false in fact and intended merely for delay:

It is therefore ordered that the answer of the said defendant in this action be stricken out as sham.

Form No. 18560.⁶

(*Commencing as in Form No. 18562, and continuing down to *.*)

It is ordered and adjudged that the answer of the defendant herein be stricken out as sham, with *ten* dollars costs of this motion.

Enter:

J. M., J. S. C.

1. The matter enclosed by [] will not be found in the reported case.

2. For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

3. *New York*. — Code Civ. Proc., § 538.
See also, generally, *supra*, note 2, p. 98.

4. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

5. *Indiana*. — Horner's Stat. (1901), § 382.

See also, generally, *supra*, note 2, p. 98.

II. FRIVOLOUS PLEADINGS.¹1. Notice of Motion for Judgment Upon.²Form No. 18561.³

Supreme Court, New York County.

Alleine Lee, plaintiff,
againstWilliam H. Jacob and Reuben Skinner,
defendants. }

Please to take notice that on the pleadings in this action we shall apply to this court in part I. of the *special* term thereof, on the *fifth* day of *October*, 1898, at the opening of the court on that day, or as soon thereafter as counsel can be heard,* for judgment upon the answer herein as frivolous, with costs of this application, and for such other and further relief as may be just and proper.

Dated *September 30th*, 1898.

Lee & Lee, Plaintiff's Attorneys,
20 Nassau Street, Borough of *Manhattan*,
New York, N. Y.

To *Olcott & Olcott*, Esquires, Defendants' Attorneys.

1. **Statutes** relating to frivolous pleadings exist as follows:

Arizona. — Rev. Stat. (1901), § 1355.*Minnesota*. — Stat. (1894), § 5240.*Missouri*. — Rev. Stat. (1899), § 611.*Montana*. — Code Civ. Proc. (1895), § 741.*New Mexico*. — Comp. Laws (1897), § 2685, subs. 50.*New York*. — Code Civ. Proc., § 537.*North Carolina*. — Clark's Code Civ. Proc. (1900), § 388.*Oregon*. — Hill's Anno. Laws (1892), § 75.*South Carolina*. — Code Civ. Proc. (1902), § 268.*South Dakota*. — Stat. (1901), § 6233.*Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 4915.*Wisconsin*. — Stat. (1898), § 2681.

2. **Requisites of Notice of Motion, Generally.** — For the formal parts of a notice of motion in a particular jurisdiction see the title *MOTIONS*, vol. 12, p. 938.

Prayer — Generally. — The proper prayer in the case of a frivolous pleading is for judgment thereon, and not that the pleading be stricken out. *Hecker v. Mitchell*, (N. Y. Super. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 453; *Darrow v. Miller*, (Supreme Ct.) 5 How. Pr. (N. Y.) 247; *Erwin v. Lowery*, 64 N. Car. 321.

And see list of statutes cited *supra*, note 1, this page.

General Relief. — But where the application contains a prayer for general relief an order for judgment will be granted, notwithstanding the specific prayer is that the pleading be stricken out as "irregular and frivolous." *Rae v. Washington Mut. Ins. Co.*, (Supreme Ct.) 6 How. Pr. (N. Y.) 21.

In *Darrow v. Miller*, (Supreme Ct.) 5 How. Pr. (N. Y.) 247, there was an application to strike out the answer, on the ground of the frivolousness thereof, "or for such other or further order as the said justice shall deem proper to grant," and it was held that judgment on account of the frivolousness of the answer could not be given, as the word "order" in the application was not equivalent to the word "judgment."

Entire Pleading Frivolous. — An application "for judgment in the action on account of the frivolousness of each and every defense set up in the answer" cannot be granted if any defense is not frivolous. *Lockwood v. Salhenger*, (C. Pl. Spec. T.) 18 Abb. Pr. (N. Y.) 136. But if the answer is irrelevant and the application, besides asking for judgment on account of frivolousness, prays for "other and further relief," the answer may be stricken out as irrelevant. *Thompson v. Erie R. Co.*, 45 N. Y. 468.

3. *New York*. — Code Civ. Proc., § 537.

See also *supra*, note 1, this page.

2. Order Striking Out and for Judgment.¹

Form No. 18562.¹

At a *Special Term* of the *Supreme Court*, held in Part *VI* thereof, at the *County Court-House*, in the Borough of *Manhattan*, in the City of *New York*, on the *10th* day of *October*, 1898.

Present — Hon. *Henry Bischoff, Jr.*, Justice.

<i>Alleine Lee</i> , plaintiff,	}
against	
<i>William H. Jacob</i> and <i>Reuben Skinner</i> , defendants.	

On reading and filing the pleadings in the above entitled action, and after hearing *W. H. L. Lee*, Esq., and *H. T. Kingsbury*, Esq., of counsel for plaintiff, in support of the motion, and *George N. Nessiter*, Esq., of counsel for defendants, in opposition thereto:

On motion of *Lee & Lee*, plaintiff's attorneys,*

It is ordered and adjudged that the answer of the defendants herein be stricken out as frivolous, and that the plaintiff have judgment thereon for the relief demanded in the complaint with the costs of the action, and *ten* dollars costs of this motion.

Enter:

H. B., Jr., J. S. C.

This is the form of a notice of motion in the case of *Lee v. Jacob*, 38 N. Y. App. Div. 531, and is copied from the records. The motion was granted.

1. For the formal parts of an order in a particular jurisdiction see the title ORDERS vol. 13, p. 356.

2. *New York*.—Code Civ. Proc., § 537. See also, generally, *supra*, note 1, p. 101.

This is the form of order in the case of *Lee v. Jacob*, 38 N. Y. App. Div. 531, and is copied from the records. This order was affirmed.

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For other Forms in Proceedings relating to Bail and Recognizance, see the title BAIL AND RECOGNIZANCE, vol. 3, p. 1.

For Forms in Proceedings on Bonds of Sheriffs and Constables, see the

title *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528.

For other Forms in *Actions Against Officers for Escape*, see the title *ESCAPE AND RESCUE*, vol. 7, p. 781.

For other Forms in *Proceedings to Amerce Sheriffs*, see the title *PENALTIES, FORFEITURES, FINES AND AMERCEMENT*, vol. 13, p. 747.

For Forms in *Proceedings Against Public Officers Generally*, see the title *PUBLIC OFFICERS*, vol. 15, p. 88.

For other Forms in *Proceedings Against Officers to Recover Property*, see the title *REPLEVIN, CLAIM AND DELIVERY*, vol. 16, p. 154.

For Forms of *Returns by Officers*, see the title *SERVICE OF WRITS AND PAPERS*, ante, p. 24.

For Forms relating to *Sheriff's Sales*, see the titles *EXECUTIONS AGAINST PROPERTY*, vol. 8, p. 1; *MORTGAGES*, vol. 12, p. 390.

See also the *GENERAL INDEX* to this work.

I. PROCEEDINGS BY.

1. Against an Execution Creditor, Where Sheriff Levied Upon Goods at the Instance of the Creditor and was Compelled to Pay Damages to the Claimant of the Said Goods.

Form No. 18563.¹

(Commencement as in Form No. 6951) for this, to wit, that at the time of the committing of the grievances hereinafter mentioned, to wit, on the *twenty-sixth* day of *December*, 1896, at the county of *Albemarle* aforesaid, the said plaintiff was sheriff of the said county of *Albemarle*, and the said defendant had then and there caused to be delivered to the said plaintiff, as such sheriff, a certain writ commonly called a writ of *fieri facias*, which had theretofore issued out of the *Circuit Court* of the said county of *Albemarle*, at the suit of the said defendant against one *Richard Roe*, bearing teste the *twenty-eighth* day of *November*, 1896, and returnable to the rules to be holden at the clerk's office in the said *Circuit Court* on the *first Monday* of *January* then *next* and directed to the sheriff of the said county of *Albemarle*, by which said writ the said sheriff was commanded that of the goods and chattels of the said *Richard Roe*, in his bailiwick, he should cause to be levied the sum of *five hundred* dollars, and the

1. This is substantially the declaration in *Humphrys v. Pratt*, 5 Bligh N. S. 154. It was held in that case that a sheriff, upon the representation of the plaintiff in an execution, having seized goods thereunder as belonging to the defendant therein, and damages having been recovered against the sheriff by a third person claiming the goods, an action upon the case would lie at

the suit of the sheriff for the false representation. The declaration in the case failed to aver fraud in the representation or knowledge of the falsehood, but was held good upon a motion in arrest of judgment, although it would have been bad upon demurrer. The form in the text has been changed to meet this defect.

said defendant then and there falsely and fraudulently represented and affirmed to the said plaintiff that the said *Richard Roe* was possessed of certain goods and chattels liable to be seized under the said writ within his bailiwick, which goods and chattels the said defendant would then and there cause to be shown to the said plaintiff, and then and there required the said plaintiff to seize said goods and chattels under said execution; and the said plaintiff says that the said defendant then and there at the time when he so falsely and fraudulently represented and affirmed to this plaintiff as aforesaid, well knew that the said *Richard Roe* was not possessed of said certain goods and chattels or of any goods or chattels liable to be seized under said writ within his bailiwick, and the said plaintiff says that he, confiding in the said representation and affirmation of the said defendant so falsely and fraudulently made as aforesaid and believing the same to be true, and not knowing to the contrary thereof, did afterward, to wit, on the day and year and at the place aforesaid, seize within his bailiwick, at the request and by the direction and at the requisition of the said defendant, under the said writ, certain goods and chattels, that is to say, (*Here specify the goods*), which were then and there shown by the said defendant to said plaintiff as and for the goods and chattels of the said *Richard Roe*, liable to be seized under said writ, within his bailiwick, he, the said defendant, then and there well knowing that the said goods and chattels were not liable to be seized under said writ; that the said goods and chattels were afterward claimed by one *Samuel Short* as his property, and that the said defendant after such seizure and claim falsely and fraudulently insisted and asserted that said claim was unfounded, he, the said defendant, then and there well knowing the claim of the said *Samuel Short* to be just and that the aforesaid goods and chattels were the property of him, the said *Samuel Short*. And the said plaintiff further says that the said defendant, in truth and in fact, wilfully, knowingly and craftily deceived the said plaintiff in this, to wit, that the said last mentioned goods and chattels were not at the time of the delivery of the said writ to the plaintiff the goods or chattels or property of the said *Richard Roe* liable to be seized under said writ, as the said defendant then and there well knew. And the said plaintiff further says that afterward, to wit, on the *third* day of *February*, 1897, at the said county of *Albemarle*, the said *Samuel Short*, as the true and lawful owner of the said goods and chattels at the time they were so shown to the said plaintiff and seized under the said writ, brought his certain action against this plaintiff in the *Circuit Court*, in the said county of *Albemarle*, to recover damages for the seizing and taking of the said goods and chattels under the said writ, and such proceedings were thereupon had in the said action, that the said *Samuel Short* afterward, to wit, on the *fifth* day of *April*, 1897, before the said *Circuit Court*, at *Charlottesville*, by the consideration and judgment of the said court, recovered against the said plaintiff a large sum of money, to wit, the sum of *five hundred* dollars, as and for the value of the said goods and chattels so seized by the plaintiff as aforesaid, and further the sum of *one hundred* dollars for costs and damages by the said *Samuel Short* about his said suit in

that behalf expended, making together the sum of *six hundred* dollars; and that afterward, to wit, on the *twentieth* day of *April*, 1897, at the said county of *Albemarle*, this plaintiff was forced and obliged to pay and then and there did pay to the said *Samuel Short* the said sum of *six hundred* dollars, and was also then and there forced and obliged to lay out and expend and did lay out and expend a certain other large sum of money, to wit, the sum of *fifty* dollars, in and about defending the said action so brought against him as aforesaid, in and about taking and pursuing other necessary proceedings made incumbent upon him in consequence of the said seizure and the said recovery, and was and is otherwise greatly injured; and the said plaintiff says that by reason of the said several premises he has been injured and has sustained damage to the amount of *seven hundred* dollars. And therefore he brings this suit.

Jeremiah Mason, p. q.

2. On Indemnity Bond.

Form No. 18564.¹

(Commencement as in Form No. 6951.)

John Lynch, sheriff of the county of *Henrico* (who sues for the benefit of *John Smith*), plaintiff, complains of *Richard Roe*, *Samuel Short* and *William West*, defendants, who have been summoned to answer of a plea that they render unto him, the said plaintiff, the sum of *five hundred* dollars, which to him they owe and from him unjustly detain. And thereupon the said plaintiff saith that heretofore, to wit, on the *first* day of *June*, 1898, at the county aforesaid, the said defendants, by their certain writing obligatory, sealed with their seals and now here to the court shown, the date whereof is the same day and year aforesaid, acknowledged themselves held and firmly bound unto the plaintiff in the just and full sum of *five hundred* dollars, to the payment whereof, well and truly to be made to the said plaintiff, his executors, administrators or assigns, they bound themselves, their heirs, executors and administrators, jointly and severally, firmly by said writing obligatory, with a condition thereto annexed and underwritten, in substance and to the effect following, that is to say, that whereas the said *Richard Roe* had sued out of the *Circuit Court of Henrico* county a writ of *feri facias* against the goods and chattels of *John Doe*, upon a judgment obtained in said court, which writ, with the legal costs attending the same, amounted to the sum of *two hundred* dollars, which writ was directed to the said plaintiff, sheriff as aforesaid. And whereas the said plaintiff, as sheriff by virtue of the said writ to him directed, had levied the same on *one* bay horse, and a doubt having arisen whether the said property was liable to such levy, the said plaintiff, as such sheriff as aforesaid, had applied to the said *Richard Roe* for an indemnifying bond according to the statute in such cases provided. If, therefore, the said defendants should indemnify the said plaintiff against all damages which he might sustain in consequence of the seizure or

sale of the property on which the said execution had been levied, and should pay to any claimant of such property all damages which he might sustain in consequence of such seizure or sale, and should also warrant and defend to any purchaser of the property such estate or interest therein as should be sold, then the said writing obligatory to be void; otherwise to remain in full force. And the said plaintiff avers that the said bay horse was thereupon then and there, to wit, on the day and year and at the place last mentioned by him, as sheriff as aforesaid, in virtue of the execution aforesaid, sold to satisfy the same, and that the said horse, at the time of the seizure and sale of him as aforesaid, under the execution aforesaid, was the lawful, rightful, bona fide and absolute property of the said *John Smith* and not the property of the said *Richard Roe*, and that the said *John Smith*, by the seizure and sale of the said horse as aforesaid, hath sustained great damage, to wit, to the value of *five hundred* dollars. And the plaintiff, protesting that the said defendants, or any or either of them, have not in anything performed or fulfilled the said condition of their said writing obligatory, further avers that the said defendants, or any or either of them, although often thereto requested, have not paid or satisfied the said *John Smith* the damages sustained by him in consequence of the seizure and sale of said horse aforesaid, or any part thereof, but have hitherto wholly refused and still do neglect and refuse so to do. By means whereof, and by virtue of the act of assembly in such cases made and provided, an action hath accrued to the plaintiff to demand and have of the said defendants the said sum of *five hundred* dollars. Yet the said defendants, or any or either of them, although often thereto requested, the said sum of *five hundred* dollars to the plaintiff have not paid, but the same to pay have hitherto refused and still do refuse, to the damage of the plaintiff *five hundred* dollars. And therefore he sues.

Jeremiah Mason, p. q.

Form No. 18565.¹

(Title of court and cause as in Form No. 5936.)

The plaintiff for his complaint in this action complains and alleges —

I.

That during all the times hereinafter mentioned the plaintiff was and still is the duly qualified and acting sheriff of *Lewis County, State of Washington*.

II.

That on the *24th* day of *June, 1891*, the defendant *J. V. O'Loughlin* had commenced an action in the *Superior Court* of *Lewis County, State of Washington*, against one *George W. Hunt*, and had procured and caused to be issued from said *Superior Court* a writ of attachment against the said *George W. Hunt*, which writ of attachment was by said *J. V. O'Loughlin* placed in hands of this plaintiff as sheriff aforesaid, and this plaintiff, by virtue of said writ of attachment and by direc-

1. This complaint is copied from the Wash. 260. A judgment for plaintiff records in *Barnett v. O'Loughlin*, 8 was affirmed.

tion of said defendant *J. V. O'Loughlin*, levied upon and seized as the property of the said *George W. Hunt* the following described personal property, to-wit: 94 boxes of Judson powder, 102 boxes of giant powder, one case of giant caps, and 6,000 feet of fuse, which said personal property was claimed from this plaintiff on the 6th day of August, 1891, by *Edward W. Dixon* as his property.

III.

That on the 25th day of August, 1891, in consideration that the plaintiff retain and keep said property so levied upon in his possession under said writ of attachment, the defendant *J. V. O'Loughlin* and *J. T. Laraway* and *Patrick Fowler*, since deceased, made, executed and delivered to the plaintiff their certain bond of indemnity, a copy of which is hereto attached, marked "Exhibit A," and made a part of this complaint, and by said bond the said *J. V. O'Loughlin*, *John T. Laraway* and *Patrick Fowler* bound themselves unto the plaintiff, as sheriff of *Lewis County, State of Washington*, in the sum of \$3,000.00, and for the payment of said sum they bound themselves, their heirs, executors and administrators, jointly and severally, and contracted and agreed that if the said *J. V. O'Loughlin* should indemnify the said *John W. Barnett* against all damages and costs which he might sustain in consequence of the seizure and sale of the said property under and by virtue of said attachment, and pay and satisfy to the said *Edward W. Dixon* all damages which he might sustain in consequence of said seizure and sale, then said bond to be void; otherwise to remain in full force and effect.

IV.

That the said bond and the conditions thereof were accepted and approved by this plaintiff, as sheriff aforesaid, and the said personal property so levied upon as aforesaid kept and retained in his possession under said writ, and was afterward, to wit, on April 22d, 1892, at *Chehalis* in said county, sold by the plaintiff as sheriff, by and under direction of the defendants herein and the attorneys for *J. V. O'Loughlin*, in the action against *George W. Hunt* to *L. J. Newberry* at private sale for the full sum and the price of \$619.55, which was the highest and best price that could be obtained for the same; that the sum so realized from the sale of said property was applied to the payment of the costs and expenses of levying upon and attaching said property and the expenses connected with watching, caring for and handling the same, which expenses amounted to the sum of \$619.50.

V.

That thereafter, to wit, on or about the 8th day of August, 1891, the said *Edward W. Dixon* commenced an action in the *Superior Court of Lewis County, State of Washington*, to recover damages from this plaintiff in the sum of one thousand seven hundred and thirty-four dollars, the alleged value of the said 94 boxes of Judson powder, 102 boxes of giant powder, one case of giant caps, and 6,000 feet of fuse, the same property described in said bond of indemnity so delivered to the plaintiff by said *J. V. O'Loughlin*, *J. T. Laraway* and *Patrick Fowler* on August 25th, 1891.

VI.

That the said *J. V. O'Loughlin*, *J. T. Laraway* and *Patrick Fowler* had actual knowledge that said action had been commenced by said *Dixon* against the plaintiff.

VII.

That such proceedings were thereafter had in said action that on the first day of *June*, 1892, final judgment, entered by direction of the *Supreme Court* of the State of *Washington*, was duly rendered by the *Superior Court* of *Lewis County*, State of *Washington*, for the sum of one thousand seven hundred and forty-four dollars and fifty-six cents (\$1,744.56), together with \$63.95, his costs on appeal, and the further sum of \$53.75, costs of said *Superior Court*, in favor of said *Edward W. Dixon* and against this plaintiff, and it was further provided that the amounts aforesaid should bear interest from *June 1st*, 1892, at ten per cent. per annum.

VIII.

That neither the said *J. V. O'Loughlin*, *John T. Laraway* or the said *Patrick Fowler*, or other person or party for them or on their behalf, has paid or satisfied to the said *Edward W. Dixon* the damages he sustained or the judgment so rendered against this plaintiff as aforesaid, nor have they indemnified the plaintiff against all or any damages and costs which he may or has sustained in consequence of the seizure and sale of the said property under and by virtue of said attachment, so caused to be issued in the suit wherein said *J. V. O'Loughlin* was plaintiff and said *George W. Hunt* was defendant.

IX.

That since this action was commenced, in consequence of the neglect and refusal to pay the damages sustained by said *Edward W. Nixon* or to pay or cause to be satisfied the judgment so as aforesaid rendered in favor of said *Edward W. Nixon* and against the plaintiff, this plaintiff has been obliged to pay and did pay, in order to satisfy said judgment, the following sums, to wit, \$750.00 on *November 5th* and \$1,201.50 on *December 15th*, 1892, which sums so paid by the plaintiff paid the amount actually due on said judgment with interest and costs, and on said *15th day of December*, 1892, said judgment was so paid in full and was thereupon cancelled and satisfied of record in the records of said *Superior Court* for *Lewis County*, State of *Washington*.

X.

That the defendant *J. V. O'Loughlin* is not a resident of the State of *Washington*, but at the time said bond so given to plaintiff was executed, *August 25th*, 1891, he had and owned several valuable tracts of real estate in *Lewis County*, State of *Washington*, which he has since disposed of in part with intent to defraud his creditors and particularly this plaintiff, but he has still some real estate in said *Lewis County* subject to the jurisdiction of this court.

XI.

That *Patrick Fowler*, one of the securities on said bond, so delivered to the plaintiff on *August 25th*, 1891, died in *Lewis County*, *Washing-*

ton, on or about *January 19th, 1892*, leaving an estate consisting of real estate and personal property in said *Lewis County*, and on the *9th day of May, 1892*, *Henry Hanson* was, by order of the *Superior Court of Lewis County, State of Washington*, duly appointed administrator of the estate of *Patrick Fowler* and had fully qualified, but afterward resigned and was discharged, and is not acting as the administrator of said *Patrick Fowler's* estate, and there is not at this time any administrator of his estate, and the same has never been administered upon, and there is no person to whom the claim of the plaintiff as against said *Patrick Fowler* can be presented.

Wherefore the plaintiff asks that such proceedings be had by or under direction of the court as will result in the appointment of an administrator upon the estate of *Patrick Fowler*; that the plaintiff have judgment against the defendants *J. T. Laraway* and *J. V. O'Loughlin* for the sum of \$750.00, with interest thereon from *November 5th, 1892*, and the sum of \$1,201, with interest from *December 15th, 1892*, at ten per cent. per annum; that said administrator of *Patrick Fowler* pay the amount ascertained to be due on said bond in due course of administration.

Reynolds & Stewart, Attorneys for the Plaintiff.

State of *Washington*, County of *Lewis*, ss.

John W. Barnett, having been first duly sworn, says: That he is the plaintiff in the above entitled action, that he has heard the foregoing complaint read, knows the contents thereof and believes the same to be true.

J. W. Barnett.

Subscribed and sworn to before me this *18th day of March, 1893*.

W. A. Reynolds, Notary Public,
Residing at *Chehalis, Lewis County, Washington*.

II. PROCEEDINGS AGAINST.

1. By Action.

a. Complaint, Declaration or Petition.

(1) AGAINST SHERIFF.¹

1. Requisites of Complaint, Declaration or Petition, Generally.—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

The plaintiff must set forth every fact necessary to enable him to recover. *Figueira v. Pyatt*, 88 Ill. 402; *State v. Bacon*, 24 Mo. App. 403; *Mills v. Kennedy*, 1 Bailey L. (S. Car.) 17; *Loomis v. Wheeler*, 18 Wis. 524.

Alternative Pleading.—In *Com. v. Abell*, 6 J. J. Marsh. (Ky.) 476, it was held that a declaration which averred that the defendant levied on a female slave and "had either converted her

to his own use or negligently suffered her to escape" is bad as being in the alternative.

Trespass.—In an action against a sheriff in his individual capacity for a trespass committed by himself or his deputy, the official character of the defendant need not be stated. *Hirsch v. Rand*, 39 Cal. 315; *Poinsett v. Taylor*, 6 Cal. 78; *Dennis v. Snell*, 54 Barb. (N. Y.) 411; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Stillman v. Squire*, 1 Den. (N. Y.) 327; *Burchett v. Purdy*, 2 Okla. 391; *Drake v. Paulhamus*, 66 Fed. Rep. 895.

Where the declaration is that the alleged trespass was committed by the sheriff, the averment will be supported

(a) For Default of Deputy.¹

aa. FAILURE TO SERVE AND RETURN AN EXECUTION.

Form No. 18566.³

(Oliver's Prec. (2d ed.) 431.)

(Commencing as in Form No. 18575, and continuing down to *) recovered judgment by the names and additions of *John Doe* and *Richard Roe*, both of *Portland*, in the county of *Cumberland*, tanners, against *William West*, of *Portland*, in the county of *Cumberland*, trader, for the sum of *five hundred* dollars damages and *thirty* dollars costs of suit, by him in that behalf expended; and the said plaintiffs, at said *Portland*, on the *tenth* day of *June*, 1898, purchased out of the clerk's office of our same court our writ of execution upon the same judgment, directed to the sheriff of our said county of *Cumberland*, or his deputy, wherein we commanded them severally, that of the goods, chattels or lands of the said *William West*, within their precinct, they should cause to be paid and satisfied to the said plaintiffs the sum of *five hundred* dollars damages and *thirty* dollars costs, and *twenty-five* cents more for our said writ of execution on the same judgment; and the said sheriff and his deputy, in and by the said writ, were severally commanded that they should, for want of goods, chattels or land of the said *William West*, to be by him shown unto them or found within their precinct, to the acceptance of the said plaintiffs to satisfy the sums aforesaid, take the body of the said *William West*, and him commit unto either of the jails in our said county of *Cumberland*, and to be there detained in their custody, until he paid said sums with their fees, or should be otherwise discharged; and the said sheriff and his deputy were therein severally commanded to make return of the same writ of execution, with their doings therein, into the clerk's office of our said *Supreme Judicial* Court within *sixty* days next following the date of the same writ; and the plaintiffs aver, that the said *John Lynch*, on the said *tenth* day of *June*, 1898, was, and long before was, and ever since has been, sheriff of our said county of *Cumberland*, and in his said capacity was liable for all the malfeasance and misfeasance of his deputies; and the said plaintiffs at (*stating place*), on (*stating time*), delivered the

by proof of the commission of the trespass by the sheriff or his deputy. *Pratt v. Bunker*, 45 Me. 569; *Grinnell v. Phillips*, 1 Mass. 530.

Refusal to Give Copy of Process. — In an action to recover a penalty imposed by statute for neglecting or refusing to give a person a copy of the process by virtue of which he is arrested, the declaration must show that the officer had in his hands process or a warrant for detaining the prisoner at the time of the demand for a copy. *McMahan v. Edgerton*, 34 Vt. 77.

Damage — Generally. — Where the complaint shows that no damage has

resulted or can result, no recovery can be had. *Kendall v. Clark*, 10 Cal. 17.

Special Damage. — In an action to recover special damage arising from the act complained of, the complaint must set out the facts showing the special damage. *Knight v. Fair*, 12 Cal. 296; *Conway v. Magill*, 53 Neb. 370.

1. Default of Deputy. — In an action against a sheriff for the default of his deputy, the declaration must allege that the defendant was a sheriff. *Low v. Tilton*, 19 N. H. 271.

2. See, generally, *supra*, note 1, p. 112.

same writ of execution to *John Smith*, of said *Portland*, who then was, and ever since has been, a deputy sheriff of the said *John Lynch*, duly and legally qualified, and for whose conduct in the said office of deputy sheriff the said *John Lynch* was answerable, for him, the said *John Smith*, to serve, execute and return the same, according to our command therein given; now the plaintiffs aver, that the said *John Smith*, neglecting his duty in his said office of deputy sheriff, as aforesaid, totally neglected to serve, execute and return the same writ of execution, according to our command therein given (except that he did serve the same for and receive thereon the sum of *fifty* dollars and the sum of *eighty* dollars), by means whereof the said plaintiffs have totally lost the benefit of their said judgment for the sums for which the said execution issued (excepting the two sums last above stated), in having lost their right to obtain an alias writ of execution to satisfy their said judgment, to the damage of the plaintiffs *seven hundred* dollars, which shall then and there be made to appear, with other due damages, and have you (*concluding as in Form No. 6940*).

bb. FAILURE TO ARREST DEBTOR AND TO ATTACH HIS GOODS ON MESNE PROCESS.

Form No. 18567.¹

(*Oliver's Prec. (2d ed.) 440.*)

(*Commencing as in Form No. 6940*) for that whereas at *Portland*, in said county of *Cumberland*, on (*stating time*), one *Richard Roe*, by his note under his hand, for value received, promised the plaintiff to pay him or his order *five hundred* dollars on demand, with lawful interest till paid; and afterwards, on (*stating time*), the contents of the said note being unpaid, though the said *Richard Roe* was before duly requested, the plaintiff, for the recovery of his due damages for the breach of that promise, purchased out of the office of the clerk of our *Supreme Judicial* Court for said county our writ of attachment, in due form as by the law is required, directed to the sheriff of said county of *Cumberland*, or his deputy, commanding them, among other things, to attach the goods and estate of the said *Richard Roe* to the value (*in common form*) to answer to the said *John Doe* upon his declaration therein at large set forth, and to have the same writ, with their doings thereon, at the same court, as by the record of the same writ, in the same court remaining, more fully appears. And afterwards, to wit, on (*stating time*), at (*stating place*), the said *John Doe* delivered the same writ to one *John Smith*, then and ever since a deputy sheriff for the same county, duly authorized and qualified under the said *John Lynch*, who then was, and ever since has been, sheriff of our said county, and then and there was, and still is, by law, answerable for the neglect of the said *John Smith*, his deputy aforesaid, to be by him, the said *John Smith*, duly executed, served and returned, according to the precept thereof; and afterwards, on the same day, at said *Portland*, the said *John Smith*, being possessed of the same writ, was present and in company with the said *Richard*

1. See, generally, *supra*, note 1, p. 112.

Roe and could have attached his body; yet the said *John Smith*, regardless and negligent of his duty in this particular, did then and there utterly refuse and neglect to attach the body of the said *Richard Roe* as he might have done; neither did the said *John Smith*, at any time, by force of the same writ, attach the goods of the same *Richard Roe* to the value of *eight hundred* dollars as he was therein commanded; but thereafterwards, on the same day, attached a chair of no value, as the estate of the said *Richard Roe*, and at the same *Supreme Judicial Court* returned the same writ, and thereon, among other things, falsely returned that he could not take the body of the defendant (meaning the said *Richard Roe*), and that he had attached a chair as his estate, being all he could find; by reason of which neglect and misdoing of the said *John Smith* the said *John Doe* hath altogether lost the aforesaid sum of *five hundred* dollars, together with the lawful interest therefor, and such other due damages as he might have recovered for the payment thereof, and his lawful costs of this suit, to the damage (concluding as in *Form No. 6940*).

cc. FAILURE TO ARREST EXECUTION DEBTOR.

Form No. 18568.¹

(*Oliver's Prec.* (2d ed.) 439.)

(Commencing as in *Form No. 18575*, and continuing down to *) recovered judgment against one *Richard Roe*, of *Portland*, in said county of *Cumberland*, for the sum of *five hundred* dollars damages, and *thirty* dollars costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, to wit, on (*stating time*), the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of *Cumberland* or his deputy, commanding them, among other things, of the goods, chattels or lands of the said *Richard Roe*, within their precinct, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums, with *twenty-five* cents for our said writ of execution; and for want of goods, chattels or lands of the said *Richard Roe*, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said *Richard Roe* and him commit unto our jail in *Portland*, and him detain in custody until he should pay the full sums above mentioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, the creditor, or otherwise by order of law; and to make return of our said writ of execution, with their doings thereon, into the clerk's office of our said *Supreme Judicial Court* to be holden at *Portland*, on (*stating time*); and the plaintiff avers that on (*stating time*), and long before, the said *John Lynch* was, and ever since has been, the duly qualified sheriff of our said county of *Cumberland*, and afterwards, to wit, on the same day, at *Portland*, the plaintiff delivered our said writ of execution to one *John Smith*, of said *Portland*, then and ever since one of the

1. See, generally, *supra*, note 1, p. 112.

sheriff's deputies for our said county of *Cumberland*, and for whose doings in his said office the said sheriff is answerable by law, to be duly executed; and requested the said *John Smith* to serve, execute and return the same according to the precept thereof. And the said *John Smith* then and there received the same of the said plaintiff, to be served, executed and returned according to the precept thereof. And afterwards, before the return of said writ, to wit, on (*stating time*), at (*stating place*), the said *Richard Roe* was in the presence of the said *John Smith*, yet the said *John Smith*, in no wise regarding the duty of his said office, but contriving and fraudulently intending to deprive the plaintiff of his proper remedy to obtain satisfaction and payment of the aforesaid sums, amounting to (*stating amount*), did then and there wilfully refuse and neglect to take the body of the said *Richard Roe* according to the command of our said writ of execution, though the said *John Smith* might then and there easily have taken or arrested the said *Richard Roe*; nor hath the said *John Smith* at any time since taken or arrested the said *Richard Roe* upon our writ of execution, or in any wise satisfied the plaintiff for the sums aforesaid. And the said *Richard Roe* hath, ever since the day of the return of the said writ, absconded and escaped into places altogether unknown; so that the plaintiff hath, by means of the said *John Smith's* wilful neglect of his duty aforesaid, totally lost all benefit of the judgment and execution aforesaid, to the damage (*concluding as in Form No. 6940*).

dd. FAILURE TO RETURN ALIAS EXECUTION AND NOT PAYING OVER TO PLAINTIFF.

Form No. 18569.¹

(*Oliver's Prec. (2d ed.) 438.*)

(*Commencing as in Form No. 18575, and continuing down to **) recovered judgment against one *Richard Roe*, of *Portland*, for the sum of *five hundred* dollars damages, and *thirty* dollars costs of the same suit, as by the record thereof, in the same court remaining, appears; and afterwards, to wit, on (*stating time*), the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of *Cumberland*, or his deputy, commanding them, among other things, that of the goods, chattels or lands of the said *Richard Roe*, within their precinct, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums, with *twenty-five* cents for our said writ of execution; and for want of goods, chattels or lands of the said *Richard Roe*, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said *Richard Roe*, and him commit unto our jail in *Portland*, until he should pay the full sums above mentioned, with the said sheriff's or his deputy's fees, and that he should be discharged by the plaintiff, the creditor, or otherwise, by order of law; and to make return of our said writ of execution, with their doings thereon, into the clerk's office of our said *Supreme Judicial Court* then next to be holden on (*stating time*), at (*stating place*), within and

1. See, generally, *supra*, note 1, p. 112.

for our said county of *Cumberland*. And the plaintiff avers that on the said (*stating time*), the said *John Lynch* was, and ever since has been, the duly qualified sheriff of our said county of *Cumberland*. And afterwards, to wit, on the same day, at said *Portland*, the plaintiff delivered our said writ of execution to one *John Smith*, of said *Portland*, then and ever since one of said sheriff's deputies for our said county of *Cumberland*, and for whose doings in his said office the said sheriff is answerable by law, to be duly executed; and requested the said *John Smith* to serve, execute and return the same, according to the precept thereof; and the said *John Smith* then and there received the same of the said plaintiff, to be served, executed and returned, according to the precept thereof. And afterwards, before the return of said writ, to wit, on (*stating time*), at (*stating place*), the said *John Smith* received of the said *Richard Roe* fifty dollars, in part satisfaction of said execution; and afterwards, to wit, on (*stating time*), returned the same execution into our said court, to which the same was returnable as aforesaid, satisfied in part, to wit, the sum of *two hundred* dollars. And afterwards, to wit, on (*stating time*), at (*stating place*), the plaintiff took out and delivered to the said *John Smith* an alias execution upon said judgment, for the remainder then due thereon, in the same form with the first, directed to the same officers, and containing the like commands with the first, as to levying the same, and returnable into said court, on (*stating time*), at (*stating place*); by virtue of which the said *John Smith* afterwards, to wit, on (*stating time*), at (*stating place*), received of the said *Richard Roe* the further sum of *one hundred* dollars, in part of said alias execution, and well might and ought to have served the said execution on the said *Richard Roe* for the remainder, according to the precept of said writ; yet the said *John Smith* then and there neglected so to do; nor did he return the last mentioned execution, according to the precept thereof; nor has he ever paid said sums, by him received on said executions, to said plaintiff, though requested, at (*stating place*), on (*stating time*), as by law and the duty of his office he might and ought to have done, but hath neglected and refused, and still neglects and refuses, to pay them; and so the said plaintiff hath wholly lost the benefit of said judgment and executions, for recovering the sums aforesaid, to the damage (*concluding as in Form No. 6940*).

ee. FALSE RETURN ON EXECUTION.

(aa) *No Part Satisfied by Virtue of Creditor's Order.*

Form No. 18570.¹

(Oliver's Prec. (2d ed.) 433.)

(*Commencing as in Form No. 18575, and continuing down to **) recovered judgment against one *Richard Roe*, of said *Portland*, for the sum of *five hundred* dollars, damages, and *thirty* dollars, costs of suit, as by the record in our said court appears, and on (*stating time*), sued out our writ of execution thereon, in due form of law,

1. See, generally, *supra*, note 1, p. 112.

directed to the sheriff of our said county of *Cumberland*, and his deputy, and returnable to our *Supreme Judicial Court*, then next to be holden at *Portland*, within and for said county of *Cumberland*. And the plaintiff avers that on (*stating time*), the said *John Lynch* was, and ever since has been, and is now, the duly qualified sheriff of said county of *Cumberland*; and on (*stating time*), the said plaintiff delivered our said writ of execution to one *John Smith*, who then was, and until after the day when our said writ was returnable continued to be, one of the said *John Lynch's* deputy sheriffs of our said county of *Cumberland*, to be by the said *John Smith* duly executed and returned, according to our command therein given; yet neither the said *John Smith* nor the said *John Lynch*, nor any of said *John Lynch's* deputies, for whose defaults he is answerable, would execute our said writ, nor make any lawful return thereof to our said court, where the same was returnable, according to our command therein given; but the same *John Smith* kept the same writ until (*stating time*), and then returned it into the clerk's office of our said court, with this false return indorsed thereon, viz:

"*Cumberland, ss. June 10, 1898.*

I return this execution in no part satisfied, by virtue of the creditor's order.

John Smith, Deputy Sheriff."

Now the plaintiff in fact saith that he never gave any such order, and that he has not been satisfied for his debt aforesaid, but the same still remains due and unpaid; and by means of the said *John Smith's* doings aforesaid the said plaintiff has lost his debt and costs aforesaid, to the damage (*concluding as in Form No. 6940*).

(bb) *Satisfied Only in Part, After Receipt of Whole Debt and Costs.*

Form No. 18571.¹

(*Oliver's Prec. (2d ed.) 432.*)

(*Commencing as in Form No. 18575, and continuing down to **) recovered a certain judgment against one *William West*, of said *Portland*, for the sum of *five hundred* dollars damages, and the sum of *thirty* dollars costs of suit, by him in that behalf expended; and the said plaintiffs, at (*stating place*), on (*stating time*), purchased out of the clerk's office of our said court their writ of execution upon their said mentioned judgment, directed to the sheriff of our said county of *Cumberland*, or his deputy, wherein we commanded them severally, that the goods, chattels, or lands, of the said *Richard Roe*, within their precinct, they should cause to be paid and satisfied to the said plaintiffs the sums of *five hundred* dollars damages and *thirty* dollars costs, and *twenty-five* cents more for our said writ of execution on our said judgment mentioned; and the said sheriff and his deputy were therein commanded, that they should, for want of goods, or lands, of him, the said *William West*, to be by him shown unto them or found within their precinct, to the acceptance of the said plaintiffs, to satisfy and pay the sums aforesaid, take the body of

1. See, generally, *supra*, note 1, p. 112.

the said *William West*, and him commit unto either of the jails in our said county of *Cumberland*, to be there detained in their custody until he paid said sums with their fees, or should be otherwise discharged; and the said sheriff and his deputy were therein severally commanded to make return of the same writ of execution, and the aforesaid mentioned judgment, with their doings thereon, into the clerk's office of our said *Supreme Judicial Court*, within *sixty* days next following the date of said writ of execution. And the plaintiffs aver, that the said *John Lynch*, on (*stating time*), was, and long before was, and ever since has been, sheriff of our said county of *Cumberland*, and in his said capacity was liable for all malfeasance and misfeasance of his deputies. And the said plaintiffs, at (*stating place*), on (*stating time*), delivered our aforesaid mentioned writ of execution to *John Smith*, of said *Portland*, who then was, and ever since has been, a deputy sheriff of said *John Lynch*, duly and legally qualified, and for whose conduct in the said office of deputy sheriff the said *John Lynch* was answerable for him, the said *John Smith*, to serve and execute and return the same, according to our command therein given: Now the plaintiffs aver, that the said *John Smith*, neglecting his duty in the said office of deputy sheriff, did receive full and complete payment of the sums required or satisfied in said execution, yet did not return the same according to the command therein given, but made the following false return, in the words following, viz: "I return this execution satisfied for the above sums of *two hundred* dollars in part for debt, and *thirty-five* dollars in full for costs of this execution. *John Lynch*, deputy sheriff." All which is to the damage of (*concluding as in Form No. 6940*).

ff. RELEASING GOODS ATTACHED.¹

Form No. 18572.²

(Conn. Prac. Act, p. 161, No. 285.)

(Commencement as in Form No. 5912.)

1. The defendant is, and for more than *two* years last past has been, sheriff of *Hartford* county.

2. *John Stiles* is, and for more than *two* years last past has been, deputy sheriff of *Hartford* county, appointed and retained in office by the defendant.

3. On *September 12th*, 1878, the plaintiff delivered to said *John Stiles* a writ of attachment duly issued in a civil action wherein this plaintiff was plaintiff, and *Richard Roe*, of *Hartford*, was defendant,

1. Requisites of Complaint, Declaration or Petition, Generally.—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Failure to Keep Property Attached.—In an action on a sheriff's bond to recover damages for loss of the plaintiff's judgment by a failure of the sheriff to keep safely property attached to satisfy

the judgment, if the complaint alleges the neglect and sets forth the amount of the judgment and the value of the attached property, it is sufficient, although it does not allege that the plaintiff lost his debt by such neglect of the officer. *Cotton v. Atkinson*, 53 Ark. 98.

2. See, generally, *supra*, note 1, this page.

demanding \$300 damages, returnable to the *October Term*, 1878, of the Court of *Common Pleas* for *Hartford* county, and directed to said sheriff and his deputy.

4. Said *John Stiles*, by virtue of said writ, attached a carriage and two horses of said *Richard Roe*, of the value of \$450, and served and returned said writ according to law.

5. Said writ and action were duly entered at said *October Term* of the Court of *Common Pleas*, and the plaintiff thereupon recovered judgment against said *Richard Roe* for \$250 damages and \$40 costs of suit.

6. Upon said judgment the plaintiff obtained a writ of execution, duly issued, dated *October 20th*, 1878, returnable in *sixty* days, and directed to said sheriff, his deputy, or either constable of the town of *Hartford*.

7. Afterwards the plaintiff delivered said writ of execution to *John Doe*, a constable of the town of *Hartford*, who, by virtue thereof, on *November 2d*, 1878, within *sixty* days after rendition of said judgment, made demand of said *Richard Roe* for goods and chattels on which to levy said execution, but none were shown him, nor could he find any within his precincts.

8. Afterwards, and within *sixty* days after said judgment, said *John Doe*, by virtue of said execution, made demand of said *John Stiles* of the goods and estates of said *Richard Roe* by him attached as aforesaid

9. Said *John Stiles*, in violation of his duty, did not keep said goods, by him attached, *sixty* days after judgment rendered as aforesaid, but released and discharged them from attachment, and did not deliver them to said *John Doe*, when demanded by him as aforesaid, but refused to deliver the same.

10. Said judgment is in full force, and has never been satisfied. The plaintiff claims \$350 damages.

(Concluding as in Form No. 5912.)

Form No. 18573.¹

(Oliver's Prec. (2d ed.) 445.)

(Commencing as in Form No. 6940) for that one *Richard Roe* was indebted to the plaintiff in the sum of *five hundred* dollars for certain goods before that time sold and delivered to said *Richard Roe* at his request; and the plaintiff, in order speedily to recover said debt, on (*stating time*), sued out, in due form of law, our writ of attachment against the said *Richard Roe*, returnable to our *Supreme Judicial Court*, then next to be holden at (*stating place*), on (*stating time*), within and for the county of *Cumberland*, and directed to the sheriff of our said county, or his deputy, to serve and return the same according to law; and the plaintiff avers that on (*stating time*), the said *John Lynch* was, and ever since has been, and now is, the duly qualified sheriff of said county of *Cumberland*. And afterwards, on (*stating time*), the plaintiff delivered the same to one *John Smith*, then and still a deputy sheriff of the said *John Lynch*, sheriff of said

1. See, generally, *supra*, note 1, p. 112.

county, as aforesaid, who, by virtue thereof, attached (*describe the goods*), all of the value of *eight hundred* dollars, the estate of the debtor aforesaid, and served and returned the said writ accordingly to the said *Supreme Judicial Court*, to which the same was returnable as aforesaid; at which said court the plaintiff entered his action aforesaid, and thereupon, by the consideration of our justices of the same court, recovered judgment for the said sum of *five hundred* dollars, and *thirty* dollars costs of suit, as by the record in our said court appears; yet neither the said *John Lynch*, nor any of his deputies, for whose defaults he is answerable, did retain and keep the said goods for the space of *thirty* days after the judgment aforesaid was rendered, to the end that the plaintiff might take them in execution to satisfy said judgment, being not otherwise satisfied within that time; but within the said *thirty* days they released the said goods, and discharged them from the arrest aforesaid, against the law in that case provided. And the plaintiff avers that the same judgment is still unsatisfied; whereby the plaintiff has lost his whole debt and costs aforesaid, to the damage (*concluding as in Form No. 6940*).

Form No. 18574.¹

(2 Rev. Swift's Dig. 540.)

(*Commencement as in Form No. 10663*) for that whereas *Richard Roe*, of *Woodstock*, was indebted to him by note in the sum of *three hundred* dollars, and the plaintiff, on the *first* day of *September*, 1899, prayed out a writ of attachment of that date from *Abraham Kent*, justice of the peace, in due form of law, against the said *Richard Roe*, returnable to the *County Court*, to be holden at *Woodstock*, in and for the county of *Windsor*, on the *second Tuesday* of *October*, 1899, and directed to the sheriff of the county of *Windsor*, or his deputy, to serve and return the same according to law; and afterwards, on the *second* day of *September*, 1899, delivered the same to *John Lynch*, then and still a deputy sheriff of the defendant, who then was and still is sheriff of said county, who, by virtue thereof, attached (*describe the goods*), the estate of the said *Richard Roe*, and of the value of *four hundred* dollars, and served and returned the writ accordingly to the said *County Court*, to which the same was returnable as aforesaid, at which court the plaintiff entered his action aforesaid, and thereupon recovered judgment against the said *Richard Roe* for the sum of *three hundred and ten* dollars debt, and for the sum of *thirty* dollars for the costs of suit, and prayed out his writ of execution dated the *tenth* day of *November*, 1899, signed by *Calvin Clark*, clerk of said court, returnable in *sixty* days, and directed to the sheriff of said county, his deputy, or to either constable of the town of *Woodstock*, in said county, all in the form prescribed by law; and the plaintiff delivered said execution to *John Smith*, constable of said town of *Woodstock*, who, by virtue thereof, afterwards, on the *twentieth* day of *November*, 1899, at said *Woodstock*, within *sixty* days after the rendition of the judgment aforesaid, made demand of the said *Richard Roe*, for goods and chattels on which to levy said execution, but none

1. See, generally, *supra*, note 1, p. 112.

were shown unto him, nor could he find any within his precincts, whereupon he made demand of the said *John Lynch*, of the goods and estate of the said *Richard Roe* by him attached as aforesaid; but the said *John Lynch* did not retain and keep the said goods for the space of *sixty* days after said judgment was rendered as aforesaid, to the end that the plaintiff might take them in execution to satisfy the same, but released and discharged said goods from attachment, and did not deliver said goods to said *John Smith*, constable of said *Woodstock*, when demanded by him, by virtue of said execution, so that they might be taken and disposed of according to law, in satisfaction of said judgment and execution, but wholly refused to deliver the same; and the plaintiff says that said judgment is in full force, and has never been paid or satisfied, and by the neglect and misconduct of the said *John Lynch* he has wholly lost his said debt and cost, and that a right of action has accrued to him to recover the same of the defendant; and to recover the same, with cost, the plaintiff brings this suit.

Fail not (*concluding as in Form No. 10663*).

gg. SUFFERING A VOLUNTARY ESCAPE.

Form No. 18575.¹

(*Oliver's Prec. (2d ed.) 428.*)

(*Commencing as in Form No. 6940*) for that whereas the plaintiff, by the consideration of our justices of our *Supreme Judicial Court*, holden at *Portland*, on the *tenth* day of *May*, 1898, within and for our county of *Cumberland*,* recovered judgment against one *Richard Roe*, of *Portland*, for the sum of *five hundred* dollars damages, and *fifty* dollars costs of the same suit, as by the record thereof in the same court remaining appears; and afterwards, on the *first* day of *June*, 1898, the plaintiff sued out our writ of execution thereupon, in due form of law, directed to the sheriff of our said county of *Cumberland*, or his deputy, commanding them, among other things, that of the goods, chattels, or lands, of the said *Richard Roe*, within their precinct, to cause to be paid and satisfied unto the plaintiff, at the value thereof in money, the aforesaid sums, with *twenty-five* cents more for our said writ of execution; and for want of goods, chattels, or lands, of the said *Richard Roe* to be by him shown unto them, the said plaintiff or deputy, or found within their precinct, to the acceptance of the plaintiff, to satisfy the sums aforesaid, to take the body of the said *Richard Roe*, and him to commit unto our jail in *Portland*, in our said county of *Cumberland*, and to detain him in our said jail until he should pay the full sums above mentioned, with the said sheriff's or deputy's fees, or that he should be discharged by the plaintiff, the creditor, or otherwise by order of law. And the plaintiff avers that on (*stating time*), the said *John Lynch* was, and ever since has been, and is now, the duly qualified sheriff of said county of *Cumberland*. And afterwards, on said *first* day of *June*, at *Portland*, the plaintiff delivered the said writ of execution to one *Samuel*

1. See, generally, *supra*, note 1, p. 112.

Short, then and ever since one of the deputies of the said *John Lynch*, in and for our county of *Cumberland*, to be duly executed by him, the said *Samuel Short*. And thereafterwards, on the *third* day of *June*, 1898, by virtue of our said writ of execution, and for want of goods, chattels, or lands, of the said *Richard Roe*, by him shown, or to be found as aforesaid, the said *Samuel Short* took the body of the said *Richard Roe* and him had and detained in his custody for the space of *one* hour; and then the said *Samuel Short*, in no wise regarding the duty of his said office, freely and voluntarily suffered him, the said *Richard Roe*, to escape out of his custody, and go at large whither the said *Richard Roe* would, without the license and against the will of the plaintiff, the damage, costs and charges aforesaid being then unpaid and unsatisfied to the plaintiff; whereby an action hath by law accrued to the plaintiff to demand and have the aforesaid sums, amounting in the whole to *five hundred and fifty* dollars, of the said *John Lynch*, who by law is answerable for the laches and misdoings of the said *Samuel Short*, in the execution of his said office of deputy sheriff; yet the said defendant, although often requested, has not as yet paid the aforesaid sum of money above demanded, or any part thereof, to the plaintiff, but to pay the same the said defendant hath hitherto wholly refused, and still does refuse, to the damage (concluding as in *Form No. 6940*).

Form No. 18576.¹

(Oliver's Prec. (2d ed.) 437.)

(Commencing as in *Form No. 6940*) for that whereas the said plaintiff, by the consideration of the justices of the *Supreme Judicial* Court, held at *Portland*, within and for the said county of *Cumberland*, on the *tenth* day of *June*, 1898, recovered judgment against one *Richard Roe*, of *Portland*, in said county, *mariner*, for the sum of *five hundred* dollars damages, and *thirty* dollars costs of the same suit, as by the record thereof, in that court remaining, appears; and afterwards, viz, on the *first* day of *July*, 1898, the said plaintiff sued out a writ of execution thereupon, in due form of law, directed to the sheriff of the said county of *Cumberland*, or his deputy, commanding him, among other things, of the goods, chattels, or lands, of the said *Richard Roe*, within his precinct, to cause to be paid and satisfied unto the said plaintiff, at the value thereof in money, the aforesaid sums, with *twenty-five* cents more for the said writ of execution, and for want of goods, chattels, or lands, of the said *Richard Roe*, to be by him shown unto the said sheriff or his deputy, or found within their precinct, to the acceptance of the said plaintiff, to satisfy the sums aforesaid, to take the body of the said *Richard Roe*, and him commit unto the jail of said county of *Cumberland*, and to detain him in the said jail until he should pay the full sums above mentioned, with the fees of the said sheriff or his deputy, or be discharged by the said plaintiff, the creditor, or otherwise, by order of law, and to make return thereof into the said *Supreme Judicial* Court holden at (*stating place*), on (*stating time*), within and for said county of *Cumberland*.

1. See, generally, *supra*, note 1, p. 112.

And the plaintiff avers that on (*stating time*), the said *John Lynch* was, and ever since has been, and now is, the duly qualified sheriff of said county of *Cumberland*. And afterwards, to wit, on the *first* day of *July*, 1898, at said county, the said plaintiff delivered the said writ of execution unto *John Smith*, then one of the deputies of the said *John Lynch*, to be by the said *John Smith* duly executed and levied; and afterwards, on (*stating time*), the said *John Smith*, one of the deputies of the said *John Lynch* aforesaid, for want of goods, chattels, or lands, of the said *Richard Roe*, took his body and him had in custody, by virtue of the said writ; yet the said *John Smith* there- afterwards, viz, on the same day, not regarding his duty and the command of the said writ, but contriving to defraud the said plaintiff of the whole benefit of his said writ of execution and his judgment aforesaid, did wickedly and voluntarily suffer and permit the said *Richard Roe* to escape and go at large out of his said custody, without the consent of the said plaintiff, who remains wholly unsatisfied of his damages and costs aforesaid, so that by means of the said willful neglect and misconduct of the said *John Smith* the said plaintiff hath wholly lost all benefit of the judgment and execution aforesaid; to the damage of the said plaintiff, as he says, the sum of (*concluding as in Form No. 6940*).

(b) *For Escape of Judgment Debtor.*¹

1. **Escape—Generally.** — For an escape the plaintiff may proceed against the officer on his common-law liability or upon his statutory liability as bail. If the plaintiff proceed against the sheriff as bail, he must state the proceedings to and including the escape and allege that the defendant is bail, and demand the appropriate judgment. If the plaintiff prosecute for an escape, the complaint must set out the same matters, except that all allegations as to the character of the defendant as bail should be omitted as wholly irrelevant to the cause of action. *Smith v. Knapp*, 30 N. Y. 581.

In *Nehresheimer v. Bowe*, (C. Pl. Gen. T.) 3 Civ. Proc. (N. Y.) 368, the complaint, after setting forth the arrest of A, under an order of arrest in an action brought against A, alleged that, without being discharged upon bail and before bail had been furnished by A, he escaped from the sheriff, and that after the arrest and escape the sheriff served upon the plaintiff's attorneys a bail-bond, the sureties to which, upon its being excepted to, failed to justify. It was held that it was impossible to tell from the complaint whether the plaintiff sought to charge the sheriff as bail or to recover damages for an escape. If it was sought

to charge the sheriff as bail, the allegations of the complaint as to the escape were entirely irrelevant and redundant; and if it was sought to recover for an escape, the allegations in respect to the failure of the bail to justify were irrelevant and redundant.

On Mesne Process. — In *New York*, an action for escape may be maintained against a sheriff for an escape of a prisoner held under mesne process under the code, although at common law the sheriff might discharge the defendant from arrest without bail if he had him on the return day. *Cosgrove v. Bowe*, (C. Pl. Gen. T.) 2 Civ. Proc. (N. Y.) 61.

Consent of Officer. — The charge in a complaint, in an action for an escape, that the officer, against the will of the plaintiff, illegally suffered and permitted the judgment debtor to escape and go at large out of his custody, means merely that the officer did not prevent him from doing so. It does not necessarily import or involve the allegation that the officer actually consented to the escape or had any knowledge of it. *Toll v. Alvord*, 64 Barb. (N. Y.) 568. But it is immaterial whether the escape was through negligence or was voluntary on the part of the sheriff. An averment that the debtor was at large

aa. NEGLIGENT ESCAPE.¹Form No. 18577.²

(2 Rev. Swift's Dig. 539.)

(Commencement as in Form No. 10663) for that whereas at a County Court, holden at Woodstock, in and for the county of Windsor, on the second Tuesday of October, 1899, he, the plaintiff, recovered judgment in an action of trover against one Richard Roe, of Windsor, for the sum of five hundred dollars damages, and thirty dollars costs of suit, as by the record thereof appears, and the plaintiff prayed out a writ of execution thereon in due form of law, dated the tenth day of November, 1899, and signed by Calvin Clark, clerk of said court, and directed to the sheriff of the county of Windsor, or his deputy, and afterwards, on the tenth day of November, 1899, delivered the same writ of execution to the defendant, then and ever since sheriff of the county of Windsor, and keeper of the jail therein, to be by him executed according to the command and directions thereof; and the defendant afterwards duly took the body of said Richard Roe, by virtue of said execution, and him committed to the jail aforesaid, and afterwards made due return of said execution, as he was therein directed; and thereupon the defendant became by law obliged, and by said writ was commanded, to detain the said Richard Roe in his custody until he should pay the aforesaid sum of five hundred and thirty dollars, and the cost of levying said execution, or be discharged by order of the plaintiff. Now the

beyond the liberties is sufficient. *Dunford v. Weaver*, 84 N. Y. 445.

Damages.—The measure of damages in an action for an escape is the amount of the judgment. *Zenner v. Blessing*, (N. Y. City Ct. Gen. T.) 4 N. Y. Supp. 866; *Patterson v. Westervelt*, 17 Wend. (N. Y.) 543.

1. Precedent.—In *Swan v. Bridgeport*, 70 Conn. 143, the allegations of default of the sheriff were as follows:

"On the 17th day of September, 1894, the said Swan & Bushnell had a valid claim against one Edward Klaus, of Bridgeport, Connecticut, to the amount \$240, which said claim was of a nature that the body of said Klaus was liable to be attached therefor and have execution levied thereon to satisfy the same. On said day Swan & Bushnell, through their attorney, caused to be placed in the hands of said Dwight Thompson, a sheriff of said city of Bridgeport, a writ legally issued and signed, commanding him, the said sheriff, to attach to the amount of \$400 the goods or estate of said Klaus, and in want thereof his body; and the sheriff being unable to find any property of the said Klaus, did attach his body to respond to the demand of said writ and took said

body into his possession. Immediately thereafter, while the body of said Klaus was still in his possession, he, the said sheriff, negligently and carelessly permitted him, the said Klaus, to escape from his custody, and the said Klaus, by means of said carelessness and negligence of the sheriff, was enabled to so escape and did flee from said sheriff out of his jurisdiction and out of the State of Connecticut, where he has ever since remained. After said escape, said sheriff made no further efforts to serve said process, and did not otherwise serve the same than as stated, and did not return said writ to the court to which it was returnable. The said Klaus owned no property of any kind that can be taken to satisfy this claim of said Swan & Bushnell, and by his said escape from said sheriff, and by said misconduct and negligence of said sheriff as aforesaid described, the said Swan & Bushnell have lost their said claim and all chance to secure the same or to enforce payment thereof."

A judgment in favor of the plaintiff was affirmed.

2. See, generally, *supra*, note 1, p. 124.

plaintiff says that the said sums, or any part thereof, have never been paid, nor did he ever discharge said *Richard Roe* from said jail; yet the defendant did not there safely keep and detain the said *Richard Roe*, but did there so carelessly and negligently keep and detain him that by means of the carelessness and negligence of the defendant the said *Richard Roe* was suffered to escape, and on the *tenth* day of *December*, 1899, did escape out of said jail, and out of the custody of the defendant, and cannot now be found; by means whereof the defendant became liable in law to pay said damages and cost, amounting to the sum of *five hundred and thirty* dollars, to the plaintiff on demand. Nevertheless the plaintiff says that the defendant has never paid the same, though often requested and demanded, which is to his damage *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not (*concluding as in Form No. 10663*).

bb. VOLUNTARY.

(aa) *On Execution.*

aaa. IN GENERAL.

Form No. 18578.¹

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectively shows to this court:

1. That at the times hereinafter mentioned the defendant was sheriff of the county of *Suffolk*, in the state of *New York*.*

2. That on or about the *tenth* day of *April*, 1899, in an action brought in the *Supreme Court* of the state of *New York*, in the county of *Suffolk*, by this plaintiff against one *Richard Roe*, for unlawfully converting property (*or state other cause authorizing arrest*), this plaintiff recovered judgment duly given by said court against the said *Richard Roe* for *five hundred* dollars.

3. That † on or about the *twentieth* day of *April*, 1899, an execution against the property of the said *Richard Roe* was duly issued by this plaintiff on said judgment, directed and delivered to the sheriff of said county of *Suffolk*, in which county the said *Richard Roe* resided, which said execution was thereafter duly returned wholly unsatisfied (*or except as to the sum of three hundred dollars*).

4. That thereafter, on or about the *thirtieth* day of *April*, 1899, an execution against the person of the said *Richard Roe* was duly issued by this plaintiff on said judgment, and then directed and delivered to this defendant, as such sheriff, whereby this defendant was required to arrest the said *Richard Roe* and to commit him to the jail of said county of *Suffolk* until he should pay said judgment or be discharged according to law.

5. That thereafter this defendant, as such sheriff, arrested the said *Richard Roe* and committed him to jail pursuant to said execution, but in violation of his duty as such sheriff, has since, to wit, on or about the *tenth* day of *June*, 1899, without the consent of this plain-

1. See, generally, *supra*, note 1, p. 124.

tiff, permitted said *Richard Roe* to escape out of the custody of defendant and to go at large (or but since then, to wit, on or about the tenth day of June, 1899, the said *Richard Roe* went and was at large without the limits and boundaries of the liberties of said jail, without the assent of this plaintiff), to the damage of the plaintiff seven hundred dollars.

Wherefore (concluding as in Form No. 11457).

Form No. 18579.¹

(2 Rev. Swift's Dig. 538.)

(Commencement as in Form No. 10663) for that whereas at the County Court, holden at *Woodstock*, in and for the county of *Windsor*, on the second Tuesday of October, 1899, he, the plaintiff, recovered judgment in an action of trespass against *Richard Roe*, of *Windsor*, in said county of *Windsor*, for the sum of five hundred dollars damages, and thirty dollars costs of suit, as by the record thereof appears, and that he prayed out an execution thereon in due form of law dated the tenth day of November, 1899, signed by *Calvin Clark*, clerk of said court, directed to the sheriff of the said county of *Windsor*, or his deputy, returnable in sixty days from the date thereof, and on the tenth day of November, 1899, delivered the same to *John Lynch*, then and ever since a deputy sheriff under the defendant, who then was, and ever since has been, sheriff of said county and keeper of the jail in said county, to be executed according to law, by force of which the said *John Lynch*, afterwards and before the return of said writ, on the twentieth day of November, 1899, at said *Windsor*, for want of the goods or estate of the said *Richard Roe* sufficient to satisfy said writ of execution, took his body and committed him to the jail of said county and to the custody of the defendant, then and still keeper of said jail as aforesaid, and by force thereof the said *Richard Roe* was in the custody of the defendant as sheriff and keeper as aforesaid until the twentieth day of December, 1899, when the defendant wrongfully suffered the said *Richard Roe* to escape out of his custody and from said jail, and to go at large where he would, without the consent of the plaintiff, who then was, and still is, unsatisfied of his debt or cost, or any part thereof, but the whole now remains due and unpaid; whereby an action has accrued to the plaintiff to demand and recover of the defendant the aforesaid debt and costs, amounting to the sum of five hundred and thirty dollars; yet the defendant has never paid the same, though often requested and demanded, which is to the damage of the plaintiff eight hundred dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (concluding as in Form No. 10663).

bbb. ORDER OF ARREST PREVIOUSLY GRANTED AND EXECUTED.

Form No. 18580.¹

(Commencing as in Form No. 18578, and continuing down to *.)

2. That on or about the tenth day of April, 1899, in an action

1. See, generally, *supra*, note 1, p. 124.

brought in the *Supreme Court* of the state of *New York*, in the county of *Suffolk*, by this plaintiff against one *Richard Roe*, for (*state cause authorizing arrest*), an order of arrest was duly made by the Hon. *John Marshall*, one of the justices of the said court, whereby this defendant, as such sheriff, was required to arrest the said *Richard Roe* forthwith and hold him to bail in the sum of *one thousand* dollars; that thereafter, on or about the *eleventh* day of *April*, 1899, said order was duly delivered to this defendant, as such sheriff, to be executed; that thereafter this defendant, as such sheriff, arrested the said *Richard Roe* and committed him to jail pursuant to said order; that said order has not been vacated.

3. That thereafter and on or about the *tenth* day of *May*, 1899, judgment was duly given in said action by said court in favor of this plaintiff and against the said *Richard Roe* for the sum of *five hundred* dollars.

4. That thereafter (*concluding as in Form No. 18578, from †*).

cc. WHERE DEBTOR WAS ARRESTED ON ATTACHMENT PREVIOUSLY ISSUED AND SERVED.

Form No. 18581.¹

(Oliver's Prec. (2d ed.) 434.)

(*Commencing as in Form No. 6940*) for that whereas one *Richard Roe* was indebted to the plaintiff in the sum of *five hundred* dollars for goods before that time sold to the said *Richard Roe*, at his request; and the plaintiff, in order more speedily to recover his just debt aforesaid, on (*stating time*), at (*stating place*), purchased a writ of attachment, in due form of law, out of the clerk's office of our *Supreme Judicial Court* for the county of *Cumberland*, returnable at our said court then next to be holden at *Portland*, on (*stating time*), within and for said county of *Cumberland*, and to the sheriff of said county directed; and then and there delivered the same to the said *John Lynch*, who then was, and still is, sheriff of said county, for him to serve and return the same; by virtue of which the said *John Lynch* was commanded to attach (*Here recite the writ*). And afterwards, on (*stating time*), at (*stating place*), in pursuance of the same writ, the said *John Lynch*, sheriff as aforesaid, for want of goods or estate of the said *Richard Roe*, took the body of said *Richard Roe* and committed him to our jail in *Portland*, of which jail said *John Lynch* then was, and ever since hath been, keeper, and made true return of his said doings, according to his said precept, unto our said *Supreme Judicial Court*, holden at *Portland* on (*stating time*), within and for our said county of *Cumberland*, at which same court, to which the same was returnable as aforesaid, the plaintiff entered his action aforesaid; and thereupon, by the consideration of our justices of the same court, recovered against the said *Richard Roe* the sum of *five hundred* dollars damages, with costs of suit, taxed at *thirty* dollars, and afterwards, on (*stating time*), took out of the same office at (*stating place*) our writ of execution on the same judgment, in form by law prescribed, and directed to the sheriff of said county of *Cumberland*;

1. See, generally, *supra*, note 1, p. 124.

and then, at said *Portland*, being within *thirty* days after the judgment aforesaid was recovered, delivered the same to the said *John Lynch*, sheriff as aforesaid, to be by him levied and returned; by which same precept the said *John Lynch* was commanded (*as in the execution*); yet the said *John Lynch*, at said *Portland*, suffered the said *Richard Roe* to escape out of the jail as aforesaid and go at large, and returned the said execution entirely unsatisfied, without doing anything in pursuance thereof; by means whereof neither the said *Richard Roe*, nor his goods or estate, were ever since to be come at; and the plaintiff, by the said *John Lynch's* misconduct and laches as aforesaid, hath utterly lost his debt and costs aforesaid, to the damage (*concluding as in Form No. 6940*).

(bb) *On Mesne Process.*

Form No. 18582.¹

(2 Rev. Swift's Dig. 537.)

(*Commencement as in Form No. 10663*) for that whereas on the *tenth* day of *June*, 1899, a right of action had accrued to the plaintiff against one *Richard Roe*, of *Windsor*, in the county of *Windsor* and state of *Vermont*, to recover damages against the said *Richard Roe* for the unlawful taking and carrying away by the said *Richard Roe* of certain goods and chattels belonging to the plaintiff; and afterwards, on the *first* day of *September*, 1899, the plaintiff prayed out a writ of attachment of that date from *Abraham Kent*, a justice of the peace for the county of *Windsor*, in due form of law, directed to the sheriff of the said county of *Windsor*, his deputies or either of the constables of the said town of *Windsor*, in said county, commanding them to attach the goods and estate of said *Richard Roe* to the value of *three hundred* dollars, and for want of such goods or estate to attach the body of the said *Richard Roe* and him have before the *County Court* then to be holden at *Woodstock* in and for said county, on the *second Tuesday* of *October*, 1899, to answer to the plaintiff upon his declaration therein set forth, as by the record of said writ in said court more fully appears; and afterwards, on the *second* day of *September*, 1899, the plaintiff delivered the same writ to the defendant, then lawful sheriff of said county, to be by him served according to law and the directions therein given; * by virtue of which said writ the defendant so being sheriff as aforesaid, afterwards, on the *second* day of *September*, 1899, within his bailiwick, took and arrested said *Richard Roe* by his body, and then and there had and detained him in his custody, as such sheriff, at the suit of the plaintiff, for the cause aforesaid; † yet the defendant, so being sheriff of said county, not regarding the duties of his office, but contriving and intending to injure the plaintiff and to delay him in the recovery of his said damages, afterwards, on the *tenth* day of *September*, 1899, without the leave or license, and against the will of the plaintiff, voluntarily and wrongfully suffered and permitted the said *Richard Roe* to escape and go at large wherever he would out of the custody of the defend-

1. See, generally, *supra*, note 1, p. 124.

ant, the damages for which the said *Richard Roe* was arrested as aforesaid then and still being wholly unpaid to the plaintiff, and unsatisfied; and the plaintiff says that the said *Richard Roe* did not appear † before the County Court holden at *Woodstock* on the *second Tuesday of October, 1899*, to which said writ was returnable, according to the exigency thereof, but wholly failed of his appearance, whereby the plaintiff has been and is greatly injured, and delayed in his recovery of his aforesaid damages, and is likely to lose the same, and thereby also he, the plaintiff, has lost and been deprived of the means of recovering his costs and charges laid out and expended in the commencement and prosecution of said suit against the said *Richard Roe*, as aforesaid, amounting to the sum of *thirty* dollars, all of which is to the damage of the plaintiff *five hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (concluding as in Form No. 10663).

(c) *Failure to Serve Process.*¹

aa. SUMMONS.

Form No. 18583.¹

(Conn. Prac. Act, p. 160, No. 283.)

(Commencement as in Form No. 5912.)

1. The defendant was, at the time of the grievances hereinafter complained of, sheriff of *Litchfield* county.

2. On *February 5th, 1879*, the plaintiff delivered to the defendant a writ of summons, duly issued, in a civil action wherein this plaintiff was plaintiff and *John Stiles*, of *Litchfield*, was defendant, demanding \$750 damages, returnable to the *April* term, 1879, of the *Superior* Court for *Litchfield* county, and directed to said sheriff; and at the time of delivery told the defendant to serve the writ immediately.

3. The defendant, in violation of his duty, did not serve said writ immediately, and neglected to serve said writ until *March 31st, 1879*, when he served the same and returned it to said court.

4. Said action was brought to recover a debt of \$700 which accrued six years before *March 25th, 1879*, and the recovery was barred by the Statute of Limitations on said day.

5. *John Stiles* appeared at said court and pleaded the Statute of

1. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 1, p. 112.

Wilful Neglect or Refusal. — In *Vermont*, it has been held that under the statute providing that the officer who shall wilfully refuse or neglect to serve a writ, or shall wilfully neglect to return a writ, or shall make a false or undue return, shall be liable to pay the party aggrieved all damages which he shall have sustained by reason of such neglect or refusal, to be recovered in an action on the statute, the neglect or

refusal must be expressly charged to have been wilful, and that the omission of the word "wilful" cannot be supplied. *Walbridge v. Griswold*, 1 D. Chip. (Vt.) 162.

Jurisdiction of Justice. — In an action against an officer for failure to execute a process issued by the justice of the peace, the jurisdiction of the justice must be shown. *Robinson v. Harlan*, 2 Ill. 237.

2. See, generally, *supra*, note 1, this page.

Limitations in defense to said action, and upon said defense recovered judgment against the plaintiff for \$37, costs of suit.

6. Said debt has never been paid.

The plaintiff claims \$800 damages.

(Concluding as in Form No. 5912.)

Form No. 18584.¹

(2 Rev. Swift's Dig. 543.)

(Commencement as in Form No. 10663) for that whereas, on the first day of September, 1899, the plaintiff held a note-of-hand against one Richard Roe, payable to the order of the plaintiff three months after date, for three hundred dollars; that said note was in danger of being outlawed by lapse of time, and that, to prevent the recovery of the same from being barred by the statute of limitations, the plaintiff, on said first day of September, 1899, prayed out a writ of summons of that date, from Abraham Kent, justice of the peace for the county of Windsor, returnable before the County Court, on the second Tuesday of October, 1899, directed to the sheriff of the county of Windsor, or his deputy, or either constable of the town of Windsor, to serve and return; that the plaintiff, on the said first day of September, 1899, delivered said writ to the defendant, who then was and still is deputy of said sheriff of Windsor, directing him to serve the same without delay; yet that the defendant, disregarding his duty as such deputy, wilfully neglected and refused to serve said writ for a long time, to wit, twenty days, and until after the time when said note became outlawed by lapse of time, to wit, on the twenty-first day of September, 1899, when he served said writ, and returned it to said court; and the plaintiff says that the said Richard Roe appeared at said court, and made defense of said suit, and such proceedings were thereupon had that the defendant, by pleading the statute of limitations to said suit, obtained a judgment against the plaintiff for thirty dollars cost of suit; and the plaintiff says that, by reason of the neglect of duty of the defendant as aforesaid, he has lost said note, which has never been paid, and has been put to great trouble, cost, and expense, in prosecuting said suit, to his damage eight hundred dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not (concluding as in Form No. 10663).

bb. ATTACHMENT.²

Form No. 18585.³

(Conn. Prac. Act, p. 160, No. 284.)

(Commencement as in Form No. 5912.)

1. See, generally, *supra*, note 1, p. 130.

2. **Requisites of Complaint, Declaration or Petition, Generally.**—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Setting Out Writ.—In an action against an officer for failure to levy an attachment, the writ need not be set out in full: if the substance and legal effect thereof be stated, it is sufficient. *Griffin v. Ganaway*, 6 Ala. 148.

3. See, generally, *supra*, note 2, this page.

1. The defendant was, at the time of the grievances hereinafter complained of, sheriff of *Litchfield* county.

2. On *December 10th*, 1878, the plaintiff delivered to the defendant a writ of attachment, duly issued, in a civil action wherein this plaintiff was plaintiff and *Richard Roe* was defendant, demanding \$2,000 damages, returnable to the *January* term, 1879, of the *Superior* Court for *New London* county, and directed to said sheriff.

3. Afterwards the defendant returned said writ to said court with his indorsement that he had made diligent search within his precincts for estate of said *Richard Roe*, but could find none, and that he had summoned said *Richard Roe* to appear before said court.

4. Said return and indorsement were false. Said *Richard Roe*, at the time of service and return of said writ, had within the defendant's precincts estate of greater value than \$3,000, to wit, 500 barrels of flour at the store of said *Roe*, in *New London*, which, by the use of due diligence, might have been found and attached by the defendant.

5. At said *January* term of the *Superior* Court, the plaintiff recovered judgment in said action against said *Richard Roe* for \$1,750 damages, and \$69 50-100 costs of suit.

6. Afterwards the plaintiff obtained execution on said judgment, and on *March 16th*, 1879, delivered the same to the defendant to levy.

7. The defendant returned said execution in its life-time, wholly unsatisfied.

8. Said judgment is in full force, and has never been satisfied.

9. Said *Richard Roe*, shortly before said judgment was rendered, became insolvent.

The plaintiff claims \$2,000 damages.

(Concluding as in Form No. 5912.)

Form No. 18586.¹

(2 Rev. Swift's Dig. 542.)

(Commencement as in Form No. 10663) for that whereas, on the *first* day of *September*, 1899, he, the plaintiff, prayed out a writ of attachment of that date, in his own name, in an action of book-debt, against *Richard Roe*, of *Woodstock*, dated the *first* day of *September*, 1899, signed by *Abraham Kent*, justice of the peace for the county of *Windsor*, directed to the sheriff of the county of *Windsor*, his deputy, or to either constable of the town of *Woodstock*, commanding them to attach of the goods or estate of said *Richard Roe*, to the value of *five hundred* dollars, and to summon him to appear before the *County* Court, to be holden at *Woodstock*, on the *second Tuesday* of *October*, 1899, and demanding *three hundred* dollars damages; and the plaintiff says that afterwards, on the *first* day of *September*, 1899, he delivered said writ of attachment into the hands of the defendant, who then was, and ever since has been, lawful sheriff of the county of *Windsor*, to serve and return according to law; and that afterwards, on the *first* day of *October*, 1899, the defendant returned said writ into the

1. See, generally, *supra*, note 2, p. 131.

office of the clerk of the said *County Court*, with his indorsement that he had made diligent search within his precincts after the estate of said *Richard Roe*, but could find none, and that he had summoned the said *Richard Roe* to appear before said court; and the plaintiff says that said return and indorsement were false and untrue, and that the said *Richard Roe*, at the time of the service and return of said writ, had, within the precincts of the defendant, estate of much greater value than *five hundred* dollars, which, by the use of due diligence, might have been found and attached by the defendant; and the plaintiff says that, at the *County Court* holden at *Woodstock* on the *second Tuesday of October, 1899*, he recovered judgment in said action against the said *Richard Roe* for *three hundred* dollars debt, and *thirty* dollars cost of suit, and took out execution therefor, with *twenty-five* cents for the same, all in due form of law, and on the *tenth* day of *November, 1899*, delivered the same to the defendant to levy and collect, who afterwards, in the life of said execution, returned said execution to the clerk of said court wholly unsatisfied; and the plaintiff says that such judgment has not been reversed, nor said execution satisfied, but now remains due; that the said *Richard Roe*, a few days previous to the rendition of said judgment, disposed of all his visible property, and became insolvent; and that, owing to the neglect of duty of the defendant as aforesaid, the plaintiff has wholly lost his said debt, to his damage *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit. Fail not, (concluding as in *Form No. 10663*).

cc. EXECUTION.¹

(aa) In General.

Form No. 18587.²

(Commencing as in *Form No. 18592*, and continuing down to †.)

1. Requisites of Complaint, Declaration or Petition, Generally.— See *supra*, note 1, p. 112.

That Debtor Had Property.— In an action against a sheriff for neglecting to make a levy or to arrest the body, the complaint must aver that the defendant in the execution had property upon which a levy might have been made or that his body might have been found. *Lawton v. Erwin*, 9 Wend. (N. Y.) 233. That the officer had notice that the defendant resided or had property within the county need not be alleged, although such is the custom. *Tomlinson v. Rowe*, Hill & D. Supp. (N. Y.) 410.

Special damage need not be averred in an action for failure to levy: *prima facie*, the damages are the amount due on the execution. *Clough v. Monroe*, 34 N. H. 381; *Ledyard v. Jones*, 7 N. Y. 550; *Evans v. House*, 26 Ohio St. 488.

Precedent.— In *Beveridge v. Wagner*, 48 Ill. 525, the declaration contained two counts. The first averred that the officer made a levy on certain personal property, but did not make the money thereon, and “wrongfully, falsely and deceitfully” returned upon said writ that the suit had been appealed as per bond and order of the court thereto annexed. The writ was returned in no part satisfied. The second count averred that the defendant in the writ had personal property on which the sheriff might have levied, and of which he had notice, but that he neglected and refused to levy, and “wrongfully, falsely and deceitfully” returned the writ as in the first count alleged. It was held that this mode of declaring was sufficient and in conformity with the established precedents.

2. See, generally, *supra*, note 1, this page.

4. That at the time of the said delivery of the said execution to this defendant, there was within said county of *Suffolk* personal property belonging to the said *Richard Roe*, to wit, (*specify the property*), out of which this defendant might have satisfied the said execution, and of which property this defendant then and there had notice: nevertheless, in violation of his duty as such sheriff, this defendant failed to levy of the said goods and chattels the moneys or any part thereof, as by said execution he was required to do, and has returned said execution wholly unsatisfied, to the damage of the plaintiff *seven hundred* dollars.

Wherefore, (*concluding as in Form No. 11457*).

Form No. 18588.¹

(2 Rev. Swift's Dig. 542.)

(*Commencement as in Form No. 10663*) for that whereas, by the consideration of the County Court holden at *Woodstock*, within and for the county of *Windsor*, on the *second Tuesday of October, 1899*, he, the plaintiff, recovered judgment, in his own name and favor, against *Richard Roe*, of *Windsor*, for the sum of *five hundred* dollars damages, and the sum of *thirty* dollars costs of suit, and took out execution for said sums, with *seventeen* cents more for the same, which said execution was dated the *tenth* day of *November, 1899*, directed to the sheriff of the county of *Windsor*, his deputy, or to either constable of the town of *Windsor*, to serve and return, and was returnable in *sixty* days from the date thereof, and was in due form of law, and signed by *Calvin Clark*, clerk of said court, as by the files and records of said court, ready to be produced, appears; which said execution the plaintiff afterwards, in the life of the same, on the *tenth* day of *November, 1899*, delivered to the defendant, then and ever since the lawful sheriff of said county of *Windsor*, to levy, collect and return the same according to law; and took the receipt of the defendant for the same;* yet the plaintiff says that the defendant, neglecting and disregarding his duty, did not serve, levy or collect said execution, or return the same into the office of the clerk of said county within said *sixty* days from the date thereof, nor has said execution ever been returned or satisfied, but now wholly remains due and unpaid, and said judgment has never been reversed, but is now in force, and the defendant has never accounted to the plaintiff for said execution, in pursuance of his said receipt, though often requested so to do, which doings are to the damage of the plaintiff *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (*concluding as in Form No. 10663*).

(bb) Against the Body.

aaa. IN GENERAL.

Form No. 18589.¹

(*Commencing as in Form No. 18592, and continuing down to *.*)

3. That on the *twentieth* day of *April, 1899*, an execution against

1. Sec. generally, *supra*, note 1, p. 133.

the person of the said *Richard Roe* was duly issued by this plaintiff on said judgment and directed and then delivered to the defendant, a sheriff of the said county of *Suffolk*, of which execution the following is a copy, to wit: (*Here set out the copy of the execution and the indorsements, or state the substance of the execution, e. g., thus:* "whereby said defendant was directed to arrest the said *Richard Roe* and to commit him to the jail of the said county of *Suffolk* until he should pay said judgment or be discharged according to law.")

4. That before the return of said execution, to wit, on the *fifteenth* day of *April*, 1899, this defendant had notice that the said *Richard Roe* was within said county of *Suffolk*, and had the said *Richard Roe* in his view and presence, so that by virtue of said execution he could and should have arrested the said *Richard Roe*, but that the defendant, in violation of his duties, wilfully neglected to execute the command thereof and falsely returned on said execution that he had made diligent search and inquiries for the said *Richard Roe*, and that the said *Richard Roe* was not found within said county, to the damage of plaintiff *eight hundred* dollars.

Wherefore, (*concluding as in Form No. 11457*).

555. WITHIN FIVE DAYS AFTER JUDGMENT, SUFFERING PRISONER TO ESCAPE.

Form No. 18590.¹

(2 Rev. Swift's Dig. 540.)

(*Commencement as in Form No. 10663*) for that whereas *Richard Roe*, on the *tenth* day of *August*, 1899, was liable to the plaintiff for damages for an assault and battery of the plaintiff by the defendant, and to recover his said damages, he, the said plaintiff, on the *first* day of *September*, 1899, prayed out a writ of attachment of that date from *Abraham Kent*, justice of the peace, in due form of law, returnable to the *County Court*, to be holden at *Woodstock*, in and for the county of *Windsor*, on the *second Tuesday* of *October*, 1899, and directed to the sheriff of said county, or his deputy, to serve, and return according to law; and afterwards, on the *second* day of *September*, 1899, at *Windsor*, delivered the same writ to the defendant, who then was, and still is, sheriff of said county, to serve, and return the same according to law; by virtue of which writ the defendant, as sheriff of the county of *Windsor*, was commanded to attach the goods or estate of the said *Richard Roe* to the value of *five hundred* dollars, and for want of estate to attach his body, and him have to appear before the court to which said writ was returnable; and afterwards, in pursuance of the same writ, the defendant, for want of goods or estate of the said *Richard Roe*, took his body, and committed him to the jail in said county, of which jail the defendant then was, and ever since has been, keeper, and made due return of said writ to the *County Court*, holden at *Woodstock*, in and for said county, on the *second Tuesday* of *October*, 1899, at which court, to which the same was returnable, the plaintiff entered his action aforesaid, and before the same court recovered judgment against the said *Richard Roe* for the sum of *five hundred* dollars damages, and for the sum of *thirty*

1. See, generally, *supra*, note 1, p. 133.

dollars costs of suit, and afterwards took out execution thereon, dated the *tenth* day of *November*, 1899, signed by the clerk of said court, directed to the sheriff of said county, or his deputy, returnable in *sixty* days, and all in the form prescribed by law; which execution the plaintiff, within *five* days after the rendition of said judgment, delivered to the defendant, sheriff as aforesaid, and him directed, for want of goods and chattels of the said *Richard Roe* on which to levy said execution, within said *five* days, to demand the said *Richard Roe* at the jail aforesaid, and to levy said execution on the body of the said *Richard Roe* within said *five* days, according to law. Yet the defendant suffered the said *Richard Roe* to escape out of the jail aforesaid, and go at large, and did not levy said execution on him, the said *Richard Roe*, but returned the same unsatisfied, without doing anything in pursuance thereof, and neither the said *Richard Roe* nor his goods or estate have ever since been found to satisfy said execution, and by means of the negligence and misconduct of the defendant the plaintiff has wholly lost his said debt and cost, which is to his damage *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (*concluding as in Form No. 10663*).

dd. MESNE PROCESS.

Form No. 18591.

(2 Rev. Swift's Dig. 538.)

(*Commencing as in Form No. 18582, and continuing down to **) and the plaintiff says that the said *Richard Roe*, at the time of the delivery of the said writ to the defendant, so being sheriff of the county of *Windsor*, and from thence until the return of the said writ was within the bailiwick of the defendant, and the defendant at the time during that period might have taken and arrested the said *Richard Roe* by virtue of said writ at the suit of the plaintiff, if he would so have done, whereof the defendant so being sheriff as aforesaid during all that time had notice; yet the defendant, not regarding the duties of his office, but contriving and intending to injure the plaintiff and to delay him in the recovery of his said damages, did not nor would at any time before the return of said writ, although often requested so to do, take or cause to be taken the said *Richard Roe*, as by said writ he was commanded, but thereon wholly failed and made default and the said *Richard Roe* did not appear, (*concluding as in Form No. 18582*).

(d) *Failure to Return Execution.*¹

1. **Failure to Return Execution.** — An action on the case will lie against a sheriff for not returning an execution, or the party may proceed by attachment, at his election. *Burk v. Campbell*, 15 Johns. (N. Y.) 456.

Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see

the titles *COMPLAINTS*, vol. 4. p. 1019; *DECLARATIONS*, vol. 6, p. 244.

Official Character of Defendant. — A complaint against a sheriff for damages for failure to return a writ of execution, which in the title of the cause describes the defendant as sheriff and states his official capacity, and that the writ was delivered to him as sheriff, and that in violation of his duty as sheriff he

aa. IN GENERAL.

Form No. 18592.¹

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiff respectfully shows to this court —

1. That during all the times hereinafter mentioned the defendant was and is now the sheriff of the county of *Suffolk* and state of *New York*.

2. That on or about the *tenth* day of *April*, 1899, in an action in the *Supreme Court* of the state of *New York*, in the county of *Suffolk*, (or in the *County Court* of the county of *Suffolk*, in the state of *New York*, or before *Abraham Kent*, a justice of the peace in and for the town of

failed to return the writ, shows sufficiently that the action is against the defendant as sheriff and is not subject to demurrer for ambiguity in not showing whether the action is against him in his official or individual capacity. *Van Cleave v. Bucher*, 79 Cal. 600.

Jurisdiction of Court to Issue Execution. — The steps in an action on which the regularity of process depends need not be set forth to show that the court had jurisdiction to issue process; that the court did issue it is sufficient. *French v. Willett*, 4 Bosw. (N. Y.) 649.

In declaring against an officer for neglecting to serve and return a justice's execution, the plaintiff must aver the rendition of the judgment and set forth the facts showing that the justice had jurisdiction of the person and of the subject-matter. *Cornell v. Barnes*, 7 Hill (N. Y.) 35.

Request to Return. — The officer is obliged to return an execution unless the return is dispensed with by the plaintiff, and the officer is liable to an action for neglect to discharge his duty without first being called upon to make the return by rule or notice, and the request for the return need not be alleged. *Corning v. Southland*, 3 Hill (N. Y.) 552.

That Officer's Fees were Paid. — In an action against an officer for damages for failure to return an execution, it is not necessary to allege in the complaint that the fees of the officer were paid: if the fees were not paid and the writ was not served and returned on that ground, it is a matter of defense. *Van Cleave v. Bucher*, 79 Cal. 600.

Judgment. — In an action against a sheriff for failure to return an execution, the declaration must aver a judgment on which the execution issued. *State v. Spencer*, 4 Blackf. (Ind.) 310;

Ansonia Brass Co. v. Conner, (C. Pl. Gen. T.) 62 How. Pr. (N. Y.) 272; *Forsyth v. Campbell*, 15 Hun (N. Y.) 235; *Cornell v. Barnes*, 7 Hill (N. Y.) 35.

Special Damage. — In an action against an officer for failure to return an execution against property, special damage need not be alleged. The amount due on the judgment is *prima facie* the measure of damages, and the burden is upon the defendant to show that the full amount could not be collected. *Pach v. Gilbert*, 124 N. Y. 612; *Swezey v. Lott*, 21 N. Y. 481; *Ledyard v. Jones*, 7 N. Y. 550; *Brookfield v. Remsen*, 1 Abb. App. Dec. (N. Y.) 210; *Pardee v. Robertson*, 6 Hill (N. Y.) 550. And see *Goodnow v. Willard*, 5 Met. (Mass.) 517, holding that an officer is liable for neglecting to return an execution, although the judgment creditors suffer no injury by such neglect; and *M'Rae v. Evans*, 1 Dev. & B. L. (18 N. Car.) 243, holding that a sheriff is liable for the mere failure to return an execution, and the damages therefor will be nominal.

In *Mississippi*, under the code, an officer, upon failure to return an execution, is liable for the amount of the execution with interest and damages at five per cent. *Beall v. Shattuck*, 53 Miss. 358.

In *Pennsylvania*, a sheriff failing to return an execution is liable absolutely for the amount of the execution and costs. *Bachman v. Fenstermacher*, 112 Pa. St. 331.

In *Iowa*, it has been held that, in an action against an officer for the failure to return an execution, the plaintiff must allege and prove special damage. *Musser v. Maynard*, 55 Iowa 197.

1. See, generally, *supra*, note 1, p. 136.

Huntington, in the county of Suffolk and state of New York,) wherein this plaintiff was plaintiff and one *Richard Roe* was defendant, the plaintiff recovered a judgment duly given by said court against the said *Richard Roe* for the sum of *five hundred* dollars (*or, if judgment was rendered in the Justice's Court, say, "duly given by the said justice against the said Richard Roe for the sum of one hundred dollars, which judgment was thereafter duly docketed in the office of the clerk of said county of Suffolk")*.*

3. That on the *twentieth* day of *April, 1899*, an execution against the property of the said *Richard Roe* was duly issued by this plaintiff on said judgment and directed and then delivered to the defendant as sheriff of the said county of *Suffolk*, of which execution the following is a copy, to wit: (*Here set out a copy of the execution and the indorsements, or state the substance of the execution, e. g., thus: "whereby said defendant was directed to satisfy said judgment out of the personal property of the said Richard Roe, in said county of Suffolk, or, if sufficient personal property could not be found, out of the real property belonging to said Richard Roe on the day when said judgment was docketed in the said county of Suffolk, or at any time thereafter, and to return said execution to the clerk of the county of Suffolk within sixty days after the receipt thereof by him."*)†

4. That although more than *sixty* days have elapsed after the delivery of the aforesaid execution to this defendant and before the commencement of this action, yet the said defendant has, in violation of his duty as such sheriff, failed to return said execution, to the damage of this plaintiff *seven hundred* dollars.

Wherefore, (*concluding as in Form No. 11457*).

bb. AND TO PAY OVER AMOUNT COLLECTED.

Form No. 18593.¹

(Conn. Prac. Act, p. 162, No. 286.)

(*Commencement as in Form No. 5912.*)

1. The defendant is and for more than *two* years last past has been sheriff of *Hartford* county.

2. On *October 1st, 1878*, the plaintiff recovered judgment against one *John Doe*, of *Hartford*, before the *Superior Court* for *Hartford* county, at its *September* term, 1878, for *\$1,060*.

3. On *October 10th, 1878*, the plaintiff took out execution on said judgment, directed to the sheriff of said county, and delivered it to the defendant, as such sheriff, for service.

4. The defendant, by virtue thereof, on *October 15th, 1878*, levied on and sold the goods of *John Doe*, of the value of *\$1,000*; but, although the time for the return of said execution has long elapsed before this action, he has failed to make return of said execution, and no part of the avails of said levy has been paid to the plaintiff.

The plaintiff claims *\$1,200* damages.

(*Concluding as in Form No. 5912.*)

(*e*) *Failure to Return Attachment.*

1. See, generally, *supra*, note 1, p. 136.

Form No. 18594.

(Oliver's Prec. (2d ed.) 441.)

(Commencing as in Form No. 6940) for that the plaintiff, on (*stating time*), purchased our writ of attachment out of the office of the clerk of our *Supreme Judicial Court* for our county of *Cumberland*, in form by law prescribed, for the recovery of the sum of *five hundred* dollars, with interest, due to the plaintiff from one *Richard Roe*, then an inhabitant of said *Portland*, by his, the said *Richard Roe's*, note of hand dated the *first day of April, 1897*, as also for the recovery of a further sum of *five hundred* dollars due to the plaintiff from the said *Richard Roe*, according to the said negotiable note, indorsed to the plaintiff; and the plaintiff declared accordingly, in his said writ of attachment, against the said *Richard Roe*, in a plea of the case, setting forth the sums due from the said *Richard Roe* on the notes aforesaid, and the plaintiff's damage by the said *Richard Roe's* neglecting to pay the said sums to the plaintiff; and the said writ was directed to the sheriff of our said county of *Cumberland* or his deputy, commanding them (*in common form*). And afterwards, viz, on (*stating time*), at (*stating place*), the plaintiff delivered the said writ to the said *John Lynch*, then and to this day sheriff of our said county of *Cumberland*, to be executed and returned into the then next *Supreme Judicial Court*, which was held at *Portland* in and for the said county of *Cumberland*, on (*stating time*), and the said *John Lynch* then and there promised to serve and return the same writ accordingly; yet the said *John Lynch*, neglecting in the premises, never made any return of the said writ, or of his doings therein, to the said court, when and where it was returnable as aforesaid; nor did any of his deputies make any return thereof, but secreted the same; whereby the plaintiff hath lost the benefit thereof, and of the said notes, which remain yet unpaid, to the damage (*concluding as in Form No. 6940*).

(f) Failure to Pay Over Moneys Collected on Execution.¹

1. Failure to Pay Over Money. — Upon failure of an officer to pay over moneys collected on an execution, the judgment creditor may proceed against him by action or attachment. *Hatfield v. Hatfield*, (N. Y. City Ct. Spec. T.) 15 N. Y. St. Rep. 788. And the action may be in tort for breach of duty or in assumpsit for moneys had and received, at the option of the plaintiff. *Dyert v. Crane*, 1 Wend. (N. Y.) 534; *Shepard v. Hoit*, 7 Hill (N. Y.) 198.

Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Authority of Officer to Act. — In an action against an officer for neglect of

duty in not paying over money collected on an execution, the declaration must show that the sale of the property was made by the defendant by virtue of his office. *Wheeler v. Wilard*, 14 Pick. (Mass.) 486.

That Money has been Made. — An allegation that the sheriff has levied the amount to be collected on an execution out of the goods and chattels seized and taken by him is synonymous with an allegation that the amount has been made or produced. *Dyert v. Crane*, 1 Wend. (N. Y.) 534.

Failure to Pay. — That the sheriff has failed to pay over the money must be alleged. *Hoag v. Warden*, 37 Cal. 522.

Previous demand on the sheriff need not be alleged. *Pope v. Hays*, 1 Mo. 450; *Brewster v. Van Ness*, 18 Johns.

Form No. 18595.¹

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiff respectfully shows to this court:

1. That during all the times hereinafter mentioned the defendant was, and is now, the sheriff of the county of *Suffolk*, in the state of *New York*.

2. That on the *tenth* day of *April*, 1899, an execution was duly issued out of the County Court of the county of *Suffolk* and state of *New York*, in form and effect as required by law, against the property of one *Richard Roe* and in favor of this plaintiff upon a judgment for the sum of *five hundred* dollars, theretofore duly given in favor of the plaintiff against the said *Richard Roe*, in said County Court, which execution was directed and by this plaintiff was delivered to the defendant as sheriff of said county of *Suffolk*.

3. That this defendant thereafter, as such sheriff, collected and received upon the aforesaid execution, to the use of this plaintiff, the sum of *five hundred and twenty-five* dollars, besides the lawful fees and poundage.

4. That although more than *sixty* days elapsed after the delivery of said execution to the defendant and before this action, yet this defendant has, in violation of his duty, failed to pay over to this plaintiff or to pay into said court the amount so collected.

Wherefore, (concluding as in Form No. 11457).

(g) Failure to Serve Execution and Making False Return Thereon.²

(N. Y.) 133; Dygert v. Crane, 1 Wend. (N. Y.) 534.

1. See, generally, *supra*, note 1, p. 139.

2. Precedent. — In Warner v. Lowry, 1 Aik. (Vt.) 55, the declaration was as follows:

Heman Lowry, of *Burlington*, in the county of *Chittenden*, is attached to answer unto *Isaac Warner*, of the same *Burlington*, in a plea of trespass on the case, for that, whereas, the said *Isaac Warner*, heretofore, to wit, at said *Burlington*, on the *9th* day of *February*, 1821, before *George Robinson*, Justice of the Peace, recovered judgment, in his, the said *Isaac's*, favor, against one *Truman Barney*, by the consideration of said Justice, and confession of said *Barney*, for the sum of *118* dollars damages and *twenty-five* cents costs of said judgment, as by the records thereof, in the said Justice's office remaining, appears. And afterwards, to wit, on the *27th* day of *October*, 1821, the said *Warner* took out a writ of execution, of the price and cost of *25* cents, in due form of law, on the judgment aforesaid, in favor of the said *Warner*, against the said *Barney*, for the aforesaid sums, dated the day and year last aforesaid,

signed by said justice *Robinson*, made returnable within *sixty* days from the date thereof, and directed to the sheriff of *Chittenden* county, his deputy, or either constable of *Jericho*, in said county, and afterwards, to wit, on the *25th* day of *December*, 1821, at said *Burlington*, the said *Warner* delivered the said writ of execution, the same then being in full life, and wholly unsatisfied, to *Heman Lowry*, who then, for a long time before, and since that time, was, and still is, sheriff of said *Chittenden* county, duly appointed and authorized to serve, execute and return, all writs, processes and executions, to him directed, within said county of *Chittenden*, to serve, execute and return according to law. And the said *Heman Lowry*, sheriff as aforesaid, having received the said execution, not regarding his duty as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *Isaac Warner* in that behalf, and to deprive him of the benefit of his said judgment and execution, and prevent his collecting the said sums of money mentioned in said execution, did not execute and return said writ of

execution, according to law, within *sixty* days from the date thereof; but wholly neglected and refused so to do — whereby the said *Warner* is greatly injured, and has wholly lost the benefit of his said judgment and execution.

Second Count.

And whereas, the said *Isaac Warner* heretofore, to wit, at said *Burlington*, on the *9th* day of *February*, 1821, before *George Robinson*, Esq., one of the Justices of the Peace, etc., recovered one other judgment, in his, the said *Warner's*, favor, against the said *Truman Barney*, by the consideration of said justice, and the confession of said *Barney*, for the sum of 118 dollars damages, and 25 cents costs of said judgment, as, by the said record thereof, in said justice's office remaining, appears. And afterwards, to wit, on the *27th* day of *October*, 1821, the said *Isaac* took out a writ of execution, of the price and cost of 25 cents, on the said last mentioned judgment, in due form of law, in favor of said *Warner*, against said *Barney*, for the last mentioned sum of 118 dollars damages, and 25 cents costs, dated the day and year last aforesaid, signed, etc., made returnable, etc., and directed, etc.; and afterwards, to wit, on the *25th* day of *December*, A. D. 1821, at *Burlington*, aforesaid, the said *Warner* delivered the said last mentioned writ of execution (the same being in full life, and wholly unsatisfied) to *Heman Lowry*, who, etc., to serve, execute, and return, according to law.* And the said *Isaac Warner* in fact saith, that the said *Truman Barney*, at the time of the delivery of the said last mentioned execution to the said *Heman Lowry*, so being sheriff as aforesaid, and from thence until the return day of the said last mentioned execution was within the said sheriff's precinct, and the said sheriff, at any time during that time, might have arrested and taken the said *Truman Barney*, by virtue of the last mentioned execution, in favor of the said *Warner*, if he would so have done; whereof the said *Heman Lowry*, so being sheriff as aforesaid, during all that time, had notice, to wit, at *Burlington*, aforesaid. Yet, the said *Heman Lowry*, so being sheriff as aforesaid, not regarding the duties of his said office, but contriving, and intending wrongfully and unjustly to injure, prejudice and aggrieve the said *Warner*, and to delay and hinder him in and from the

collection of his said last mentioned execution, did not, nor would he at any time, within the life of the said last mentioned execution, although often requested so to do, arrest and take the said *Truman Barney*, and him commit to the jail of the said county, as by the said last mentioned execution he was commanded, and by law he ought to have done (there being no goods, chattels, or estate of the said *Barney*, shown to the said sheriff, or found within his precinct, whereon to levy, or wherewith to satisfy the same); but wholly neglected so to do; whereby the said *Warner* hath been, and is, greatly injured and prevented from the collection of his said last mentioned execution, and hath wholly lost the benefit of his said last mentioned judgment and execution.

Third Count.

And whereas, also, (*the same as the second count to the asterisk, and then proceeds*) And afterwards, to wit, at said *Burlington*, on the *26th* day of *December*, 1821, the said *Heman Lowry*, so being sheriff as aforesaid, by virtue of the said last mentioned execution, thereon arrested and took the said *Truman Barney*, and him committed to the jail of said county, within said prison, of which said *Lowry* is keeper, until he should pay and satisfy to the said *Warner* his said damages and cost, mentioned in the said last mentioned execution, for which the said *Truman* was committed to jail as aforesaid; yet the said *Heman Lowry*, so being sheriff of said county aforesaid, not regarding his duty as such sheriff, but contriving, and wrongfully and unjustly intending to injure, prejudice and aggrieve the said *Warner* in that behalf, and to deprive him of the benefit of his said last mentioned judgment and execution, and of the benefit of the said commitment of the said *Barney* to the jail of said county as aforesaid, until he should pay the said *Warner* his said last mentioned damages and costs, specified in said last mentioned execution, did not make return on said execution last mentioned, of his said commitment of said *Truman Barney* to the jail of said county, by virtue of the said last mentioned execution, at the return thereof, according to the precept thereof, and as by law he ought to have done; but therein wholly failed, and made default. And at the return day thereof, to wit, on the *26th* day of *December*, 1821,

Form No. 18596.¹

(Oliver's Prec. (2d ed.) 426.)

(Commencing as in Form No. 6940) for that the said plaintiff, by the consideration of our Justices of our *Supreme Judicial Court*, recovered judgment against *Richard Roe*, of *Portland*, in our county of *Cumberland*, for the sum of *five hundred* dollars damages and costs of suit, taxed at *fifty* dollars, as appears of record in our said *Supreme Judicial Court*. And afterwards, viz, on the *first* day of *June*, 1898, at said county, the said plaintiff, for recovery of the sum of *five hundred* dollars, part of said damages, and for recovery of the costs aforesaid, then remaining due and unsatisfied, purchased our writ of execution, in form by law prescribed, out of the clerk's office of our said *Supreme Judicial Court*, directed to the sheriff of our said county of *Cumberland*, or his deputy, commanding him that the goods, chattels, or lands, of the said *Richard Roe*, within his precinct, he should cause to be paid and satisfied unto the said plaintiff, at the value thereof in money, the aforesaid sums due, being the sum of *five hundred* dollars damages and *fifty* dollars costs, with *twenty-five* cents more for that writ, and thereof to satisfy himself for his own fees, and for want of goods, chattels, or lands, of the said *Richard Roe* to be by him shown unto him, or found within his precinct, to the acceptance of the said plaintiff, to satisfy the sums due as aforesaid, to take the body of the said *Richard Roe*, and him commit unto our jail, in our said county of *Cumberland*, and detain in his custody within our said jail until he should pay the full sums due as above mentioned, with his fees, or that he should be discharged by the said plaintiff, the creditor, or otherwise by order of law, and thereof not to fail, and to make return of that writ, with his doings thereon, into our *Supreme Judicial Court* at *Portland*, within and for said county of *Cumberland*, in *sixty* days after the date thereof. And the plaintiff avers that on (*stating time*), the said *John Lynch* was, and ever since has been, and now is, the duly qualified sheriff of said county of *Cumberland*. And afterwards, viz, on the *second* day of *June*, 1898, at said *Portland*, our said writ of execution was delivered to the said *John Lynch*, sheriff of our said county of *Cumberland* as aforesaid, to be served, executed and returned according to the precept thereof; and the said sheriff avers that the said *John Lynch* then and there had goods and chattels, viz, (*describing them*), of the said *Richard Roe*, in his hands, more than sufficient to pay and satisfy the

falsely and deceitfully made return upon said last mentioned execution, into said justice's office, that he could find neither the body nor property of the said *Barney* within his precinct, whereon to levy and satisfy said last mentioned execution, as by the said return endorsed on said last mentioned execution, remaining in said justice's office, fully appears, by means of which, the said *Truman Barney* hath been liberated and discharged from his imprisonment, by virtue of the said

last mentioned execution, in favor of said *Warner*; and the said *Warner* is thereby greatly injured, and deprived of the means of collecting the said sums of money, mentioned in the said last mentioned execution, and hath wholly lost the benefit of the same, which is still wholly unpaid and unsatisfied to the said *Warner*, etc.

To his damage *two hundred* dollars, etc.

1. See *supra*, note 2, p. 140.

sums aforesaid, due as aforesaid, whereout he then and there well might and by law ought to have paid and satisfied the same to the said plaintiff, by virtue of that writ, and the said *John Lynch* was then and there requested by the said plaintiff to pay and satisfy him the same thereout accordingly; yet the said *John Lynch*, regardless of his duty in the premises, and minding to defraud the said plaintiff of the sums aforesaid, due to him as aforesaid, and to deprive him of the benefit of his judgment and writ of execution aforesaid, then and there refused, and ever since hath refused, to pay and satisfy to the said plaintiff said sums, out of said goods, chattels, gold, silver, and moneys, by virtue of said execution, but afterwards, viz, on the *thirtieth* day of *June*, 1898, returned our said writ of execution into our said *Supreme Judicial Court*, then sitting at *Portland*, within and for our said county of *Cumberland*, and thereon falsely and deceitfully returned and certified that he had made diligent search and could not find goods, lands, chattels or body of the said *Richard Roe*, and so returned that execution in no part satisfied; by means whereof the said plaintiff hath wholly lost the benefit of his judgment and execution aforesaid, and his remedy for recovery of the sums aforesaid, and the same remain still due and unpaid; to the damage (*concluding as in Form No. 6940*).

(h) *Failure to Turn Over Imprisoned Debtor to Officer's Successor.*¹

Form No. 18597.³

(Precedent in *French v. Willet*, (N. Y. Super. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 99.)³

[*(Commencing as in Form No. 18578, and continuing down to *.)*]⁴

That on the *9th* day of *February*, in the year 1856, the plaintiff recovered, in the *Superior Court* of the city of *New York*, a judgment in an action against one *Plin White*, for the sum of *twelve thousand five hundred and eighty-eight* dollars and *fifty-six* cents, a transcript of which said judgment was on the same day filed in the office of the clerk of the *city and county of New York*.

That the said action was brought to recover the amount of a debt fraudulently contracted by the said *Plin White*.

That thereafter, on the *9th* day of *February*, in the year 1856, an execution against the property of the said *Plin White*, upon the said judgment, was duly issued by the plaintiff to the defendant, who was at that time sheriff of the *city and county of New York*, which said execution was thereafter, by the said defendant, as such sheriff, returned wholly unsatisfied.

1. Failure to Deliver Prisoner. — In an action against a sheriff for not delivering to his successor in office a prisoner taken by him and committed to jail on an execution against the body, an averment that the execution was duly issued is at most all that is necessary, as against the sheriff, to show that it was his duty to execute the writ. It is not necessary that the complaint should

state that an order for the arrest of the party was obtained. *French v. Willet*, 4 Bosw. (N. Y.) 649.

2. *New York.* — Code Civ. Proc., §§ 182-184.

3. This complaint was held sufficient.

4. The matter to be supplied within [] will not be found in the reported case.

That thereafter, to wit, on the *14th* day of *April*, in the year 1856, an execution against the person of the said *Plin White* was duly issued by this plaintiff, on the said judgment, to the defendant, who was then sheriff as aforesaid, directed and delivered to the defendant as such sheriff, whereby he was required to arrest the said *Plin White*, and commit him to the jail of the said county of *New York* until he should pay said judgment, or be discharged according to law.

That thereafter, to wit, before the *first* day of *January*, in the year 1859, the defendant, as such sheriff, arrested the said *Plin White* upon the said execution, and committed him to jail pursuant thereto.

That on the *first* day of *January*, in the year 1859, the term of office of the defendant, as sheriff as aforesaid, expired; and that a new sheriff, to wit, one *John Kelly*, was elected as sheriff in place of the defendant, and duly qualified and gave the security required by law.

That the certificate of the clerk of the *city and county* of *New York*, under his official seal, certifying that the said *John Kelly* had qualified as such new sheriff, and given the security required by law, was duly served on the defendant on or about the *11th* day of *January*, in the year 1859.

That the defendant did not, within *ten* days after the service on him of such certificate, deliver to his successor, the said new sheriff, the said *Plin White*, who then remained in custody of the said defendant, on the said execution, confined within the liberties of the jail of the *city and county* of *New York*.

Wherefore, [(concluding as in Form No. 11457).]¹

(i) *False Return.*²

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Complaint, Declaration or Petition, Generally.**—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Falsity of Return.—In order to recover for false return by an officer, the complaint must show the falsity of the return. *State v. Hammond*, 72 Ind. 472; *Harrell v. Warren*, 100 N. Car. 259; *Lemit v. Mooring*, 8 Ired. L. (30 N. Car.) 312; *Astor v. Heller*, 61 N. J. L. 78, Com. v. Bartlett, 7 J. J. Marsh. (Ky.) 161; *Clough v. Monroe*, 34 N. H. 381; *Kidzie v. Sackrider*, 14 Johns. (N. Y.) 195.

An averment that the return of the defendant was false in this, that said officer did not, as in said return alleged, at the time alleged, or at any other time, leave at the dwelling-house

of the clerk of Manchester an attested copy of Whittle's writ and his return thereon, is a sufficiently explicit statement of the falsity of the return. *Clough v. Monroe*, 34 N. H. 381.

Fraud or Deceit.—That the false return was made fraudulently or deceitfully need not be alleged; it is necessary only that the return should be untrue. *Peebles v. Newsom*, 74 N. Car. 473; *Ledbetter v. Arledge*, 8 Jones L. (53 N. Car.) 475.

Valid Judgment.—In an action against an officer for a false return to an execution, the plaintiff must allege and prove a valid judgment. *Cox v. Ross*, 56 Miss. 481; *McDonald v. Bunn*, 3 Den. (N. Y.) 45.

Special Damage.—In an action against an officer for false return, the particular damage resulting to the plaintiff from the falsity of the return must be alleged. *Sawyer v. Whittier*, 2 N. H. 315; *Wright v. Darlington*, 108 Pa. St. 372.

Form No. 18598.¹

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiff respectfully shows to this court:

1. That at the time of the issuing and return of the execution hereinafter mentioned the defendant was the sheriff of the county of *Suffolk*.

2. That on the *tenth* day of *April*, 1899, this plaintiff recovered a judgment, duly given by the *Supreme Court* of the state of *New York*, in and for the county of *Suffolk*, against one *Richard Roe*, for *five hundred dollars*.

3. That on the *twentieth* day of *April*, 1899, an execution against the property of said *Richard Roe* was duly issued on said judgment by this plaintiff and directed and then delivered to the defendant as such sheriff, of which execution and the indorsements thereon the following is a copy: (*Here set out a copy of the execution and the indorsements, or state the substance of the execution, e. g., thus: "whereby said defendant was directed to satisfy said judgment out of the personal property of the said Richard Roe in said county of Suffolk, or, if sufficient personal property could not be found, out of the real property belonging to said Richard Roe on the day when said judgment was docketed in the said county of Suffolk, or at any time thereafter, and to return said execution to the clerk of the county of Suffolk within sixty days after the receipt thereof by him."*)

4. That the defendant, as such sheriff, did, within *sixty* days thereafter, by virtue of said execution, levy on certain personal property of the said *Richard Roe* within said county of *Suffolk* of the value sufficient to satisfy said judgment (or said judgment in part, to wit, the amount of *three hundred dollars*), together with the defendant's fees and poundage.

5. That notwithstanding the premises, and in violation of his duty as such sheriff, the defendant did not satisfy said judgment, or any part thereof, but has falsely returned upon said execution to the

Where the statute provides for penalty when an officer makes a false return, special damage need not be alleged. *Albright v. Tapscott*, 8 Jones L. (53 N. Car.) 473.

In *Alabama*, it has been held that though the action on the case is given by statute against a sheriff for a false return of an execution, yet this statute can be regarded only as declaratory of the procedure. It does not profess to interfere with the nature of the action, and the principles which control it as a common-law remedy. It is an action sounding in damages, the measure and extent of which must depend upon the circumstances of each particular case. Hence the plaintiff, to entitle himself to a recovery, must prove that he has sustained damages and to what

extent, and in this regard the action would seem to differ very materially from the action of debt, which is more appropriately applicable as a remedy to cases in which the duty is certain. So, a motion under the statute against the sheriff for a failure to collect an execution cannot be assimilated in all respects to the action on the case. *Tombeckbee Bank v. Godbold*, 3 Stew. (Ala.) 240.

In *Texas*, under the statute, an officer who fails to return an execution is liable to the plaintiff in the execution for the full amount of the debt, interest and costs, if these are *prima facie* the measure of the plaintiff's damages. *Smith v. Perry*, 18 Tex. 510.

1. See, generally, *supra*, note 1, p. 144.

clerk of the county of *Suffolk*, that the said *Richard Roe* had not any goods or chattels within said county whereby he could cause to be levied the amount of said judgment, or any part thereof, to the damage of the plaintiff *seven hundred dollars*.

Wherefore, (*concluding as in Form No. 11457*).

Form No. 18599.¹

(2 Rev. Swift's Dig. 538.)

(*Commencing as in Form No. 18582, and continuing down to †*) and the defendant, so being sheriff of the county of *Windsor*, as aforesaid, afterwards, on the *twenty-third* day of *September*, 1899, being the return day of the said writ, falsely and deceitfully returned upon the said writ to the *County Court*, holden at *Woodstock*, on the *second Tuesday* of *October*, 1899, that the said *Richard Roe* was not found in the bailiwick of the defendant, so being sheriff as aforesaid, and the said *Richard Roe* did not appear, whereby the plaintiff has been and still is greatly injured and delayed in the recovery of his said damages, and is likely to lose the same, and thereby, also, he, the plaintiff, has lost and been deprived of the means of recovering his costs and charges laid out and expended in the commencement and prosecution of said suit against the said *Richard Roe* as aforesaid, amounting to the sum of *thirty* dollars; all of which is to the damage of the plaintiff *five hundred dollars*, (*concluding as in Form No. 18582*.)

Form No. 18600.¹

(2 Rev. Swift's Dig. 543.)

(*Commencing as in Form No. 18588, and continuing down to **.) And the plaintiff says that the defendant afterwards, on the *twentieth* day of *November*, 1899, returned said execution into the office of the clerk of said court, with his indorsement thereon, that he had made diligent search and inquiry after the goods and estate of said *Richard Roe* whereon to levy and satisfy said execution, but could find none within his precincts, as by the files and records of said court, ready to be produced, will appear; and the plaintiff says that the said return and indorsement of the defendant are false and untrue, and that, during the life of said execution, and whilst the same was in the defendant's hands to levy and collect, the said *Richard Roe* had goods and estate within the said precincts of the defendant sufficient to have satisfied said execution, which the defendant, with due diligence, might have levied on and taken; and the plaintiff says that said judgment has not been reversed, or satisfied, or said execution paid, but the same is now due; which doings of the defendant are to the damage of the plaintiff *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (*concluding as in Form No. 10663*).

(j) *Illegal Seizure.*²

1. See, generally, *supra*, note 1, p. 144. or **Petition, Generally.** — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see
2. **Requisites of Complaint, Declaration**

Form No. 18601.¹

(Conn. Prac. Act, p. 163, No. 287.)

(Commencement as in Form No. 5912.)

1. The plaintiff is trustee of the insolvent estate of *John Stiles*, appointed by the Court of *Probate* for the District of *Hartford*, upon the petition of *Richard Roe*, by decree of said court made *March 10th*, 1879.

2. The defendant *John Doe* is, and for more than *one* year last past has been, sheriff of *Hartford* county.

3. The *fifty* barrels of flour hereinafter mentioned belonged to said *John Stiles*, and were a part of his estate at the time of the plaintiff's said appointment.

4. On *April 5th*, 1879, the defendant *John Doe*, under color of a writ of execution issued on a judgment rendered in favor of the defendant *James Smith* in an action by him against said *John Stiles*, wrongfully seized said *fifty* barrels of flour, and afterwards caused the same to be sold by auction, and appropriated the proceeds thereof.

5. In making said seizure and sale the defendant *John Doe* acted under the special direction of the defendant *James Smith*, who had notice that the property seized belonged to the plaintiff.

The plaintiff claims \$500 damages.

(Concluding as in Form No. 5912.)

Form No. 18602.¹(Precedent in *Bush v. Collins*, 35 Kan. 536.)²

the titles *COMPLAINTS*, vol. 4, p. 1019; *DECLARATIONS*, vol. 6, p. 244.

Facts showing that levy was wrongfully made must be stated, and to allege that the levy was wantonly and fraudulently made, without averring any act of wanton violence, is not sufficient. *McCart v. Maddox*, 68 Tex. 456.

Value of Goods Seized.—In an action against a sheriff for wrongfully seizing and selling mortgaged goods, the value of the goods at the time of taking need not be alleged, where no elements of special damage are averred, but in order to support a judgment for the amount of the debt there must be evidence as to their value. *Sheehan v. Levy*, 1 Wash. 149.

Special Damage.—An item of special damage, though recoverable, cannot be included in the judgment unless averred in the complaint. *Sheehan v. Levy*, 1 Wash. 149.

Precedent.—In *Kyd v. Cook*, 56 Neb. 71, the petition, among other things, alleged:

"And that plaintiff enjoyed among the wholesale houses, business men, and manufacturers throughout the country, a high and first-class credit, and was thereby enabled to do and

was doing a large, prosperous and profitable business. * * * And plaintiff further alleges that the said defendant, *Robert Kyd*, as such sheriff, and under said writ of attachment, then and there levied upon and took into his possession, carried away from plaintiff's said place of business, and converted to his own use all of the said furniture, goods, wares and merchandise set forth and mentioned in Exhibit B, the same being of the value of \$6,000, and then and there forcibly and wrongfully closed up the plaintiff's store and locked the same, and kept the same closed up and locked and remained in possession thereof for the period of *ten* days, and thereby broke up, damaged, injured and destroyed plaintiff's business and plaintiff's credit, by reason whereof the plaintiff has been damaged in the sum of \$——. * * *

It was held that these averments were sufficiently specific to permit the plaintiff to introduce evidence of loss of credit sustained by him in consequence of the attachment.

1. See, generally, *supra*, note 2, p. 146.

2. Judgment for plaintiff in this case was reversed, the defendant hav-

[(Title of court and cause as in Form No. 5917.)]¹

The plaintiff, *Charles Collins*, complains of the defendant, *H. E. Bush*, sheriff of *Shawnee* county, of the state of *Kansas*, and for cause of action against the defendant says: That the plaintiff is now, and was all the time hereinafter complained of, a citizen of the state of *Kansas*; that the defendant is now, and was at all times herein-after complained of, a citizen of the state of *Kansas*, and duly elected, qualified and acting sheriff of the county of *Shawnee* in said state of *Kansas*; and in all the matters hereinafter stated and complained against him, acted in the capacity of sheriff of the county of *Shawnee*, in the state of *Kansas*.

On the 7th day of *October*, 1882, and for a long time prior thereto, the plaintiff was the owner of, and in the actual possession thereof, of a large and valuable stock of merchandise in the city of *Topeka*, in the county of *Shawnee* and state of *Kansas*, consisting of groceries, clothing, furnishing goods, hats and caps, outfitting store, and other merchandise, of the aggregate value of *twenty-five thousand* dollars, and which stock of merchandise is more particularly and in detail described, with the separate value of each item thereof opposite thereto, in a certain schedule hereto attached, marked "*Schedule A*," and made a part of this petition.

On the day last aforesaid, the defendant, *H. E. Brush*, sheriff of the county of *Shawnee*, in the state of *Kansas*, and in his capacity of said sheriff, wrongfully and tortiously seized and took into his possession and from the possession of the plaintiff, and at the county of *Shawnee* aforesaid, the entire stock of merchandise hereinbefore mentioned, and every item thereof embraced and stated in said schedule *A*, to his own use.

On the date aforesaid the plaintiff demanded of and from the defendant the return to him of said entire stock of merchandise and each and every part thereof, and the plaintiff avers and charges the same to be true that although the defendant then and before that time well knew that the plaintiff was the owner thereof, and was actually in the quiet and peaceable possession thereof before the unlawful taking hereinbefore stated, and was lawfully entitled to the possession thereof after the taking of the same aforesaid, the defendant upon said demand and at all times thereafter refused and still refuses to return said stock of merchandise or any part thereof, to the damage of plaintiff in the sum of *twenty-five thousand* dollars, with interest thereon from the 7th day of *October*, 1882.

Wherefore, the plaintiff asks judgment against the defendant, *H. E. Brush*, sheriff of the county of *Shawnee*, in the state of *Kansas*, for the sum of *twenty-five thousand* dollars and interest thereon at 7 per cent. per annum from *October 7*, 1882, and costs of suit.

[(Signature and verification as in Form No. 5917.)]¹

(k) Not Assigning Bail Bond.

ing shown the transfer to plaintiffs to have been fraudulent.

1. The matter to be supplied within [] will not be found in the reported case.

Form No. 18603.¹

(2 Rev. Swift's Dig. 541.)

(Commencing as in Form No. 18582, and continuing down to †) and the plaintiff further says that the said *Richard Roe*, being so arrested, and in the custody of the defendant, so being sheriff as aforesaid, by virtue of said writ, for the cause aforesaid, he, the defendant, as such sheriff, afterwards, and before the return of said writ, on the *tenth* day of *September*, 1899, at *Woodstock*, took bail for the appearance of the said *Richard Roe* in said court, to which said writ was returnable according to law, and the defendant took a bail-bond of the said *Richard Roe* and two other persons as his sureties or bail, in the penal sum of *seven hundred* dollars, conditioned for the appearance of the said *Richard Roe* at the time and place aforesaid; and the plaintiff further says that the said *Richard Roe* did not appear before said court above mentioned, according to the condition of said bail-bond, and the exigency of said writ, but wholly failed to appear, and made default of appearance, whereby the said bail-bond became forfeited; and though the plaintiff did afterwards, and while the defendant was sheriff as aforesaid, on the *twentieth* day of *October*, 1899, at *Woodstock*, aforesaid, request the defendant to assign to him, the plaintiff, said writing obligatory, or bail-bond, in the said action, according to the form of the statute in such case provided, yet the defendant, not regarding the duty of his said office as sheriff, nor the statute in such case made and provided, but contriving and intending to injure the plaintiff, and to prevent him from bringing an action on said bail-bond, and to deprive him of the means of recovering the debt aforesaid, did not, nor would, at the time when he was so requested, as aforesaid, assign the said bail-bond to him, the plaintiff, but wholly refused, and has ever since neglected and refused so to do, by means whereof the plaintiff has been and is prevented from bringing any action on said bail-bond, and has been and is deprived of the means of recovering his said debt, and is likely to lose the same, to his damage *eight hundred* dollars, for the recovery of which, with just costs, the plaintiff brings this suit.

Fail not, (concluding as in Form No. 10663).

(1) On Officer's Liability as Bail.

Form No. 18604.²

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiffs respectfully shows to this court:

1. That at the times hereinafter mentioned the plaintiffs were copartners doing business in the city of *New York* under the firm name of *Doe & Roe*.

2. That the defendant was sheriff of the county of *New York* on and from the *first* day of *January*, 1899, to the *first* day of *January*, 1901.

1. See, generally, *supra*, note 1, p. 112.

2. *New York*.—Code Civ. Proc., § 587.

3. That an order of arrest, of which a copy is annexed and made a part of this complaint, and marked Schedule *A*, was duly made by the Hon. *John Marshall*, at that time a justice of the *Supreme Court* of the state of *New York*, and delivered to the said defendant on or about the *tenth* day of *January*, 1899, in an action in said court, wherein these plaintiffs were plaintiffs and one *Samuel Short* was defendant, requiring the defendant in this action to arrest and hold to bail in the sum of *one thousand* dollars the said *Samuel Short*.

4. That thereupon this defendant arrested the said *Samuel Short*, on or about the *twelfth* day of *January*, 1899, but thereafter permitted him to escape from his custody; that on or about the *fifteenth* day of *January*, 1899, the said defendant delivered to the plaintiffs' attorneys, by whom said order of arrest was subscribed and indorsed, a paper purporting to be a certified copy of an undertaking of the bail taken by him upon the discharge of the said *Samuel Short* from arrest, a copy of which is annexed as a part of this complaint, and marked Schedule *B*, but the same was not executed by *two* or more sufficient bail and did not state their places of residence and occupations according to law, and that on the next day, that is to say, on or about the *sixteenth* day of *January*, 1899, a notice was duly served on this defendant by these plaintiffs that plaintiffs did not accept the said bail; that after the receipt of the said notice by the defendant, neither the defendant nor the said *Samuel Short* gave to the plaintiffs, or their attorneys, by whom the said order of arrest was subscribed, notice of the justification of the same or of other bail before a judge of this court or a county judge at any specified time or place, or any justification or other notice or justification as required by law.

5. That on or about the *twentieth* day of *May*, 1899, the plaintiffs obtained judgment in said action against the said *Samuel Short*, for the sum of *eight hundred* dollars, and on the *twenty-second* day of *May*, 1899, caused to be filed a transcript of said judgment in the office of the clerk of *New York* county, and an execution to be duly issued to the defendant, sheriff of said county, upon said judgment against the property of said *Samuel Short*, which was thereafter returned by said sheriff wholly unsatisfied, and thereafter and on the *twenty-ninth* day of *May*, 1899, an execution against the person of the said *Samuel Short* was duly issued to the said sheriff, which has also been returned by the said sheriff "defendant not found."

6. That the said judgment has not been paid nor any part thereof, but the same is still unpaid and in full force.

7. That the amount of said judgment and interest was duly demanded of this defendant before the commencement of this action and the payment of the same refused.

8. That by reason of the premises aforesaid this plaintiff has been damaged in the sum of *one thousand* dollars, and this defendant is liable therefor to plaintiff as bail.

Wherefore, (concluding as in Form No. 11457).

(m) On Joint and Several Officers' Receipt.

Form No. 18605.¹

(Conn. Prac. Act, p. 137, No. 237.)

(Commencing as in Form No. 5912.)

1. On *May 1st*, 1878, the plaintiff was sheriff of *New Haven* county, and had in his hands for service a writ of attachment against *John Doe*.

2. On said day *John Doe* and the defendant signed and delivered to the plaintiff a receipt for certain property attached under said writ, of which Exhibit *A*, hereto annexed, is a copy.

3. On *May 1st*, 1879, and during the continuance of said attachment lien, the plaintiff demanded said property of the defendant, who failed to redeliver the same.

The plaintiff claims \$500 damages.

(Concluding as in Form No. 5912.)

(n) *Wrongfully Returning Writ Nulla Bona and Refusing to Distribute Proceeds Pro Rata to Several Judgment Creditors.*

Form No. 18606.²

*[(Title of court and cause as in Form No. 5929.)]*³

Now comes the plaintiff and says that it is a partnership doing business under the laws of the state of *Ohio*, with its principal place of business in the city of *Cleveland, Ohio*.

That defendant is now, and was, at the time of the grievances hereinafter mentioned, the duly elected, qualified and acting sheriff of *Cuyahoga* county in said state of *Ohio*.

1st. Plaintiff says that on or about the *sixteenth* day of *January*, 1893, by the consideration of this court at its *January* term, 1893, one *Simon Fischel* recovered a judgment against one *Adolph Mahrer* for the sum of *three thousand and forty-one* dollars and *thirty* cents and *five* dollars and *fifty-five* cents costs, and that a writ of execution on said judgment was duly issued to the defendant; that under and by virtue of said writ, said defendant levied upon and took possession of certain goods and chattels then and there the property of said *Adolph Mahrer*, and advertised to sell the same in accordance with law on the *twenty-sixth* day of *January*, 1893; that on said *sixteenth* day of *January*, 1893, and subsequent to said levy, said *Adolph Mahrer* duly assigned, according to law, his property to *Peter Zucker*, Esq., for the benefit of his creditors.

1. See, generally, *supra*, note 1, p. 112.

2. *Ohio*. — Bates' Anno. Stat. (1897), § 5382.

This petition is copied from the records in *Ryan v. Root*, 56 Ohio St. 302. The court of common pleas sustained a demurrer to the petition, but upon error to the circuit court this judgment was reversed. The supreme court affirmed the judgment of the circuit court and held that under the statute, where two or more writs of execution against the same debtor are

sued out during the term at which judgment was rendered, no preference shall be given to either writ; that the seizure under the first writ inures to the benefit of the subsequent judgment creditors and no formal levy of later executions is necessary, and that it is the duty of the sheriff to distribute the proceeds to the several judgment creditors pro rata.

3. The matter to be supplied within [] will not be found in the reported case.

That on the *twenty-fifth* day of *January*, 1893, by the consideration of this court at its *January* term, 1893, plaintiff recovered a judgment against said *Adolph Mahrer* for the sum of *two thousand eight hundred and fourteen* dollars and *fourteen* cents and costs amounting to *five* dollars and *fifty-five* cents, and that on said *twenty-fifth* day of *January*, 1893, a writ of execution was duly issued on said judgment and delivered to said sheriff commanding him to make of the goods and chattels of said *Adolph Mahrer* said sum of *two thousand eight hundred and fourteen* dollars and *fourteen* cents damages and *five* dollars and *fifty-five* cents costs, and that, for want of goods and chattels, he cause the same to be made of the lands and tenements of the said *Adolph Mahrer*, and that he return said execution within *sixty* days from the date thereof.

Defendant, as such sheriff, at the time said writ was so delivered to him, was in possession of said goods and chattels hereinbefore mentioned belonging to the said *Adolph Mahrer*, upon which a levy could have been made and out of which said judgment might have been satisfied, but defendant, disregarding his duty as such sheriff, failed and neglected to make any levy in the premises.

Plaintiff says that it obtained its judgment aforesaid during the same term of court at which the said *Simon Fischel* obtained his aforesaid judgment, and that, under and by virtue of section 5382 of the Revised Statutes of Ohio, it was entitled to its pro rata share of the amount realized by the sale of said goods by said sheriff under and by virtue of the writ of execution issued on the judgment of the said *Simon Fischel*; that on or about the *twenty-fifth* day of *January*, 1893, plaintiff, by its attorneys, served written notice upon the said sheriff that it had obtained its judgment aforesaid and that he, the said sheriff, should hold all the funds received from the sale of said goods and chattels subject to the rights of this plaintiff; that defendant has failed and neglected to have any part of the money so levied before said court at the return day thereof or to pay the same or any portion thereof to the plaintiff, although plaintiff, on said *twenty-fifth* day of *January*, 1893, and at divers other times, demanded of the defendant the payment of its pro rata amount as provided by law; that defendant falsely returned upon said writ of execution that said *Adolph Mahrer* had no goods and chattels, lands or tenements within said county, whereon to levy the amount of said judgment or any part thereof; that defendant, by the sale of said goods and chattels, realized the sum of *three thousand and forty-one* dollars and *thirty* cents and the costs of suit; that plaintiff has at divers and various times demanded of defendant the payment to it of its pro rata share of said sum so realized, but the defendant refused and still refuses to pay the same.

2d. Plaintiff says that on or about the *sixteenth* day of *January*, 1893, by the consideration of this court at its *January* term, 1893, one *Simon Fischel* recovered a judgment against one *Adolph Mahrer* for the sum of *three thousand and forty-one* dollars and *thirty* cents and *five* dollars and *fifty-five* cents costs, and that a writ of execution on said judgment was duly issued to the defendant; that under and by virtue of said writ said defendant levied upon and took possession

of certain goods and chattels then and there the property of said *Adolph Mahrer* and advertised to sell the same in accordance with law on the *twenty-sixth* day of *January*, 1893.

Plaintiff says that on or about the *twenty-seventh* day of *February*, 1893, by the consideration of this court at its *January* term, 1893, it recovered a judgment against said *Adolph Mahrer* for the sum of *one thousand seven hundred and two* dollars and *twenty* cents and costs amounting to *forty-one* dollars and *thirty-five* cents; that on the *twenty-seventh* day of *February*, 1893, an execution was duly issued on said judgment and delivered to the defendant, as sheriff of said county, commanding him to make of the goods and chattels of said *Adolph Mahrer* said sum of *one thousand seven hundred and two* dollars and *twenty* cents and *forty-one* dollars and *thirty-five* cents costs, and, for want of goods and chattels, that he cause the same to be made of the lands and tenements of said *Adolph Mahrer*; that he return said execution within *sixty* days from the date thereof.

Plaintiff says that by its attorneys it did, on the *twenty-fifth* day of *January*, 1893, serve written notice upon said defendant to hold the funds derived from the sale of the goods and chattels of the said *Adolph Mahrer*, under and by virtue of a writ of execution issued on the judgment of the said *Simon Fischel* against said *Mahrer*, subject to the rights of this plaintiff; that it claimed the right to pro rata thereon, as provided by section 5382 of the Revised Statutes of Ohio; that defendant falsely returned upon said execution that the said *Adolph Mahrer* had no goods and chattels, lands or tenements within said county whereon to levy the amount of said judgment or any portion thereof; that defendant disregarded his duty, as such sheriff, to hold said funds, although the said judgment of plaintiff was taken at the same term of court as the judgment of said *Simon Fischel*; that defendant, by the sale of said goods and chattels, realized the sum of *three thousand and forty-one* dollars and *thirty* cents and the costs of suit; that the plaintiff has, at divers and various times, demanded of defendant the payment to it of its pro rata share of said sum so realized, but the defendant refused and still refuses to pay the same.

By reason of the premises aforesaid, plaintiff has been deprived of the means of obtaining the moneys so directed to be levied; that he has lost his remedy against the said *Adolph Mahrer*; that he has been damaged in the sum of *one thousand eight hundred and twenty-seven* dollars and *two* cents and interest from *January 26th*, 1893, for which he asks judgment against said defendants.

[(*Signature and verification as in Form No. 5929.*)]¹

- (2) AGAINST SHERIFF AND SURETIES ON HIS BOND, FOR ILLEGAL LEVY AND SALE, AND AGAINST A THIRD PERSON, WHO DIRECTED OR PROCURED SUCH LEVY OR SALE TO BE MADE AND GAVE AN INDEMNIFYING BOND THEREOF.

Form No. 18607.

(Precedent in *State v. Smith*, 119 N. Car. 350.)³

1. The matter to be supplied within [] 2. A demurrer was sustained to this will not be found in the reported case. complaint in the trial court. On ap-

[(Title of court and cause as in Form No. 5927.)]

The State of *North Carolina*, on the relation of *H. L. Cook*, as assignee of *A. McIver* and *A. B. McIver*, complains of the defendants and alleges:]¹

1st. That on the 20th day of *May*, 1891, *A. McIver* and *A. B. McIver* made, executed and delivered to the plaintiff and *John S. McIver* a deed of assignment whereby and wherein they conveyed to them in trust, and for the purposes therein mentioned, all the goods, wares and merchandise, property and effects, as fully described and set out in said deed, which was recorded in said county on the 20th day of *May*, 1891, in book *R*, No. 4, pages 207-8-9 and 10, and which said deed is made a part of this complaint.

2d. That the defendant, *Jas. B. Smith*, is now, and was at the time hereinafter mentioned, the sheriff of *Cumberland* county, having given bond and qualified as such, with the defendant *Walter Watson* as surety, a copy of which said bond is hereto attached and made a part of this complaint.

3d. That on the 23d day of *May*, 1891, the defendant, *Frank W. Thornton*, caused to be issued to the defendant, *James B. Smith*, sheriff, as aforesaid, executions against the property of the said *A. McIver* and *A. B. McIver* for the sum of \$38 and \$51, total \$91; and notwithstanding the said *James B. Smith*, sheriff, had notice that the plaintiff claimed title to said goods, levied the said execution upon the property of the plaintiff, who has since become a sole assignee of *A.* and *A. B. McIver*, by order of the court, in violation of the plaintiff's rights, unlawfully levied and unlawfully sold the said goods under said executions as the property of said *A.* and *A. B. McIver*.

4th. That the said defendant sheriff, in making the levy which the plaintiff alleges was unlawful, seized and took into his possession a large amount of goods of far greater value than the amount called for in the executions, to wit: a large amount of goods, such as groceries and other goods, an inventory of which has not been filed by the said sheriff, and a large amount of goods, such as liquors and other property, at the *Overbaugh* house, the goods first mentioned being in the storehouse on *Hay* street, in *Fayetteville, N. C.*, lately occupied by *A.* and *A. B. McIver*, the said levy being largely in excess of the amount called for by execution, and a great many of the same became injured and a number utterly ruined by being kept without air or ventilation while so in the custody of the defendant sheriff, to the great damage of the plaintiff, and that the value of the goods so levied upon by the said sheriff was \$3,000, and the amount called for in the execution under and by virtue of which the levy was made was \$91 and costs \$4.50.

5th. That the goods and effects so wrongfully levied upon were advertised and sold, the sale being advertised for the 6th day of *June*, *Saturday*, when the said sheriff, without sufficient notice and without cause, postponed the sale, notwithstanding the fact that the day

peal, the ruling was held erroneous and the complaint held sufficient. supplied within [] will not be found in the reported case.

1. The matter enclosed by and to be

advertised for the sale was the time when large numbers of bidders were attending and ready as well as desired to bid at the sale; but the sale was postponed to a time later, and the plaintiff avers that the goods brought less in consequence, and were kept thereby a longer time, in the heat of a closed storehouse, thus adding to the plaintiff's loss and injury; that the first sale day as advertised was for *Saturday*, the *6th* day of *June*, 1891, when there were many people ready to attend the sale, and at the time to which it was postponed there was far less, as it was a less public day, and the plaintiff was greatly injured thereby.

6th. That, in pursuance of said unlawful levy, the said sheriff wrongfully sold the plaintiff's goods, after keeping them in possession for a long time, to wit, from the *23d* of *May* until *June 8*, 1891; and finally, on the *8th* day of *June*, 1891, he sold the same, which were of the actual value of \$220, a sum far greater than the amount called for in the said executions, and thereafter returned said executions satisfied.

7th. That the actual value of said goods so levied upon by the said sheriff was \$3,000, and the said *F. W. Thornton*, defendant herein, directed the said sheriff to sell the same without regard to the deed of assignment and the plaintiff's rights thereunder, and agreed to indemnify the said sheriff against any and all loss that might arise, or any damage that might ensue, from said unlawful levy and sale, and did do so, as the plaintiff has been informed by the said sheriff, and after the said sale the said *F. W. Thornton* received proceeds thereof to his own use and benefit.

8th. That before the said sale the plaintiff forbid the said sheriff from selling the goods so levied upon, and notified him of his title thereto, and that since said sale he demanded the proceeds thereof, which the said sheriff disregarded, and has refused to pay over the proceeds thereof to the plaintiff or any part thereof.

9th. That by reason of the premises the plaintiff has been injured, and sustained loss to the amount of the value of the goods, to wit, \$210, and the actual value of the same, which were so levied upon and sold, to-wit, and the great damage of the goods which were not sold, but injured and totally ruined by the heat of confinement in the closed places while so in the sheriff's custody.

Therefore the plaintiff demands judgment for the sum of \$210, the value of the goods sold, for the sum of *five hundred and fifty* dollars, the damages resulting from injury and loss of the goods from close confinement and the depreciation in prices resulting from the unnecessary postponement and lack of bidders which might have been had but for the sheriff's unlawful acts, and for the sum of *five thousand* dollars, the penalty of said bond, to be discharged upon the payment to the relator of the plaintiff of the sums above set forth, and for the cost of the action, and such other and further relief as the plaintiff's relator may be entitled to receive.

[(*Signature and verification as in Form No. 5927.*)]¹

(3) AGAINST DEPUTY SHERIFF, FOR SERVING WRIT IN WHICH
HE WAS A PARTY DEFENDANT.

Form No. 18608.

(Oliver's Prec. (2d ed.) 430.)

(Commencing as in Form No. 6940.)

For that, on the *first* day of *June*, 1898, at *Portland*, in the county of *Cumberland*, one *William West*, for value received of the plaintiff, indorsed over to him a promissory note, under the hands of *Richard Roe* and the said *Samuel Short*, bearing date the *first* day of *March*, 1898, by them given to the said *William West*, or his order, in *six* months from the date thereof, with lawful interest for it afterwards, if not then paid; and by the same indorsement, appointed the contents of said note, then unpaid, to be paid to the plaintiff, who afterwards, viz., on the *first* day of *September*, 1898, at said *Portland*, the said *six* months having expired, gave the said *Richard Roe* and the said *Samuel Short* due notice thereof, and then and there requested them to pay him the contents of said note, which they neglected to do; wherefore the plaintiff afterwards, viz., on the *tenth* day of *September*, 1898, took out of the clerk's office of our *Supreme Judicial* Court for said county, our writ of *capias* or attachment, in the form by law prescribed, against the said *Richard Roe*, and the said *Samuel Short*, who then was, and ever since hath been, a deputy sheriff of our said county of *Cumberland*, returnable into our said court held at *Portland*, within and for our said county of *Cumberland*, on (*stating date of return*), directed to any coroner of our said county of *Cumberland*, or his deputy, and not otherwise directed, commanding such coroner or deputy to attach the goods or estate of the said *Richard Roe* and the said *Samuel Short* to the value of *nine hundred* dollars, and for want thereof to take their bodies, if to be found in his precinct, and them safely keep, so as to have them before our justices of our said court, then next to be held at *Portland*, within and for our said county of *Cumberland*, on (*stating time*), to answer to the now plaintiff, in a plea of the case, for not paying him the said sum of *five hundred* dollars with the interest aforesaid. And the said *Samuel Short* afterwards, viz., on the *eleventh* day of *September*, 1898, perceiving that our said writ was taken out as aforesaid, and subtly contriving to defeat the plaintiff's suit aforesaid, and to defraud the plaintiff of the aforesaid *five hundred* dollars, and of the aforesaid interest for it, and to expose him not only to the costs of his suit aforesaid, but also to the payment of costs to the said *Richard Roe* and *Samuel Short*, at said *Portland*, craftily got into his hands our writ aforesaid; and afterwards, viz., on the *twelfth* day of *September*, 1898, in our said county, served the same writ on the said *Richard Roe* and *Samuel Short* by attaching a dwelling-house and *sixty* acres of land of the said *Richard Roe*, and by attaching a cow of the said *Samuel Short*, and giving each of them a summons; and wrote his said service, and doings thereon, and subscribed the same by the name of *Samuel Short*, deputy sheriff; and afterwards returned the said writ, so served, into our said court, when and where it was returnable as aforesaid. And the plaintiff, supposing the same

writ to be duly served by a coroner of our said county, or his deputy, entered his said action in our said court, held as aforesaid. And the said *Richard Roe* appeared in our said court, to answer to the plaintiff in his said action, and finding said writ was not served by such coroner as aforesaid, or his deputy, but was served by the said *Samuel Short*, without being directed to a deputy sheriff of our said county of *Cumberland*, alleged and showed the same to our said court, and prayed that the same writ might be dismissed, for want of a good legal service, and for their costs to be allowed them; whereupon our said court then and there gave judgment accordingly, and allowed the said *Richard Roe* ten dollars for his costs. And the said *Richard Roe* hath since sued out our writ of execution upon said judgment, and the plaintiff hath thereupon been compelled to pay that sum with *two* dollars more for the same writ, and hath also, by reason of the aforesaid fraudulent management and intermeddling of the said *Samuel Short*, lost his own costs and expenses in that suit, besides much time in commencing and so far prosecuting his said action, and hath also been ever since delayed in recovering the debt aforesaid, to the damage (*concluding as in Form No. 6940*).

(4) AGAINST CORONER, FOR NOT SERVING AN EXECUTION, BUT RETURNING IT FULLY SATISFIED BY TAKING NOTE OF DEBTOR FOR THE AMOUNT.

Form No. 18609.

(*Oliver's Prec.* (2d ed.) 444.)

(*Commencing as in Form No. 6940*) for that whereas the plaintiff by the consideration of our justices of our *Supreme Judicial Court*, held at *Portland* on (*stating time*), within and for the county of *Cumberland*, recovered judgment against *Richard Roe*, sheriff of the said county of *Cumberland*, for *five hundred* dollars debt, and *thirty* dollars costs of suit; and on (*stating time*), took out a second writ of execution thereon, in form by law prescribed, directed to the coroner of our said county, or his deputy, and returnable to our *Supreme Judicial Court* next to be holden at *Portland*, within and for said county of *Cumberland*; and on (*stating time*), delivered it to the said *John Lynch*, then and still coroner of the same county, to be executed and returned according to law; yet the said *John Lynch* hath not executed the said writ, nor made any lawful return thereupon; but on (*stating time*), returned thereupon into our said court that he had taken of *Richard Roe* his note for the satisfaction of the said execution, and returned it fully satisfied, whereby the plaintiff hath lost the benefit of the said execution; to the damage (*concluding as in Form No. 6940*).

b. Answer or Plea.¹

1. Requisites of Answer or Plea — Generally. — For the formal parts of an answer or plea in a particular jurisdiction see the title ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Each Defense Treated as Separate. — An affirmative defense set out in an action is to be treated as a separate plea, and upon demurrer thereto the defendant is not entitled to the benefit of denials made in another part of the

(1) TO ACTION FOR TRESPASS OR CONVERSION.

(a) *Denying the Taking.*Form No. 18610.¹

(Commencing as in Form No. 18611, and continuing down to *.)

That he denies that at the time alleged in the complaint or at any other time, at the place alleged in the complaint or at any other place, the defendant wrongfully took the said goods and chattels

answer, unless incorporated by reference and made a part of the affirmative defense. *Craft v. Brandow*, (Supreme Ct. Spec. T.) 24 Misc. (N. Y.) 306.

New Matter, Generally.—When an officer desires to introduce new matter as a defense, he must set out such matter in his pleading. *Dennis v. Snell*, 54 Barb. (N. Y.) 411; *Beaty v. Swarthout*, 32 Barb. (N. Y.) 293.

In an action against a sheriff for violation of his duty in the service of an attachment on a person, if he relies on matters occurring after its issuance and operating as a dissolution thereof, such matters must be specially pleaded. *McComb v. Reed*, 28 Cal. 281.

Action on the Case.—An action on the case against an officer differs from an action of trespass for taking the plaintiff's goods, in that in the former case the defendant, under the general issue, may give in evidence any matter of excuse or justification without pleading it specially; thus, he may show that he seized the goods as sheriff by virtue of a judgment and execution, and that the mortgage or bill of sale, under which the plaintiff claimed, was fraudulent and void as against creditors. *Hall v. Snowhill*, 14 N. J. L. 551.

Justification Under Process—Generally.—Where the officer justifies under process, such justification must be specially pleaded. *Daniel v. Hardwick*, 88 Ala. 557; *McAden v. Gibson*, 5 Ala. 341; *Harrison v. Davis*, 2 Stew. (Ala.) 350; *Olsen v. Upsahl*, 69 Ill. 273; *Isley v. Huber*, 45 Ind. 421; *Debord v. La Hue*, 26 Ind. 212; *Miller v. Hahn*, 116 Mich. 607; *Moore v. Devoy*, (N. Y. Super. Ct. Spec. T.) 37 How. Pr. (N. Y.) 18; *Schultz v. Frank*, 1 Wis. 352.

Facts must be Stated.—Every fact necessary to show a justification must be stated. *Harrison v. Davis*, 2 Stew.

(Ala.) 350; *Isley v. Huber*, 45 Ind. 421; *Whitney v. Bayley*, 4 Allen (Mass.) 173; *Morris v. Van Voast*, 19 Wend. (N. Y.) 283; *Kelly v. Fritz*, 11 Heisk. (Tenn.) 7; *Schultz v. Frank*, 1 Wis. 352.

Description of Process.—The process must be correctly described in the pleading. *Daniel v. Hardwick*, 88 Ala. 557; *Harrison v. Davis*, 2 Stew. (Ala.) 350.

Process in Force at Time of Execution.—Where the officer justifies under a legal process, he must show not only that the writ under which he acted purported to be valid when issued, but that it was in full force at the time he executed it. *Dayton v. Fry*, 29 Ill. 525.

Property Claimed by Stranger to the Process.—Where the property is claimed by a stranger to the process, the plea of justification must show that the property belongs to the defendant in the process or that it was liable to be taken under the process. *Richardson v. Smith*, 29 Cal. 529; *Barley v. Cannon*, 17 Mo. 595; *Hawk v. Lepple*, 51 N. J. L. 208; *Bruen v. Ogden*, 11 N. J. L. 370; *Howard v. Conde*, 22 Oregon 581; *Krewson v. Purdom*, 11 Oregon 266; *Buck v. Colbath*, 3 Wall. (U. S.) 334.

Return of Process.—An answer justifying the seizure of property under process, which is returnable, must allege that the process was returnable, in what court, and, if the return day is past, that it was in fact returned, or show an excuse for its non-return. *Kirksey v. Dubose*, 19 Ala. 43; *McAden v. Gibson*, 5 Ala. 341; *Walker v. Woods*, 15 Cal. 66; *Caldwell v. Kenworthy*, 31 Ind. 238; *Williams v. Babbitt*, 14 Gray (Mass.) 141; *Russ v. Butterfield*, 6 Cush. (Mass.) 242; *Wright v. Marvin*, 59 Vt. 437; *Ellis v. Cleveland*, 54 Vt. 437.

1. See, generally, *supra*, note 1, p. 157.

from the possession of the plaintiff, or that he still unjustly detains the same from the plaintiff, to the damage of the plaintiff *five hundred* dollars, or any other sum, or that by reason of the taking alleged in the complaint, or any act or acts of the defendant, the plaintiff has sustained damage to the amount of *five hundred* dollars, or any damage whatever.

(Signature, office address and verification as in Form No. 11431.)

(b) *Denying Title of Plaintiff.*

Form No. 18611.¹

(Title of court and cause as in Form No. 11431.)

The defendant, *John Lynch*, for answer to the complaint of the plaintiff in the above entitled action, says:*

That he denies that he has any knowledge or information sufficient to form a belief that at the time alleged in the complaint, or at any other time, the plaintiff was lawfully, or otherwise, possessed of the goods and chattels mentioned and described in the complaint, or any or either of them or any part thereof, or that the said goods and chattels, or any or either of them or any part thereof, were then or ever since have been, or now are, the property of the plaintiff, or that the same were or are of the value of *five hundred* dollars, or that said property composed the stock of goods in the store of the plaintiff at the place alleged in the complaint or at any other place.

(Signature, office address and verification as in Form No. 11431.)

(c) *Fraudulent Sale to Plaintiff.²*

Form No. 18612.

(Precedent in *Bush v. Collins*, 35 Kan. 537.)³

[[Title of court and cause as in Form No. 1325.]]⁴

And now comes the defendant, and for answer to the petition of plaintiff, denies each and every allegation in said petition contained.

2d. And for a second defense, the defendant alleges that at the time of the alleged taking of said goods and chattels in said petition mentioned, the defendant was the sheriff of the county of *Shawnee*,

1. See, generally, *supra*, note 1, p. 157.

2. **Requisites of Answer or Plea, Generally.**—See *supra*, note 1, p. 157.

Specially Plead.—In an action by the purchaser of a chattel against an officer for attaching the property of the vendor, the defendant cannot, under an answer simply denying the plaintiff's property, prove that the sale was fraudulent and void against creditors. This being special matter of defense, it must be set forth in the answer. *Thissell v. Page*, 11 Gray (Mass.) 394.

Where property in the hands of a stranger to an execution is seized, the officer must plead fraud in his answer,

but where the property is found in the possession of the execution debtor, and, after levy, is claimed by a stranger, the officer is not bound to surmise that there may have been a sale and so attack it for fraud in his answer: he is not bound to assail the transaction until it is brought to his knowledge, and if it makes its first appearance at the trial, he may meet it there with proof of the fraud. *Chamberlain v. Stern*, 11 Nev. 268.

3. Judgment for plaintiffs was reversed.

4. The matter to be supplied within [] will not be found in the reported case.

in the state of *Kansas*, and that said goods and chattels were the property of *A. D. McMillan* and *Wm. McMillan & Co.*; that at that time various and several writs of attachment had been issued from the office of the clerk of the *district* court of said county at the action of and in suits brought by the *McCord & Nave Mercantile Company*, a corporation organized under the laws of the state of *Missouri*, the *Gauss-Hunicke Hat Company*, a corporation organized under the laws of the state of *Missouri*, and *Isaac Weill, Isadore Weill*, and *A. Steinaker & Co.*; and also in suits and actions brought in said court by others against the said *A. D. McMillan & Co.*, and against the property of said *A. D. McMillan & Co.*, and duly delivered to defendant as such sheriff; and if defendant took the said goods and chattels, he took them as sheriff as aforesaid, and by virtue of said several writs of attachment, as he might and ought rightfully to do; and that if the plaintiff claims said goods and chattels, he claims under a pretended sale from *A. D. McMillan & Co.*; but that such pretended sale, if any was made, was a fraudulent one and void, and made with the intent to defraud the creditors of the said *A. D. McMillan & Co.*, and especially the plaintiffs in the attachment suits above mentioned. Wherefore, defendant prays judgment.

[(Signature and verification as in Form No. 12704.)]¹

(d) *Justification Under Writ of Attachment.*²

Form No. 18613.³

(Commencing as in Form No. 18611, and continuing down to *.)

1. Upon his information and belief, that on the *first* day of *June*, 1899, one *Richard Roe* was indebted to *John Doe*, in a cause of action arising upon contract, in the sum of *five hundred* dollars, with interest thereon from the *first* day of *April*, 1898, and on or about the said

1. The matter to be supplied within [] will not be found in the reported case.

2. *Requisites of Answer or Plea, Generally.*— See *supra*, note 1, p. 157.

The officer must allege not only the issuing of the attachment, but every material fact and condition necessary to the regularity of the issue, where goods were seized in the hands of a third party. *Oberfelder v. Kavanaugh*, 21 Neb. 483; *Noble v. Holmes*, 5 Hill (N. Y.) 194; *Van Etten v. Hurst*, 6 Hill (N. Y.) 311; *Bogert v. Phelps*, 14 Wis. 88.

The answer need not set forth minutely every fact relating to the attachment suit: where the time of the commencement of the action, the names of the parties, the court, and that the goods were taken by virtue of a writ of attachment issued therein, are stated, it is sufficient. *Towdy v. Ellis*, 22 Cal. 650.

Copy of Writ.— In an action of replevin against an officer, if he claims possession of the property under and by virtue of the levies of certain writs of attachment, he need not in his answer set out copies of the writs as exhibits when they are referred to by recitals showing the dates thereof, the names of the attaching creditors, the amounts claimed by each, the character of the indebtedness and the returns on the writs. *Kingsbury v. Buchanan*, 11 Iowa 387.

Debt Against Vendor.— Where the officer justifies the taking of goods from a vendee under a writ of attachment against the vendor, he must show a debt against the vendor. *Sexey v. Adkinson*, 34 Cal. 346; *Cook v. Miller*, 11 Ill. 610; *Damon v. Bryant*, 2 Pick. (Mass.) 411; *Bogert v. Phelps*, 14 Wis. 88; *Norton v. Kearney*, 10 Wis. 443;

3. See, generally, *supra*, note 2, this page.

first day of June, 1899, the said *John Doe* commenced an action in the *Supreme Court* of the state of *New York*, in and for the county of *Suffolk*, against the said *Richard Roe*, for the recovery of the said money and interest, and issued to this defendant a summons in due form of law for service, and on the said *first day of June* made application to *John Marshall*, one of the justices of the said court, for a warrant of attachment against the property of the said *Richard Roe*, and presented to the said justice on said application an affidavit or affidavits whereby it appeared that a cause of action existed against the said *Richard Roe*, specifying the amount of the said claim and the grounds therefor, and that the defendant was not a resident of the state of *New York*, but resided at No. 200 *State street*, in the city of *Hartford*, in the state of *Connecticut*, and that a summons had been issued to the sheriff of the county of *Suffolk*, and at the same time presented to the said justice an undertaking as required by law, with sufficient surety, to the effect that if said defendant in said action recovered judgment, the plaintiff therein would pay all costs that might be awarded to the said defendant and all damages which he might sustain by reason of such attachment, not exceeding the amount specified in such undertaking, and the amount specified in such undertaking was at least the sum of *two hundred and fifty* dollars.

2. That thereupon the said justice duly issued a warrant of attachment against the property of the said *Richard Roe*, directed to this defendant, as sheriff of the county of *Suffolk*, requiring and commanding him to attach and safely keep all the property of the said *Richard Roe* within his county, or so much thereof as might be sufficient to satisfy the demand of the plaintiff in said warrant of attachment for *six hundred* dollars, with interest thereon as aforesaid, being the amount of indebtedness stated in such attachment, together with all costs and expenses, and that this defendant proceed thereon in the manner required by law.

3. That the said warrant of attachment was delivered to and received by this defendant, as such sheriff, as aforesaid, for service on the *third day of June, 1899*, and under and by virtue of said warrant of attachment he forthwith levied upon and attached *four* cases and *two* casks of the character and description of those mentioned and described in the complaint, and took the same into his custody, which the defendant believes to be the goods and chattels referred to in the complaint, and that the said attaching and taking as aforesaid constitute the supposed wrongful taking in the complaint alleged.

4. Upon his information and belief, this defendant avers that the said goods and chattels so attached and taken as aforesaid were at the time of said attaching and taking the property of the said *Richard Roe*, or that the said *Richard Roe* had a leviable or attachable interest therein, or that the said goods or chattels were liable to be levied upon and taken under and by virtue of said attachment.

(*Signature, office address and verification as in Form No. 11431.*)

(c) *Justification Under Execution Against Third Person.*¹

1. **Requisites of Answer or Plea, Generally.**— See *supra*, note 1, p. 157.

Valid Judgment.— Where a sheriff justifies taking goods under an execu-

Form No. 18614.¹

(Commencing as in Form No. 18611, and continuing down to *.)

tion against the plaintiff, he is not required to plead anything more than the execution under which he seized the goods and need not set out the judgment. *Davis v. White*, 1 *Houst. (Del.)* 228; *Outhouse v. Allen*, 72 *Ill.* 529; *Jackson v. Hobson*, 5 *Ill.* 411; *Damon v. Bryant*, 2 *Pick. (Mass.)* 411; *Werner v. Waters*, 55 *Barb. (N. Y.)* 591; *Sheldon v. Van Buskirk*, 2 *N. Y.* 473; *Farley v. Lea*, 4 *Dev. & B. L. (20 N. Car.)* 169; *Traylor v. McKeown*, 12 *Rich. L. (S. Car.)* 251; and see *Bogert v. Phelps*, 14 *Wis.* 88. But where the officer levies on property claimed by a person other than the defendant in the execution, he must show the judgment upon which the execution issues, as well as the execution itself. *Johnson v. Holloway*, 82 *Ill.* 334; *Jackson v. Hobson*, 5 *Ill.* 411; *Thatcher v. Maack*, 7 *Ill. App.* 635; *Ambler v. Traver*, 2 *Ill. App.* 614; *Hartman v. Cochrane*, 2 *Ill. App.* 592; *Damon v. Bryant*, 2 *Pick. (Mass.)* 411; *McDonald v. Prescott*, 2 *Nev.* 109; *High v. Wilson*, 2 *Johns. (N. Y.)* 40; *Parker v. Walrod*, 16 *Wend. (N. Y.)* 514; *Masten v. Teller*, 7 *Okla.* 668.

Where the real defense is new matter, that is, a justification under a judgment and execution, and the defendant relies entirely upon the execution, and nothing beyond it, it is sufficient for him merely to set forth the fact; but if he desires to go further, or it becomes necessary to inquire into the consideration of the judgment, it is necessary to plead such judgment and set it forth in his answer; and having averred the existence of a judgment, he will be at liberty to prove it, and will be at liberty to show its condition, without having averred it, if material to answer any fact proved by the plaintiff. *Dennis v. Snell*, 54 *Barb. (N. Y.)* 411.

In *Shepherd v. Nabors*, 6 *Ala.* 631, the court said: "In *Savacool v. Boughton* (5 *Wend. (N. Y.)* 170) it was declared to be a settled rule of the common law, that a mere ministerial officer, who executes the process of the court having jurisdiction of the matter, and authorized to issue such process in general, or in certain specified cases, is protected in the execution of such process, if it is regular on its face, and apparently within the jurisdiction of the court issuing it. This case was re-

viewed by the court of errors, in *Parker v. Walrod* (16 *Wend. (N. Y.)* 514), and is regarded as a most satisfactory exposition of the law. It is there admitted, that if the want of jurisdiction appear upon the face of the process itself, the officer to whom it is delivered is bound to take notice of it, and can claim no protection from such process when sued for an act done in executing its mandate. Further, the court say that where the plaintiff shows title in himself, derived from the defendant in execution before its lien attached thereon, the execution will not afford a defense to the officer; but to make it available against a stranger, he must connect it with a judgment, and then show that the transfer of the property to the person thus claiming it was fraudulent and void as against the creditor who had recovered such judgment. This is stated as the only exception to the rule laid down in 5th *Wendell*. The cases cited by the plaintiff's counsel are noticed by the court, and instead of contradicting what is supposed to be the general rule, only determine that where the plaintiff shows a title derived from the defendant before the lien of the execution, in order to its invalidity, the plaintiff must produce the judgment.

Whether a case come within the rule, or what has been called the exception to it, is wholly immaterial as it respects the frame of the plea; in neither case is it necessary to allege that the *fi. fa.* was issued pursuant to a valid judgment. The execution, as we have seen, if unobjectionable in itself, will justify the officer in obeying it, and the judgment, when its production is necessary, is only evidence in connection with extrinsic proof, to show that the creditor's right to sell the property was superior to the title which the plaintiff has made out. The judgment is not a primary element in the justification of the officer, and can only be made material by the proof adduced by the plaintiff; therefore, upon principle, the pleadings cannot be required to make any averment in respect to it."

1. See also, generally, *supra*, note 1, p. 161.

1. That heretofore in an action in the *Supreme Court* of the state of *New York*, within and for the county of *Suffolk*, wherein *John Doe* was plaintiff and *Richard Roe* was defendant, judgment was, on or about the *tenth* day of *September*, 1899, duly rendered in favor of the said *John Doe*, plaintiff in said action, and against the said *Richard Roe*, defendant therein, for the sum of *five hundred* dollars, as by the judgment roll in said action, on file in the office of the clerk of said court, more fully appears.

2. That afterward, on or about the *twentieth* day of *September*, 1899, a transcript of the said judgment was duly filed and said judgment was duly docketed in the office of the clerk of the county of *Queens*, in said state of *New York*, and afterward, upon the same day, an execution against the property of the said *Richard Roe* based upon the said judgment was issued in due form of law, directed to and delivered to this defendant, as sheriff of the said county of *Queens*, for service; whereby after containing the statement and recital of the matters by law required to be stated and set forth in such case, and after setting forth that the sum of *five hundred* dollars was then actually due on the said judgment, this defendant was in substance commanded to satisfy the said judgment out of the personal property of the said judgment debtor within this defendant's county, or, if sufficient personal property could not be found, then out of the real property in his county belonging to such judgment debtor on the day when the said judgment was so docketed in his county, or at any time thereafter, in whose hands soever the same might be, and to return the said execution within *sixty* days after its receipt by him, as required by law.

3. That under and by virtue of the said execution this defendant, as sheriff of the county of *Queens*, and not otherwise, by one of his general deputies, immediately, upon receipt of said execution, levied upon certain goods and chattels of the character and description of those mentioned and described in the complaint and took the same into his custody, a schedule of which property so levied upon and taken is hereunto annexed as a part of this answer and marked "*A*;" that said goods and chattels so levied upon the defendant believes to be a portion of the goods and chattels referred to in the complaint, and that the said levying, taking and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged.

4. That this defendant, upon his information and belief, avers that the goods levied on as aforesaid were at the time of said levy the property of the said *Richard Roe*, or that the said *Richard Roe* had an interest therein liable to levy and sale under execution.

(Signature, office address and verification as in Form No. 11431.)

(f) *Justification Under Writ of Replevin.*

Form No. 18615.¹

(Commencing as in Form No. 18611, and continuing down to *.)

1. That at the times mentioned in the complaint the defendant

1. See, generally, *supra*, note 1, p. 157.

was sheriff of the county of *Suffolk*, in the state of *New York*, duly elected and qualified as such.

2. That in an action brought by one *John Doe* against one *Richard Roe*, in the *Supreme Court* of the state of *New York*, in and for the county of *Suffolk*, to recover the possession, among other things, of the property mentioned in the complaint in this action, the said *John Doe* delivered to this defendant an affidavit made by him (or *made in his behalf*) and a notice indorsed thereon describing the property mentioned in the complaint, and required this defendant to take the same from the said *Richard Roe* and deliver it to the said *John Doe*, and at the same time delivered to this defendant, as such sheriff, a written undertaking as required by law in such case, of which affidavit, notice and undertaking copies are hereto annexed as a part of this answer.

3. That by virtue of said proceedings the defendant took and detained the goods mentioned in the complaint, which are the acts of which the plaintiff complains.

(Signature, office address and verification as in Form No. 11431.)

(2) TO ACTION FOR ESCAPE.

(a) Fresh Pursuit and Recaption.

Form No. 18616.

(2 Humph. Prec. 936.)

(Title of court and cause as in Form No. 15219.)

(First plea, *nil debet.*)

And for a further plea in this behalf the said *John Lynch*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said judgment and commitment in execution in the first count of the said declaration mentioned, and the judgment and commitment in execution in the second count of the said declaration mentioned, are one and the same judgment and commitment, and not divers or different judgments and commitments, and that the supposed escape in the said first count, and the supposed escape in the said second count mentioned, are one and the same escape, and not divers or different escapes; and that after the said commitment of the said *Richard Roe* to the custody of the said *John Lynch* in execution as aforesaid, to wit, on the said (*stating date as in the declaration*), at (*stating place as in the declaration*), aforesaid, the said *Richard Roe* forcibly and without the knowledge, consent or permission of the said *John Lynch* and against his will, escaped from and out of the custody of him, the said *John Lynch*, as such sheriff as aforesaid, and fled to places to him, the said *John Lynch*, unknown, and that upon the said escape of him, the said *Richard Roe*, to wit, at (*stating place as above*), he, the said *John Lynch*, made fresh and close pursuit after the said *Richard Roe* in order to retake him, and did continue such pursuit from thence until he, the said *John Lynch*, afterwards, and before the exhibiting the bill of the

said *John Doe* against him, the said *John Lynch*, in this behalf, to wit, on (*stating time*), last aforesaid, at (*stating place*), aforesaid, retook the said *Richard Roe* upon that pursuit, and again had him detained, and hath from thence hitherto always kept and detained and doth still keep and detain him, the said *Richard Roe*, in the custody of him, the said *John Lynch*, in execution, at the suit of the said *John Doe*, for the said damages, costs and charges so by him recovered of him as aforesaid, by virtue of the said commitment of him, the said *Richard Roe*, in execution as aforesaid, to wit, at (*stating time*), aforesaid, which said escape in this plea mentioned is the same escape whereof the said *John Doe* hath above complained against him, and this he, the said *John Lynch*, is ready to verify.

Wherefore, he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

Oliver Ellsworth, Attorney for Defendant.

(*b*) *That Debtor Forcibly Escaped, but has Since Returned.*

Form No. 18617.

(2 Humph. Prec. 936.)

(*Title of court and cause as in Form No. 15219.*)

(*First plea, nil debet.*)

(*Second plea, actio non.*)

And for a further plea in this behalf the said *John Lynch*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that the said judgment and commitment in execution in the first count of the said declaration mentioned, and the judgment and execution in the said second count of the said declaration mentioned, are one and the same judgment and execution, and not divers or different judgments and commitments, and that the said supposed escape in the first count, and the said supposed escape in the said second count of the declaration mentioned, are one and the same escape, and not divers or different escapes; and that after the said commitment of the said *Richard Roe* to the custody of him, the said *John Lynch*, in execution as aforesaid, to wit, on (*stating time as in the declaration*), aforesaid, to wit, at (*stating place as in the declaration*), aforesaid, he, the said *Richard Roe*, wrongfully, privily, and without the knowledge, permission or consent of the said *John Lynch*, escaped from and out of the custody of the said *John Lynch*, as such sheriff as aforesaid, to places to him, the said *John Lynch*, unknown; but the said *John Lynch* in fact further saith that the said *Richard Roe* afterwards, and before the exhibiting of the bill of the said *John Doe* against him, the said *John Lynch*, in this behalf, to wit, on (*stating time*), last aforesaid, at (*stating place*), aforesaid, voluntarily and of his own accord returned back again into the custody of him, the said *John Lynch*, and that the said *John Lynch* did thereupon, then and there, keep and detain, and always from thence hath hitherto kept and detained, and still doth keep and detain him, the said *Richard Roe*, in the custody of

him, the said *John Lynch*, in execution, at the suit of the said *John Doe*, under and by virtue of the aforesaid commitment of him, the said *Richard Roe*, in execution as aforesaid, to wit, at (*stating place*), as aforesaid, which said escape, in this plea mentioned, is the same escape whereof the said *John Doe* hath above complained against the said *John Lynch*, and this he, the said *John Lynch*, is ready to verify.

Wherefore, (*concluding as in Form No. 15219*).

Form No. 18618.

(*Commencing as in Form No. 18611, and continuing down to *.*)

1. That the said *Richard Roe* wrongfully, and without the privity of the defendant, escaped from his custody.

2. That before the commencement of this action, to wit, on the first day of *September*, 1899, the said *Richard Roe* voluntarily returned into the defendant's custody (or upon fresh pursuit the defendant retook the said *Richard Roe* into his custody), where he ever since has remained, and now remains, by virtue of the process mentioned in the complaint.

(*Signature, office address and verification as in Form No. 11431.*)

(*c*) That Debtor was Discharged with Plaintiff's Consent.

Form No. 18619.

(2 *Humph. Prec.* 937.)

(*Title of court and cause as in Form No. 15219.*)

And the said *John Lynch*, by *Jeremiah Mason*, his attorney, comes and defends the wrong and injury, when, etc., and says that the plaintiff ought not to have or maintain his aforesaid action thereof against the defendant, because he says that after the said surrender and commitment of the said *Richard Roe* in the said several counts of the said bill of the said *John Doe* mentioned, and before the said *Richard Roe* was by the said *John Lynch* permitted and suffered to go out of his custody at large and abroad wheresoever he would and pleased and without restraint, as in the said several counts of the said bill is alleged, to wit, on (*stating time*), at (*stating place*), aforesaid, the said *John Doe* did consent that the said *Richard Roe* should be discharged out of the custody of the said *John Lynch*, so being sheriff of the county of *Greene* as in that behalf is mentioned, as to the said several actions and suits in the said several counts of the said bill mentioned, and whereupon the said *Richard Roe* had been committed to the custody of the said *John Lynch*, and did give license to the said *John Lynch* to discharge the said *Richard Roe* out of the custody of the said *John Lynch*, as to the said several actions and suits, and permit and suffer him to go out of the custody of him, the said *John Lynch*, at large and abroad wheresoever he would and pleased and without restraint; and thereupon the said *John Lynch* did discharge the said *Richard Roe* out of his custody, as to the said several actions and suits, and permit and suffer him to go out of the custody of the said *John Lynch* at large and abroad wheresoever he would and pleased and without restraint; without this, that the said *John Lynch* did voluntarily, wrongfully and freely, and without the leave or

license of the said *John Doe*, permit or suffer the said *Richard Roe* to go and escape out of the said custody of the said *John Lynch*, so being sheriff of the said county of *Greene* as aforesaid, in manner and form as the said *John Doe* hath above thereof complained against him, the said *John Lynch* is ready to verify.

Wherefore, (*concluding as in Form No. 18616*).

c. Affidavit that Escape was Without Knowledge of Officer.¹

Form No. 18620.

(*Title of court and cause, and venue as in Form No. 819.*)

Be it remembered that on this *first day of July, 1896*, before the undersigned, *Norton Porter*, a notary public of the state of *Delaware*, personally came *John Lynch*, the defendant in the above entitled cause, who, being by me duly sworn according to law, doth depose and say that he is the defendant in the above entitled cause, and that if *Richard Roe*, the prisoner for whose escape deponent is sued at the suit of the plaintiff in said cause, did in fact make such escape, he, the said *Richard Roe*, did make such escape without the consent, privity or knowledge of him, this deponent.

John Lynch.

(*Jurat as in Form No. 819.*)

2. Summary Proceeding.

a. Against Sheriff.

(1) IN GENERAL.

(a) Notice of Motion to Amerce Sheriff.²

1. Necessity for Affidavit. — If the plea be filed without an affidavit as set forth in the text, it may be treated as a nullity. 1 *Saund.* 35, note 1.

For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

2. Necessity of Notice of Motion. — Notice of motion must be given to all parties. *Marchbanks v. Rogers*, 1 *Stew. (Ala.)* 148; *Hall v. Com.*, 8 *Bush (Ky.)* 378; *Webber v. Everman*, 47 *Miss.* 540; *Demoss v. Camp*, 5 *How. (Miss.)* 516; *Torrey v. Jordan*, 4 *How. (Miss.)* 401; *Anonymous*, 6 *N. J. L.* 159; *Yeargin v. Wood*, 84 *N. Car.* 326; *Burt v. Davidson*, 5 *Humph. (Tenn.)* 425; *Chaffin v. Crutcher*, 2 *Sneed (Tenn.)* 360; *Moore v. Moore*, *Dall. (Tex.)* 553; *Wright v. McKenney*, 34 *Tex.* 568.

Requisites of Notice of Motion, Generally. — For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

Compliance with Statute. — The remedy by motion being a proceeding unknown at common law, the statute must be strictly complied with. *Watkins v. Barnes*, 1 *Sneed (Tenn.)* 201; *Wright v. McKenney*, 34 *Tex.* 568.

In Writing. — The notice of motion must be in writing. *Milor v. Farrelly*, 25 *Ark.* 353.

Address. — The notice of motion should be directed to the sheriff and his sureties, designating him and them as such. *Milor v. Farrelly*, 25 *Ark.* 353.

Joint Notice. — A joint notice of motion to an officer and his sureties is sufficient, although a separate and distinct judgment in each case should be rendered. *Hendricks v. Shoemaker*, 3 *Gratt. (Va.)* 188.

Joinder of Plaintiffs. — Several plaintiffs having distinct interests cannot unite in one motion. *Patterson v. Circuit Ct.*, 11 *Ala.* 740. But see *contra Taylor v. Johnson*, 17 *Ga.* 521.

Description of Action. — The cause of

action should be described in the notice. *Dawson v. Shaver*, 1 Blackf. (Ind.) 204.

Name of Court. — The notice must designate the court before which the motion will be made. *Milor v. Farrelly*, 25 Ark. 353.

Time of Motion. — A notice is sufficient if it specifies the term at which the motion will be made: the date of the term need not be stated. *Welch v. Fourier*, 6 Ala. 516; *McRae v. Colclough*, 2 Ala. 74.

Error in the year, in the date of a notice of motion, corrected by a statement of the time the court will be held at which the motion will be made, will not render the notice inconsistent. *Gore v. Hedges*, 7 T. B. Mon. (Ky.) 520.

Official Character of Defendant. — It is not necessary, in a notice to a sheriff that a motion will be made against him for neglect of duty, to allege that his official character continued up to the time when the process placed in his hands was returnable. *Casky v. Haviland*, 13 Ala. 314.

Grounds of Motion. — *Generally.* — The notice should contain a statement of everything to be proved in order to recover. *Broughton v. State Bank*, 6 Port. (Ala.) 48. And must contain all the requisites of a petition. *Terrill v. Cecil*, 3 Met. (Ky.) 347.

Certainly Required. — The notice must state the legal ground of amercement specifically and with the same certainty as is required in a declaration. *Milor v. Farrelly*, 25 Ark. 353; *Ritter v. Merseles*, 24 N. J. L. 627; *Stryker v. Merseles*, 24 N. J. L. 542; *Barrett v. Smith*, 4 W. Va. 709. A notice of amercement "for not having returned said execution according to law and for neglect of duty by you in relation to said execution" is not sufficient. *Ritter v. Merseles*, 24 N. J. L. 627.

Where a notice appraises the defendant of the demand intended to be set up and is certain to a common intent, it is sufficient. *James v. Moseley*, 47 Ala. 299; *Mars v. Buckler*, 1 Bibb (Ky.) 267; *Martin v. Hardin*, 6 J. J. Marsh. (Ky.) 7; *Hix v. Cornelison*, 7 Coldw. (Tenn.) 299; *Washington County v. Dunn*, 27 Gratt. (Va.) 608; *Lemoigne v. Montgomery*, 5 Call (Va.) 528; *Shepherd v. Brown*, 30 W. Va. 13; *Board of Education v. Parsons*, 22 W. Va. 308.

In *Shepherd v. Brown*, 30 W. Va. 13, it was said that it would seem unwise to attempt much accuracy or par-

ticularity; for if the notice descends to particulars as to dates, sums and names, the document when produced must correspond with the notice, though of course such particularity would not vitiate a notice. Any danger of this sort would be avoided by a mere general description, provided that it was not so vague that what is intended may be mistaken.

Joinder of Causes. — Two or more distinct grounds for which the same judgment cannot be rendered should not be joined. *Womack v. Nichols*, 39 Miss. 320; *Morgan v. Billings*, 3 Ala. 172; *M'Mahan v. Kyle*, 9 Port. (Ala.) 507. Although it has been held that where the officer is in default in more than one particular in the same process, such as failing to pay over money when collected and for failing to return execution, the plaintiff may embrace both grounds of complaint upon the same motion, although he can have but one satisfaction. *Spinks v. Caldwell*, 23 Tex. 623; *Hamilton v. Ward*, 4 Tex. 356.

Where a notice states that the sheriff received the amount of an execution and that the same was demanded of him by the plaintiff, and then avers the failure to return the execution according to law and informs the sheriff and his sureties that a motion will be made against them for such failure to return the execution, the notice does not embrace two distinct grounds, but only that for which it is indicated the motion will be made. *Bondurant v. Woods*, 1 Ala. 543.

Distinct Penalties. — Where, under the statute, the officer is subject to different penalties, at the election of the parties, the notice must inform the officer upon which statute the plaintiff relies. *Hill v. State Bank*, 5 Port. (Ala.) 537; *McRae v. Colclough*, 2 Ala. 74.

Description of Process. — In proceedings against an officer, before a justice of the peace, for failure to levy an attachment, the notice should briefly describe the process, stating when and by whom issued, the names of the parties, when received by the officer, and must aver that the officer failed to execute it, whereby the plaintiff lost his debt. *Abrams v. Johnson*, 65 Ala. 465.

Amount Due on Execution. — That a notice of motion will be made for judgment against a sheriff for the amount of his receipt for sundry executions for

Form No. 18621.¹

(Title of court and cause as in Form No. 6525.)

You will please take notice that a motion to amerce you has been filed by the undersigned, in the Court of Common Pleas of Hamilton county, state of Ohio; that said motion is still pending in said court, and will be heard therein on the *tenth* day of *September*, 1897, at *ten* o'clock in the *forenoon*, or as soon thereafter as counsel can be heard, at which time and place you are required to appear and answer thereto; said motion is in words and figures following, to wit: (*Here set out a copy of the motion*).

Dated this *twentieth* day of *August*, A. D. 1897.

John Doe,

by *Jeremiah Mason*, his Attorney.

To *John Lynch*, Sheriff of *Hamilton* County, *Ohio*.

(b) Motion to Amerce Sheriff.

Form No. 18622.¹

(Title of court and cause as in Form No. 6525.)

Now comes the above named plaintiff, *John Doe*, and moves this court to amerce *John Lynch*, as sheriff of said county of *Hamilton*, and upon such amercement to render judgment against said *John Lynch*, as sheriff as aforesaid, for the sum of *two thousand* dollars, judgment debt, recovered as hereinafter stated, and *thirty* dollars costs awarded to this plaintiff on said judgment, with interest on the same from the *tenth* day of *June*, 1899, with *ten* per cent. upon said sum, to and for the use of this plaintiff, together with the costs of this proceeding; upon the grounds following, to wit:

finer, "as appears by a copy of said receipt," is sufficient, without mentioning the aggregate sum due, the separate amount of each execution, or the time when delivered to the sheriff. *Seguine v. Auditor*, 4 Munf. (Va.) 398.

Execution Not Against the Person. — Where the notice describes the execution as a writ of fieri facias, it is sufficient to indicate that it issued against the effects and not against the plaintiff. *McRae v. Colclough*, 2 Ala. 74.

Failure to Return Execution — Designating Time. — A notice of motion against a sheriff for failure to return said execution "within one month from the return day expressed in said execution, as you were bound to do according to law," is sufficient under a statute providing a penalty upon the sheriff for failure to return an execution "for the space of one month after the return day thereof." *Gore v. Hedges*, 7 T. B. Mon. (Ky.) 520.

Demand to Produce. — In a motion

against an officer for failure to return an execution, the notice need not require him to produce the execution. *Armstrong v. Apple*, 2 Coldw. (Tenn.) 280.

Failure to Pay Over — Demand. — A notice is not subject to demurrer which fails to state a day certain upon which the money was demanded from the sheriff, if it shows that the demand was made after the collection and before the notice. *Price v. Cloud*, 6 Ala. 248.

Signature. — Notice of motion may be signed by plaintiff's attorney. *McRae v. Colclough*, 2 Ala. 74.

Date. — It is not essential that a notice of motion should be dated. The return of the coroner shows sufficiently when it was served. *McRae v. Colclough*, 2 Ala. 74; *Scott v. Dow*, 14 N. J. L. 350.

1. *Ohio*. — *Bates' Anno. Stat.* (1897), § 5594.

See also, generally, *supra*, note 2, p. 167.

That on or about the *tenth* day of *June*, 1898, in the Court of *Common Pleas* of *Hamilton* county, in the state of *Ohio*, in an action wherein this plaintiff was plaintiff and one *Richard Roe* was defendant, judgment was duly given by said court in favor of this plaintiff and against the said *Richard Roe*, as defendant, for *two thousand* dollars debt, and *thirty* dollars costs, with interest thereon at the rate of *six* per cent. per annum from said *tenth* day of *June*, 1898, which judgment remains in full force and is unsatisfied.

That on the *twentieth* day of *June*, 1898, an execution against the property of said *Richard Roe* was duly issued out of said Court of *Common Pleas*, upon said judgment, in form and effect as required by law, directed and then delivered to this defendant as sheriff as aforesaid, commanding this defendant, as such sheriff, to satisfy said judgment out of the personal property of said *Richard Roe*, in said county of *Hamilton*, or if sufficient personal property of said defendant could not be found in said county, then out of the real property belonging to him in said county, and return said execution within *sixty* days after receipt thereof by him.

That this defendant thereafter, as such sheriff, collected and received by and under said execution, for the use of this plaintiff, the sum of *two thousand and thirty* dollars, besides his lawful fees, and did, to wit, on the *tenth* day of *July*, 1898, duly return said writ indorsed by him as follows, to wit: (*Here set out the indorsement*).

That this defendant, in violation of his duty as such sheriff, failed to pay over to this plaintiff the amount so collected, and thereafter, to wit, on the *fifteenth* day of *August*, 1898, this plaintiff, at the office of said sheriff, made demand of this defendant, as such sheriff, that he pay over to him the aforesaid sums of money so collected as aforesaid, but the said defendant neglected and refused, and still neglects and refuses, to comply with said demand.

Wherefore, plaintiff asks for the amercement of the said sheriff as aforesaid.

Jeremiah Mason, Attorney for Plaintiff.

(c) *Judgment of Amercement*.¹

Form No. 18623.²

(*Title of court and cause as in Form No. 6525.*)

And now at this day this cause came on for hearing by the court, upon the motion of the plaintiff, and the notice thereof, for an order of amercement against the defendant, *John Lynch*, sheriff of the county of *Hamilton*, and the court having heard the evidence and the argument of counsel, and being fully advised in the premises, doth find that due service of said motion and of the hearing thereon, has been given to the said *John Lynch*, and that the matters and things in said motion are true.

Therefore, it is ordered and adjudged by the court that the said

1. For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645. 2. *Ohio*. — Bates' Anno. Stat. (1897), § 5594.

plaintiff, *John Doe*, recover of and from the said *John Lynch*, sheriff as aforesaid, the sum of *two thousand three hundred and twenty* dollars, being the amount of the judgment in said motion mentioned, together with costs and interest thereon, with *ten* per cent. additional and *twenty* dollars costs, by said plaintiff in this behalf laid out and expended, with interest thereon from the *tenth* day of *September*, 1898, to and for the use of said plaintiff.

(2) TO COMPEL RETURN OF PROCESS.

(a) Rule to Return Process.

Form No. 18624.¹

(Green's Prac. (1866), p. 266.)

(Title of court.)

<i>John Doe</i> , plaintiff,	} <i>June 10</i> , 1899.
against	
<i>Richard Roe</i> , defendant.	} <i>Jeremiah Mason</i> , Attorney.

The sheriff of the county of *Montcalm* having failed to return the writ of *capias ad respondendum* (*or other writ, as the case may be*), in this cause to him directed and delivered, and the return day therein specified having passed, on motion of *Jeremiah Mason*, attorney for the above named plaintiff,

Ordered, that the said sheriff return the said writ within *twenty* days after service of notice of this rule, or in default thereof that an attachment issue against him to compel such return.

(b) Notice of Rule.

Form No. 18625.¹

(Green's Prac. (1866), p. 267.)

(Title of court and cause.)

Sir: Please take notice that a rule has this day been entered in the book of common rules kept by the clerk of this court, requiring you to return the writ of *capias ad respondendum* (*or other writ, as the case may be*), in this cause to you directed and delivered, within *twenty* days after service of notice of such rule, or in default thereof that an attachment issue against you to compel such return.

Dated this *tenth* day of *June*, 1899.

Jeremiah Mason, Attorney for Plaintiff.

To *John Lynch*, Esq., Sheriff of the County of *Montcalm*.

(c) Affidavit of Delivery of Writ and Notice of Rule.

Form No. 18626.¹

(Green's Prac. (1866), p. 267.)

1. *Michigan*. — Comp. Laws (1897), § 9988.

(*Title of court and cause.*)

County of *Montcalm*, ss:

Jeremiah Mason, attorney for the plaintiff in this cause, being duly sworn, deposes and says, that on the *ninth* day of *April*, 1899, he delivered to *John Lynch*, Esq., sheriff of the county of *Montcalm*, a writ of *capias ad respondendum* (*or other writ, as the case may be*), issued in this cause, directed to the said sheriff, and returnable on the *eighth* day of *June*, 1899, by leaving the same with *John Smith*, an under sheriff of the said county, in the office of said sheriff, during the usual business hours (*or otherwise, according to the mode of service*). And this deponent further says, that on the *tenth* day of *June*, 1899, he served the said sheriff with a notice of rule to return the said writ, of which the within (*or annexed*) is a true copy, by delivering the same to the said sheriff personally (*or by delivering the same, during the usual business hours, to John Smith, one of the deputies of the said sheriff, in the office of the said sheriff, or otherwise, according to the mode of service*).

(*Signature and jurat as in Form No. 846.*)

(*d*) *Rule for Sheriff's Default for Not Returning Process.*

Form No. 18627.¹

(Green's Prac. (1866), p. 267.)

(*Title of court and cause as in Form No. 18624.*)

On reading and filing an affidavit of the delivering of the writ of *capias ad respondendum*, issued in this cause to *John Lynch*, Esq., sheriff of the county of *Montcalm*, and also of due service of notice of the rule heretofore entered in this cause, requiring the said sheriff to return said writ within *twenty* days after service of notice of such rule, and more than *twenty* days having elapsed since the service of such notice, and the said writ not having been returned, on motion of *Jeremiah Mason*, attorney for the said plaintiff,

Ordered, that the default of the said sheriff in not returning said writ be and it is hereby entered.

(*e*) *Attachment Against Sheriff for Not Returning Process.*

Form No. 18628.²

(Green's Prac. (1866), p. 268.)

(SEAL) In the Name of the People of the State of *Michigan*.
To the Coroner of the County of *Montcalm*, Greeting:

1. *Michigan*. — Comp. Laws (1897), § 9985.

2. *Michigan*. — Comp. Laws (1897), § 9988.

Indorsement.—The attachment should be indorsed as follows:

"The Circuit Court for the County of *Montcalm*."

The People of the State of *Michigan*
ex rel. John Doe, against *John Lynch*,
Sheriff of the County of *Montcalm*.

Attachment returnable the *first Tuesday* of *September*, 1899. *Jeremiah Mason*, Attorney.

Issued for not returning a writ of *capias ad respondendum* between *John Doe*, plaintiff, and *Richard Roe*, defendant. Let the defendant be held to bail in the sum of *one hundred* dollars.

Dated the *tenth* day of *August*, 1899.
John Marshall, Circuit Judge."

We command you that you attach *John Lynch*, Esq., sheriff of our said county of *Montcalm*, so that you may have him before the *Circuit* Court for the county of *Montcalm*, at the court-house in the village of *Stanton*, in said county, on the *first Tuesday of September next*, to answer to the said court for certain trespasses and contempts done and committed by him in the said court, as is alleged; and have you then there this writ.

Witness, (*concluding as in Form No. 8895*).

(f) *Interrogatories on Attachment.*

Form No. 18629.¹

(Green's Prac. (1866), p. 270.)

The *Circuit* Court for the County of *Montcalm*.

Interrogatories to be administered to *John Lynch*, Esq., sheriff of the county of *Montcalm*, touching a contempt alleged against him, in not returning a certain writ of *capias ad respondendum* issued out of this court in favor of *John Doe*, plaintiff, against *Richard Roe*, defendant:

First interrogatory. Did you or not, at any and what time, receive for service a certain writ of *capias ad respondendum*, to you directed as sheriff of the county of *Montcalm*, between *John Doe*, plaintiff, and *Richard Roe*, defendant, tested the *ninth* day of *April*, in the year 1899, and returnable at the court-house in the village of *Stanton*, in the county of *Montcalm*, on the *eighth* day of *June* then *next*? Declare fully.

Second interrogatory. Did you or not serve the said writ of *capias ad respondendum*? If yes, in what manner, and at what time in particular? If not, why did you not serve the same? Declare.

Third interrogatory. Did you or not receive from *Jeremiah Mason*, attorney for the plaintiff in the suit of *John Doe* against *Richard Roe*, a notice in writing, that a rule had been duly entered in the book of common rules kept by the clerk of this court, requiring you to return the said writ within *twenty* days after service of such rule? If yes, what was the purport of that notice, and when did you receive it?

Fourth interrogatory. Have you returned the said writ of *capias ad respondendum*? If yes, when, where, and how, in particular? If not, why have you not returned the same? Declare fully and particularly.

Dated the *thirtieth* day of *June*, 1899.

Jeremiah Mason, Attorney for Plaintiff.

(g) *Special Rule of Default of Sheriff to Appear on Return of Attachment.*

Form No. 18630.¹

(Green's Prac. (1866), p. 270.)

(*Title of court and cause.*)

1. *Michigan*. — Comp. Laws (1897), § 9988.

The defendant in this cause having been duly called upon the attachment therein issued against him, and having failed to appear and answer thereto, on motion of *Jeremiah Mason*, of counsel for the relator,

Ordered, that the default of the said defendant in not appearing be and the same is hereby entered; and that the bond taken on the arrest of the said defendant, and returnable with the said attachment, be prosecuted, and that it be delivered to the relator, who is hereby authorized to prosecute the same (or *that an alias attachment be issued against the said defendant*).

(h) *Special Rule on Appearance of Sheriff on Attachment.*

Form No. 18631.¹

(Green's Prac. (1866), p. 270.)

(Title of court and cause.)

The sheriff of the county of *Montcalm* having been this day called upon the attachment heretofore issued against him in this cause, and answered thereto, on motion of *Jeremiah Mason*, attorney for the relator,

Ordered, that the appearance of the said sheriff be and it is hereby entered. And the interrogatories having been duly filed by the attorney for the relator in this cause, on like motion, ordered, that the said sheriff answer the said interrogatories, on oath, within *twenty* days, pursuant to the rules and practice of this court.

(i) *Rule to Discharge Attachment Against Sheriff.*

Form No. 18632.¹

(Green's Prac. (1866), p. 271.)

(Title of court and cause.)

On reading and filing the answer of the respondent to the interrogatories filed against him in this cause, and on motion of *Oliver Ellsworth*, of counsel for the respondent,

Ordered, that the attachment in this matter be and the same is hereby discharged.

(j) *Rule Imposing Fine Against Sheriff.*

aa. IN GENERAL.

Form No. 18633.¹

(Green's Prac. (1866), p. 271.)

(Title of court and cause.)

The respondent not having answered the interrogatories filed and served in this cause, on motion of *Jeremiah Mason*, of counsel for the relator, the said *John Lynch* is adjudged guilty of a contempt of

1. *Michigan*. — Comp. Laws (1897), § 9988.

this court, and it is ordered that he be and hereby is adjudged to pay a fine of *one hundred* dollars, and *ten* dollars costs of this motion, and that he stand committed to the custody of the coroner of the county of *Montcalm* until the same be paid.

bb. BY CONSENT.

Form No. 18634.¹

(Green's Prac. (1866), p. 271.)

(*Title of court and cause.*)

On filing consent in this cause, signed by *Oliver Ellsworth*, attorney for the respondent, and on motion of *Jeremiah Mason*, of counsel for the relator,

Ordered, that the respondent, *John Lynch*, be fined the amount indorsed on the execution set forth in the interrogatories filed in this cause, with interest thereon, being *five hundred* dollars, with *ten* dollars costs, and that he stand committed to the custody of the coroner of the county of *Montcalm* until the same be paid.

(3) TO PUT IN SPECIAL BAIL.

(a) Affidavit to Compel Appearance.

Form No. 18635.²

(Green's Prac. (1866), p. 285.)

(*Title of court and cause.*)

County of *Montcalm*, ss.

Jeremiah Mason, attorney for the plaintiff in this cause, being duly sworn, says, that the capias ad respondendum in this cause was issued to the sheriff of the county of *Montcalm*, returnable on the *tenth* day of *June last*, on which day the said writ was returned by the said sheriff, with an indorsement thereon that the defendant had been taken; and this deponent further says, that more than *twenty* days have elapsed from the time of such return, and that special bail has not been put in and perfected in this cause, according to the rules and practice of this court. And further this deponent saith not.

(*Signature and jurat as in Form No. 846.*)

(b) Rule to Put In Special Bail.

Form No. 18636.³

(Green's Prac. (1866), p. 285.)

(*Title of court and cause as in Form No. 18624.*)

On reading and filing an affidavit showing that the writ of capias ad respondendum issued in this cause has been returned served by the sheriff of the county of *Montcalm*, and that special bail has not been put in and perfected within *twenty* days after the return day of

1. *Michigan*. — Comp. Laws (1897), § 9988.

2. *Michigan*. — Comp. Laws (1897), §§ 10037, 10038.

the said writ, on motion of *Jeremiah Mason*, attorney for the plaintiff,
 Ordered, that the said sheriff put in and perfect special bail in this cause within *twenty* days after service of a notice of this rule.

(c) *Notice of Rule.*

Form No. 18637.¹

(Green's Prac. (1866), p. 285.)

(*Title of court and cause.*)

Sir: Please take notice that a rule has this day been entered in this cause, in the book of common rules kept in the office of the clerk of this court, requiring the sheriff of the county of *Montcalm* to put in special bail in said cause within *twenty* days after service of notice of said rule.

Dated (*concluding as in Form No. 18625*).

(d) *Affidavit of Notice of Service of Rule.*

Form No. 18638.¹

(Green's Prac. (1866), p. 286.)

(*Title of court and cause.*)

County of *Montcalm*, ss.

Jeremiah Mason, attorney for the plaintiff in this cause, being duly sworn, says, that on the *tenth* day of *June*, 1899, he personally served *John Lynch*, Esq., sheriff of the county of *Montcalm*, with a notice, whereof the annexed is a true copy, by delivering the same to the said sheriff personally (*or as the case may be*); and this deponent further says that no notice of special bail having been put in in this cause has been received from the said sheriff.

(*Signature and jurat as in Form No. 846.*)

(e) *Rule for Attachment for Not Putting In Bail.*

Form No. 18639.¹

(Green's Prac. (1866), p. 286.)

(*Title of court and cause as in Form No. 18624.*)

On reading and filing an affidavit of due service upon *John Lynch*, Esq., sheriff of the county of *Montcalm*, of a notice of a rule heretofore entered in this cause, requiring the said sheriff to put in and perfect special bail in said cause within *twenty* days after notice of said rule, and that no such bail has been put in and perfected, on motion of *Jeremiah Mason*, attorney for the plaintiff,

Ordered, that an attachment issue against the said sheriff.

b. *Against Coroner.*

(1) AFFIDAVIT OF CORONER'S DEFAULT IN NOT RETURNING ATTACHMENT AGAINST SHERIFF.

1. *Michigan*. — Comp. Laws (1897), §§ 10037, 10038.

Form No. 18640.¹

(Green's Prac. (1866), p. 268.)

In the *Circuit Court* of the County of *Montcalm*.
 The People of the State of *Michigan*,
ex rel. John Doe,
 against
John Lynch, Sheriff of the County of
Montcalm.
 County of *Montcalm*, ss.

Jeremiah Mason, of *Stanton*, in the county of *Montcalm*, attorney at law, being duly sworn, says, that on the *twentieth* day of *June* he personally delivered to *John Smith*, coroner of the county of *Montcalm*, a certain attachment issued out of this court against *John Lynch*, Esq., sheriff of the county of *Montcalm*, for an alleged contempt in not returning a certain writ of (*specifying the writ*) issued out of the said court, and to him directed and delivered, in favor of *John Doe*, plaintiff, against *Richard Roe*, defendant (or in not returning a certain declaration filed in the said court by *John Doe*, plaintiff, against *Richard Roe*, defendant, a copy whereof was delivered to him for service), and which attachment was made returnable on the (*stating day of return*). And this deponent further says, that the said coroner has not returned the said attachment according to the exigency thereof, but therein has made default.

(Signature and jurat as in Form No. 846.)

(2) ALLOWANCE OF ATTACHMENT AGAINST CORONER FOR NOT
 RETURNING ATTACHMENT AGAINST SHERIFF.

Form No. 18641.¹

(Green's Prac. (1866), p. 269.)

(Title of court and cause as in Form No. 18640.)

Due proof having been made before me of the default of *John Smith*, Esq., coroner of the county of *Montcalm*, in not returning a certain attachment directed and delivered to him, commanding him to attach *John Lynch*, Esq., sheriff of the county of *Montcalm*, for an alleged contempt in not returning a certain writ of *capias ad respondendum*, heretofore issued to the said sheriff, between *John Doe*, plaintiff, and *Richard Roe*, defendant (or as the case may be), I do therefore allow the within attachment to issue, and the cause of issuing the same is the default of the said coroner in not making return to the said attachment; and the said *John Smith* is not to be discharged on bail, or in any other manner but by order of the court.

Dated this *tenth* day of *June*, 1899.

John Marshall, Circuit Judge.

(3) SPECIAL RULE FOR ATTACHMENT AGAINST CORONER FOR NOT
 RETURNING ATTACHMENT AGAINST SHERIFF.

1. *Michigan*. — Comp. Laws (1897), §§ 2609, 9988.

Form No. 18642.¹

(Green's Prac. (1866), p. 269.)

(Title of court and cause as in Form No. 18640.)

On reading and filing an affidavit of *Jeremiah Mason*, attorney for the relator in this cause, showing the delivery, on the *tenth* day of *June*, 1899, to *John Smith*, coroner of the county of *Montcalm*, of an attachment in the above cause, returnable on the (*stating day of return*), and also showing that the said coroner has not returned the said attachment according to the exigency thereof, on motion of *Andrew Jackson*, of counsel for the relator,

Ordered, that the default of the said coroner as aforesaid be and the same is hereby entered; and on like motion it is further ordered, that an attachment, notailable, issue against the said coroner for said default, and that *Samuel Short*, of *Stanton*, in said county, be and he is hereby appointed an elisor to execute the same.

(4) SPECIAL RULE ON APPEARANCE OF CORONER ON ATTACHMENT.

Form No. 18643.¹

(Green's Prac. (1866), p. 270.)

(Title of court and cause as in Form No. 18640.)

Samuel Short, an elisor appointed to execute the writ of attachment in this cause, having returned the said writ to him issued, that he has taken the said defendant by virtue thereof; and the said defendant having been called upon said attachment, and answered thereto, on motion of *Jeremiah Mason*, of counsel for the relator,

Ordered, that the appearance of the said defendant be and the same is hereby entered; and on like motion it is further ordered, that the relator have leave to file interrogatories, and that the defendant personally appear in open court before the judge thereof, at the court-house in the city of *Stanton*, in the county of *Montcalm*, on the *tenth* day of *September next*, at the opening of the said court, and answer the said interrogatories on oath, and abide and perform the order and direction of the court thereupon; or that a writ of attachment, notailable, as well for the contempt alleged in the above cause as for not appearing and answering the said interrogatories, shall be issued against the said defendant by virtue of this rule.

1. *Michigan*. — Comp. Laws (1897), §§ 2609, 9988.

SHERIFFS' SALES.

See the titles EXECUTIONS AGAINST PROPERTY, vol. 8, p. i; MORTGAGES, vol. 12, p. 390.

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CROSS-REFERENCES.

- For Forms in Proceedings to Enforce Maritime Liens and Contracts, see the title ADMIRALTY, vol. 1, p. 406.*
- For Form of Affidavit of Agent of Claimant Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3016.*
- For Form of Order Appointing Appraisers for Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3017.*
- For Form of Report of Appraisers Appointed to Appraise Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3018.*
- For Form of Oath of Appraisers Appointed to Appraise Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3019.*
- For Form of Undertaking of Claimant to Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3020.*
- For Form of Affidavit to Obtain Order to Sue Upon Undertaking Given to Discharge Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3021.*
- For Form of Order Directing Sheriff to Commence Action Upon Undertaking Given to Discharge Attached Domestic Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3022.*
- For Form of Order to Release Domestic Vessel from Attachment, see the title ATTACHMENT, ETC., vol. 2, Forms Nos. 3023, 3024.*
- For Form of Undertaking by Plaintiff to Detain Foreign Vessel Attached and Claimed by Third Person, see the title ATTACHMENT, ETC., vol. 2, Form No. 3025.*
- For Form of Order Discharging Foreign Vessel from Attachment, see the title ATTACHMENT, ETC., vol. 2, Form No. 3026.*
- For Form of Affidavit by Defendant to Obtain Foreign Vessel After Attachment is Vacated, see the title ATTACHMENT, ETC., vol. 2, Form No. 3027.*

For Form of Undertaking by Defendant to Obtain Foreign Vessel After Attachment is Vacated, see the title ATTACHMENT, ETC., vol. 2, Form No. 3028.

For Form of Return to Writ of Attachment to Enforce Lien on Vessel, see the title ATTACHMENT, ETC., vol. 2, Form No. 3049. See also the GENERAL INDEX to this work.

I. PROCEEDINGS IN REM.

1. Enforcement of Liens Against Vessel in State Court.¹

a. By Attachment.

1. Jurisdiction of State Court. — Contracts for ship-building, including contracts for materials furnished, are not of a maritime nature and may be enforced in the state court under the statute of the state. *Davis v. Mason*, 44 Ark. 553; *Thompson v. Robinson*, 34 Ark. 44; *Case v. Maffitt*, 19 Ark. 645; *Toby v. Brown*, 11 Ark. 308; *Turner v. Wallace*, 11 Ark. 662; *Langdon v. Wilcox*, 107 Ill. 606; *Johnson v. Chicago, etc., Elevator Co.*, 105 Ill. 462; *Williamson v. Hogan*, 46 Ill. 504; *The Steamboat Clarion v. Moran*, 18 Ill. 501; *The Steamboat Clarion v. Harris*, 18 Ill. 502; *Frink v. King*, 4 Ill. 144; *Sinton v. The Steamboat R. R. Roberts*, 34 Ind. 448; *Carson v. The Steamboat Talma*, 3 Ind. 194; *Baker v. The Steamboat Milwaukee*, 14 Iowa 214; *Ogden v. Ogden*, 13 Iowa 176; *White v. Tisdale*, 12 Iowa 75; *Fuller v. Nickerson*, 69 Me. 228; *Low v. Dunham*, 61 Me. 566; *Donnell v. Manson*, 109 Mass. 576; *Donnell v. The Starlight*, 103 Mass. 227; *McMonagle v. Nolan*, 98 Mass. 320; *Sarmiento v. The Catherine C.*, 110 Mich. 120; *Globe Iron Works Co. v. The Steamer John B. Ketcham 2nd.*, 100 Mich. 583; *Horn v. Wayne Circuit Judge*, 39 Mich. 15; *Lovegrove v. Kuser*, 56 N. J. L. 22; *Gaddis v. Howell*, 31 N. J. L. 313; *Onderdonk v. Voorhis*, 36 N. Y. 358; *Crawford v. Collins*, 45 Barb. (N. Y.) 269; *Nelson v. Yates*, 37 Hun (N. Y.) 52; *Delaney v. Brett*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 421; *Hill v. Mills*, 9 Humph. (Tenn.) 629; *Ferguson v. Vance*, 3 Lea (Tenn.) 90; *Waggoner v. St. John*, 10 Heisk. (Tenn.) 503; *Emory Iron, etc., Co. v. Wood*, 6 Heisk. (Tenn.) 198; *Emerson v. Steamboat Shawano City*, 10 Wis. 433.

Statutes relating to liens upon watercraft exist in the following states:

Alabama. — Civ. Code (1896), § 2758.
Arizona. — Rev. Stat. (1887), § 2288.

California. — Civ. Code (1901), § 3055 *et seq.*; Pol. Code (1897), § 2524.

Connecticut. — Gen. Stat. (1888), § 3041 *et seq.*

Florida. — Rev. Stat. (1892), § 1734 *et seq.*

Georgia. — 2 Code (1895), §§ 2787, 2806.

Illinois. — Starr & C. Anno. Stat. (1896), c. 82, par. 38.

Indiana. — Horner's Stat. (1901), § 5277 *et seq.*

Iowa. — Code (1897), § 4415.

Kentucky. — Stat. (1894), § 2480 *et seq.*

Louisiana. — Rev. Laws (1897), § 2890 *et seq.*

Maine. — Rev. Stat. (Supp. 1895), c. 91, § 8. See also *Warren v. Kelley*, 80 Me. 512.

Massachusetts. — Stat. (1896), c. 404; Pub. Stat. (1882), c. 192, § 14.

Michigan. — Comp. Laws (1897), § 10788 *et seq.*

Mississippi. — Anno. Code (1892), § 2725.

Montana. — Civ. Code (1895), § 3938 *et seq.*

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 141, § 9.

New Jersey. — Gen. Stat. (1895), p. 1961, § 1 *et seq.*

New York. — Laws (1897), c. 418, § 30 *et seq.*; c. 419, § 2 (*amending Code Civ. Proc.*, §§ 3420-3441).

North Carolina. — Laws (1893), c. 357; Code (1883), § 1804.

North Dakota. — Rev. Codes (1895), § 4839.

Ohio. — Bates' Anno. Stat. (1897), §§ 3184, 5880.

Oregon. — Hill's Anno. Laws (1892), § 3690.

Pennsylvania. — Laws (1895), No. 162.

Rhode Island. — Gen. Laws (1896), c. 117, § 5.

South Carolina. — Civ. Code (1902), § 3048 *et seq.*

(1) STATEMENT OF CLAIM.¹Form No. 18644.²

(Commencement as in Form No. 810.)

I. That on the first day of September, A. D. 1899, he, the said John

South Dakota. — Stat. (1901), §§ 5647, 5648.

Tennessee. — Code (1896), §§ 3547, 3549.

Texas. — Rev. Stat. (1895), § 3316.

Vermont. — Stat. (1894), § 2272.

Washington. — Ballinger's Ann o. Codes & Stat. (1897), § 5953.

West Virginia. — Code (1891), c. 75, § 14.

Wisconsin. — Stat. (1898), § 3348 et seq.

1. *Precedents.* — In Case *v. Maffitt*, 19 Ark. 645, the claimant alleged "that the steamboat *Thos. P. Ray* was justly indebted to him in the sum of \$48.10, to-wit: \$17.50 for a half month's service of his boy *Flan*, as cook on said boat, evidenced by a duebill, for that amount, given by *D. H. Murrain*, clerk of the boat, on the 5th of May, 1856, with interest, etc.; and also \$30.60 on an account for materials furnished towards the repairing and equipping said boat, which sum was due, and unless an attachment should issue, there was reason to believe that the debt would be lost or greatly delayed." It was held that this affidavit set forth with sufficient certainty the nature and amount of the demand.

In *McMonagle v. Nolan*, 98 Mass. 320, the affidavit was as follows: "I worked upon said vessel, as aforesaid, twenty-two days, from the twentieth day of January, A. D. 1864, to the fifteenth day of February, A. D. 1864, at three dollars and fifty cents per day, \$77.00. I have received from said *George H. Green*, in cash, \$15.00. Balance due, \$62.00. Leaving a balance due me of sixty-two dollars. And I do further certify that the said sum of sixty-two dollars is the balance justly due me for said labor on said vessel, after deducting all just credits; and I do hereby claim to hold said vessel by virtue of the statutes of the Commonwealth of Massachusetts, in such case made and provided, to secure the payment of said sum, and especially by virtue of the 151st chapter of the General Statutes, sections 12 to 20 inclusive." It was held that this affidavit was sufficient and it was not necessary

that it should show the kind or purpose of the work.

In *Hill v. Mills*, 9 Humph. (Tenn.) 629, the statement of claim was as follows: "Personally appeared *Montgomery P. Hill* before me, *James Rose*, an acting justice of the peace for said county, and made oath that *Richard Mills* and *Andrew F. Chatfield* as owners of the steamboat *Victress*, are justly indebted to him, the said *Montgomery P. Hill*, for wages due to him as mate and carpenter on board the steamboat *Victress*, in the sum of one hundred and three dollars thirty-three cents, as evidenced by a duebill signed by said *Richard Wells*, a true copy of which is hereto annexed, dated the 22nd day of May, A. D. 1848; after giving all just credits, that the said sum of one hundred and three dollars thirty-nine cents is justly due to him, the said *Montgomery P. Hill*; that said debt was contracted by said *Mills* and *Chatfield* for and in behalf of said steamboat *Victress*, within this state; that said *Mills* and *Chatfield* have removed or are removing themselves privately out of the county, or state, or so abscond or conceal themselves or their property or effects so that the ordinary process of law cannot be served upon them, or that they are inhabitants of another government, or have removed or are about to remove their property or effects beyond the limits of this state. He therefore prays a process of attachment against the estate of the said *Richard Mills* and *Andrew F. Chatfield*; and that said steamboat *Victress* may be attached, seized and safely kept, together with her tackle and furniture, until discharged according to law." It was held that this was a sufficient specification of the items in demand, as the debt had been liquidated by a note. Had the debt not been so liquidated, the particular items constituting the claim should, under the statute, have been set forth.

2. *Alabama.* — Civ. Code (1896), § 2784 et seq.

See also, generally, *supra*, note 1, p. 181.

Who may Make. — The plaintiff or
Volume 17.

Doe, was and ever since that time has been a riparian proprietor of certain lands in the county of *Dale*, in the state of *Alabama*, lying, being and adjoining certain waters in said state, to wit, the *Choctawatchee* river, which said property is more particularly described as follows: (*describing property*).

II. That prior to said *first day of September*, A. D. 1899, the said plaintiff, *John Doe*, had erected and maintained in front of his said property, in the said waters of the said river, a certain boom (or *bulkhead* or *piles*, or other structure), and on the said *first day of September*, A. D. 1899, did maintain and ever since that time has maintained the said boom (or *bulkhead* or *piles*, or other structure), for which he had a right to charge any person who fastened thereto any vessel, boat, flatboat, raft, log, stick of timber or wood, certain rates prescribed by law.

III. That on said *first day of September*, A. D. 1899, the defendant, *Richard Roe*, requested to be allowed, and was allowed, to fasten to said boom (or *bulkhead* or *piles*, or other structure) his flatboat, which said flatboat is described as follows, to wit: (*describing flatboat*).¹

That the amount agreed upon by and between the said plaintiff, *John Doe*, and the said defendant, *Richard Roe*, to be paid for the said fastening of said flatboat to the said boom (or *bulkhead* or *piles*, or other structure), was the sum of *two* dollars, the lawful charge for the same.²

That the sum of *two* dollars is due³ to the said plaintiff, *John Doe*, from said defendant, *Richard Roe*, and remains unpaid; and the said plaintiff, *John Doe*, has duly demanded payment of the same, but the said defendant, *Richard Roe*, has failed and refused, and still fails and refuses, to pay the same.

[*Or*, That the said sum of *two* dollars is not due, but will be due on the *first day of December*, A. D. 1899; and that there is good reason to believe that the said defendant, *Richard Roe*, is about to remove the said flatboat from the said boom (or *bulkhead* or *piles*, or other structure) without paying the said charge of *two* dollars.]

[*Or*, That the said sum of *two* dollars is not due, but will be due on the *first day of December*, A. D. 1899; and that the said defendant, *Richard Roe*, has removed the said flatboat from the said boom (or *bulkhead* or *piles*, or other structure) without paying the said charge of *two* dollars.]

That the said plaintiff, *John Doe*, claims a lien under the provision of chapter seventy-one, article nine, of the *Alabama* Civil Code of 1896, in such case made and provided, for the said sum of *two* dollars

his agent or attorney must make the affidavit. Ala. Civ. Code (1896), § 2786.

1. Property must be described, upon which the lien is claimed. Ala. Civ. Code (1896), § 2786.

2. Amount of charge must be stated. Ala. Civ. Code (1896), § 2786.

3. Whether charge is or is not due must be stated. Ala. Civ. Code (1896), § 2786.

If not due, the time when the charge will become due must be stated. Ala. Civ. Code (1896), § 2786.

Cause for Attachment.—One of the causes of the attachment must be stated. Ala. Civ. Code (1896), § 2786.

Vexing or Harassing Defendant.—That the attachment is not sued out for the purpose of vexing or harassing the defendant, must be stated. Ala. Civ. Code (1896), § 2786.

due for the said fastening of said flatboat to said boom (or *bulkhead* or *piles*, or other structure).

That *six* months have not elapsed since the accrual of the said plaintiff's cause of action against the said defendant.

That said attachment is not sued out for (*continuing and concluding as in Form No. 2529*).

Form No. 18645.¹

(Conn. Gen. Stat. (1888), § 3043.)

To all persons whom it may concern. This certifies that on the *first* day of *September*, A. D. 1899,² I commenced to render services (or *furnish materials*) for the construction (or *repairs*) of a vessel designated as a schooner (or *other designation, as the case may be*),³ and that I claim a lien thereon under the provisions of the statute for the sum of *one thousand* dollars⁴ on account of such services rendered (or *materials furnished*). Said vessel was situated at (*describe place in town*),⁵ in the town of *Stamford*, when such services were rendered (or *materials furnished*). The name of the vessel is "*The Belle*."⁶ The owner's (or *agent's*) name is *Richard Roe*.⁷

Dated at *Stamford*, this *fifth* day of *September*, A. D. 1899.

John Doe.

Form No. 18646.⁸

Suffolk County, ss.

John Doe, of the village of *Northport*, in the county of *Suffolk*, state of *New York*, being duly sworn, on oath, says:

That there is due to him a debt amounting to *five hundred* dollars, contracted by *Richard Roe*, the master (or *owner* or by *Samuel Short*, the agent of *Richard Roe*, the master or owner) of the ship (or vessel) "*The America*,"⁹ a seagoing¹⁰ (or *ocean-bound*) vessel (*otherwise describing the vessel*), on account of work done (or *materials furnished*) within the state of *New York* toward the building (or *repairing, fitting, furnishing or equipping*) of such vessel (or *for provisions and stores furnished within the state of New York as were fit and proper for the use of said vessel at the time when such provisions and stores were furnished, or for wharfing and the expense of keeping the said vessel in port and for the*

1. *Connecticut*. — Gen. Stat. (1888), § 3042 *et seq.*

See also, generally, *supra*, note 1, p. 181.

2. *Date of commencement of claim* should be stated. Conn. Gen. Stat. (1888), § 3042.

3. *Kind of vessel* should be designated. Conn. Gen. Stat. (1888), § 3042.

4. *Amount claimed as lien* on the vessel should be stated. Conn. Gen. Stat. (1888), § 3042.

5. *Place in town* where the services or materials were furnished should be stated. Conn. Gen. Stat. (1888), § 3042.

6. *Name of the vessel*, if known, should be stated. Conn. Gen. Stat. (1888), § 3042.

7. *Name of the owner* or owner's agent, if known, should be stated. Conn. Gen. Stat. (1888), § 3042.

8. *New York*. — Laws (1897), c. 418, § 32.

See also, generally, *supra*, note 1, p. 181.

9. *Name of vessel* must be stated. N. Y. Laws (1897), c. 418, § 32.

10. *Kind of Vessel*. — Seagoing or ocean-bound vessel may be attached for lien for an amount of fifty dollars or upward. N. Y. Laws (1897), c. 418, § 30.

Any other vessel may be attached to enforce a lien thereon for the amount of fifteen dollars or upward. N. Y. Laws (1897), c. 418, § 30.

expense of employing persons to watch it, or for loading (or unloading) said vessel and for the advances made to procure necessities therefor and for the insurance of said vessel, or for towing (or piloting) said vessel, or for the insurance or premium of insurance of or on said vessel, or on the freight of said vessel), and that deponent claims a lien upon the said ship (or vessel), her tackle, apparel and furniture,¹ for said debt.

Deponent further says that *William West*, who resides at *Northport*, in the county of *Suffolk* and state of *New York*, is the owner² of said vessel (or *that the owner of said vessel is unknown to this affiant*).

And deponent further says that the following are the specifications of defendant's said lien, consisting of a bill of particulars of his aforesaid demand, with a statement of the amount claimed to be due from said vessel, to wit: (*set out the items, dates and amount claimed*).³

(*If the debt is based upon a written contract*, say, "And deponent further says that the following are the specifications of deponent's said lien, consisting of a copy of the written contract under which said work was done (*or materials furnished*, as the case may be), with a statement of the amount claimed to be due from said vessel:" *setting out a copy of the contract and amount claimed*).⁴

And deponent further says that the said debt is not a lien on said vessel by the maritime law.⁵

And deponent further says that the aforesaid specifications are true and correct.

(*Signature and jurat as in Form No. 8805.*)⁶

(2) APPLICATION OR COMPLAINT TO ENFORCE LIEN.⁷

1. Tackle, apparel and furniture are subject to the lien. N. Y. Laws (1897), c. 418, § 30.

2. Name of owner must be stated. N. Y. Laws (1897), c. 418, § 32.

3. Particulars of debt must be given. N. Y. Laws (1897), c. 418, § 32.

Amount claimed to be due from the vessel must be stated. N. Y. Laws (1897), c. 418, § 32.

4. Debt Based on Written Contract. — If the debt is based upon a written contract, a copy of such contract shall be attached to the notice. N. Y. Laws (1897), c. 418, § 32.

5. Other than Maritime Lien. — The debt must not be a lien by the maritime law. N. Y. Laws (1897), c. 418, § 30.

6. Verification. — Statement must be verified by the lienor or his legal representative, agent or assignee. N. Y. Laws (1897), c. 418, § 32. And must be sworn to as being true and correct. N. Y. Laws (1897), c. 418, § 32.

7. Requisites of Complaint or Petition, Generally. — For the formal parts of a complaint or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; PETITIONS, vol. 13, p. 887.

Demand. — The demand must be fully set out, and on whose account it accrued must be stated, in the complaint or petition. Case v. Maffitt, 19 Ark. 645; Toby v. Brown, 11 Ark. 308; Nelson v. Yates, 37 Hun (N. Y.) 52.

By whom contract was made must be stated. Toby v. Brown, 11 Ark. 308.

Where the complaint alleged "that in or about the months of *April, May, June, July, August and September, 1893*, the said vessel being in the course of construction at the said port of *Wyandotte*, your complainants, at the request of the *Davis Boat & Oar Company*, a *Michigan* corporation, then engaged in building said vessel, furnished labor and materials in and about the building, fitting, furnishing and equipping of such craft," it was held sufficient to show that the debt was contracted by the agent of the craft. Sarmiento v. The Catherine C., 110 Mich. 120.

Vessel Within State. — That the vessel was within the limits of the state on the date of the commencement of the action need not be stated. Baker v. The Steamboat Milwaukee, 14 Iowa 214.

Form No. 18647.¹

(Precedent in *Globe Iron Works Co. v. The Steamer John B. Ketcham* 2nd, 100 Mich. 585.)²

To the Circuit Court for the County of *Wayne*:

The amended complaint of the *Globe Iron Works Company* against the steamer "*John B. Ketcham 2nd*," her engines, boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, alleges as follows:

First. That the said complainant is a corporation duly organized and existing under the laws of the state of *Ohio*.

Second. That said steamer is a water-craft of about *five* tons burthen, used, and intended to be used, in navigating the waters of this State, and said steamer also navigates the waters within and bordering upon the state of *Ohio*, and also the Great Lakes and their connecting waters, and, amongst others, Lakes *Erie*, *St. Clair*, and *Huron*, and the *Detroit* and *St. Clair* rivers; that she was built by her owners, *Bills & Koch*, hereinafter mentioned, with the intent and for the purpose of being so used in navigating said lakes and waters, and that they so intended to use said vessel during all the time she was being built.

Third. That on or about the *14th* day of *May*, 1892, at the special instance and request of *Oscar P. Bills* and *Edward E. Koch*, who were then the owners of said steamer, and were copartners doing business under the firm name of *Bills & Koch*, said complainant furnished to said steamer the materials and machinery set forth in the statement hereto annexed, marked "*Schedule A*," and made a part hereof, to be used, and which were actually used, in and about the building, fitting, furnishing, and equipping said steamer, said steamer then being in the process of construction, and such materials and machinery being intended to be used, and actually were used, in and about the original building, constructing, fitting, furnishing, and equipping said steamer; that for said materials said copartners agreed, to and with said complainant, to pay said complainant the amount of money, and the interest thereon, stated in the said schedule, to wit, the sum of \$4,054.72, \$3,936.33 thereof on the *25th* day of *November*, 1892, and \$118.39 thereof on the *25th* day of *August*, 1892.

Fourth. That said materials and machinery are reasonably worth the sums of money charged for them in said schedule.

Fifth. That, at the time of the commencement of this action, there was, and now is, due said complainant for the said materials the sum of \$4,054.72, with interest on \$3,936.33 thereof from the *25th* day of *November*, 1892, at the rate of *six* per cent. per annum, and on \$118.39 thereof from the *25th* day of *August*, 1892, at the same rate, and that no part of the same has ever been paid.

Sixth. That the said contract for furnishing the materials and

1. *Michigan*. — Comp. Laws (1897), §§ 10789, 10831.

See also list of statutes cited *supra*, note 1, p. 131.

2. The judgment of the court in overruling a demurrer to this complaint was affirmed.

machinery aforesaid was made and performed by the said complainant, and the said materials and machinery were accepted and used, and intended to be accepted and used, as aforesaid, by the said *Bills & Koch*, in the said state of *Ohio*; that at the time of the making of said contract between the said complainant and the said *Bills & Koch*, and at the time the said complainant so furnished the said materials and machinery, the said vessel, as said complainant is informed and believes, was then upon the land in said state of *Ohio*, and not in the water, and had never been in the water, and had never been launched, and that at the time of the making of said contract it was the intent and purpose of both the said complainant and the said *Bills & Koch* that the said machinery should be placed in said vessel before she was removed from the land or launched or placed in the water, and that the said materials and machinery were so placed in the said vessel while she was upon the land, and before she was launched or placed in the water; that at the time of the making of said contract, and at the time the complainant performed the same by the delivery of said materials and machinery, and at the time the same was so placed in said vessel by said *Bills & Koch*, the said vessel, as the complainant is informed and believes, had not been licensed or enrolled under the acts of Congress.

Seventh. Complainant further alleges that, on and for a long time prior to the said 14th day of *May*, 1892, and during all the time since, there have been, and now are, created, by the laws of the state of *Ohio*, liens against water-craft similar to those provided for by chapter 285 of Howell's Annotated Statutes of the State of Michigan.

Eighth. That the laws of the state of *Ohio*, on and for a long time prior to said 14th day of *May*, 1892, and during all the time since, have provided, and do now provide, that any steamboat or other water-craft navigating the waters within and bordering upon said state shall be liable, and such liability shall be a lien thereon, for all debts contracted on account thereof by the master, owner, steward, consignee, or other agent for materials, supplies, or labor in building, repairing, furnishing, or equipping of the same.

Ninth. That the laws of said state further provide that the liens hereinbefore mentioned may be enforced in a proceeding in the nature of a proceeding in rem against the water-craft against which they accrue, by name.

Tenth. That, by the laws of the state of *Ohio* aforesaid, a lien in favor of said complainant has been created, and now exists, against the said steamer, for the said sum of \$4,054.72, with interest thereon as aforesaid, and by reason of the premises, and of the statute in such case made and provided, said complainant is entitled to, and has a lien upon, the said steamer "*John B. Ketcham 2nd*," for the sum of money last mentioned, and interest thereon as aforesaid, which lien is enforceable under the statutes of this state in such case made and provided; that said complainant is informed and believes that, since its said lien has accrued, said steamer has been sold by said copartnership, but to whom said complainant does not know, but positively avers that the present owners of said steamer are not bona fide purchasers thereof without notice, but that, on the other

hand, they had full notice and knowledge of the said lien of the complainant at the time they purchased said steamer.

Wherefore said complainant prays that process in due form, according to the course and practice of this court, under the statute in such case made and provided, may issue, directed to the sheriff of said county, commanding him to seize and safely keep said steamer "*John B. Ketcham 2nd*," her tackle, apparel, and furniture, to answer all such liens as shall be established against it according to law, and to make return of said proceedings under such warrant, pursuant to said statute; and also that, pursuant to said statute, a summons to the owner or master of said steamer be issued in due form, and that judgment may be rendered in favor of said complainant for its claim aforesaid, and that the same may be satisfied, and the complainant's said lien against said steamer may be enforced, according to the statute in such case made and provided, and that said complainant may have such other and further relief in the premises as the case may entitle it to.

[(Signature and verification as in Form No. 4274.)]¹

Form No. 18648.²

To the Honorable *John Marshall*, Justice of the *Supreme* Court of the State of *New York*, in the *Second* Judicial District.

The application of *John Doe*, of *Northport*, in the county of *Suffolk* and state of *New York*, respectfully shows:

That there is now due to him a debt amounting to the sum of *five hundred* dollars, contracted by *Richard Roe*,³ the owner (or *master* or *builder*, as the case may be) of the ship "*The Admiral*,"⁴ a seagoing and ocean-bound vessel (*otherwise describing the vessel*) now lying in the waters of *Huntington* bay, in said county of *Suffolk*, for work done by him in the village of *Northport*, in the county of *Suffolk* and state of *New York*, for or toward the building (or *repairing* or *fitting* or *furnishing* or *equipping*) of said vessel at the request of said owner (or *master* or *builder*) between the *first* day of *March*, 1899, and the *first* day of *July*, 1899.⁵

That said *Richard Roe*, who resides at *Northport*, in said county of *Suffolk* and state of *New York*, is the owner of said vessel.⁶

That the items composing said debt are as follows, to wit: (*set out the items, or, if they are numerous, say*, "That the items composing said debt are set forth in the schedule hereunto annexed, marked exhibit *A*, and made a part of this application.")⁷

That said debt amounts to the sum of *five hundred* dollars,⁸ and

1. The matter to be supplied within [] will not be found in the reported case.

2. *New York*. — Code Civ. Proc., §§ 3419, 3420.

See also list of statutes cited *supra*, note 1, p. 181.

3. By whom debt was contracted must be stated. *N. Y. Code Civ. Proc.*, § 3420.

4. Vessel for which debt was contracted must be stated. *N. Y. Code Civ. Proc.*, § 3420.

5. When debt was contracted must be stated. *N. Y. Code Civ. Proc.*, § 3420.

6. Name and residence of owner, if known, must be stated. *N. Y. Code Civ. Proc.*, § 3420.

7. Items composing debt must be stated. *N. Y. Code Civ. Proc.*, § 3420.

8. Amount claimed must be stated. *N. Y. Code Civ. Proc.*, § 3420.

that the same is justly due to your applicant over and above all payments and just deductions to be made therefrom.¹

That on the *twentieth* day of *July*, 1899, and within *thirty* days after said debt was contracted, your applicant filed in the office of the clerk of the county of *Suffolk*,² within which county said debt was contracted, according to the requirements of the statute in such case made and provided, specifications of such lien, debt and claim, consisting of a bill of particulars of your applicant's demand (or *consisting of a copy of the written contract, under which said work was done*), with a statement of the amount claimed to be due from said vessel, the correctness of which was duly sworn to by your applicant.

That *twelve* months have not expired since said debt was contracted (or *that six months have not expired since the first day of January next succeeding the time the said debt was contracted, or that at the expiration of twelve months from the time said debt was contracted, or at the expiration of six months after the first day of January next succeeding the time when said debt was contracted, said vessel was absent from the port at which said debt was contracted and thirty days have not expired since said vessel next returned to said port*).^{*}

Wherefore the said applicant prays that a warrant to enforce the said lien against the said vessel, her tackle, apparel and furniture, and to collect the amount of the aforesaid demand, may be issued pursuant to the provisions of the statute of the state of *New York* in such case made and provided; for which warrant no previous application has been made.

Dated the *tenth* day of *December*, 1899.

John Doe.

Jeremiah Mason, Attorney for Applicant.

Office and post-office address, *10 Main Street, Northport, New York.*

(*Verification*).³

(3) UNDERTAKING OF APPLICANT.

Form No. 18649.⁴

Before the Honorable *John Marshall*, Justice of the *Supreme Court*.

In the matter of the attachment of the vessel called "*The American*," now lying in the waters of *Huntington* bay, in the county of *Suffolk* and state of *New York*, her tackle, apparel and furniture.

John Doe having applied to the Honorable *John Marshall*, one of the justices of the *Supreme Court* of the state of *New York*, within

1. That debt is justly due to the applicant over and above all payments and just deductions must be stated. N. Y. Code Civ. Proc., § 3420.

2. When and where notice of lien was filed must be stated. N. Y. Code Civ. Proc., § 3420.

Assignment or transfer of debt which may have taken place since it was contracted must be stated. N. Y. Code Civ. Proc., § 3420.

3. Verification.—The application must be verified in the same manner as a pleading in a court of record. N. Y. Code Civ. Proc., § 3420.

For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

4. New York.—Code Civ. Proc., § 3421.

See also list of statutes cited *supra*, note 1, p. 181.

and for the *second* judicial district, for a warrant to enforce a lien of the said applicant on the vessel "*The America*," now lying in the waters of *Huntington* bay, in the county of *Suffolk* and state of *New York*, and to collect the amount of his demand against the said vessel, which is a lien upon said vessel as aforesaid.

We, *Samuel Short*, of No. 10 *Main* street, in the village of *Northport*, county of *Suffolk* and state of *New York*, and *William West*, No. 5 *Water* street, in the village of *Huntington*, county of *Suffolk* and state of *New York*, merchants, do undertake, pursuant to the statute in such case made and provided, in the sum of *two hundred* dollars, that if the said applicant be finally adjudged not to have been entitled to such warrant, we will pay all costs that may be awarded against him, the said applicant, not exceeding the sum of *two hundred* dollars, and any damages that may be sustained by reason of the seizure of said vessel under such warrant not exceeding *fifty* dollars.

Dated this *twentieth* day of *September*, 1899.

Samuel Short.
William West.

In the presence of *Francis Fern*.

(*Justification of sureties, acknowledgment or proof.*)

(*Approval.*)

(4) WARRANT OF ATTACHMENT.¹

Form No. 18650.²

(Me. Rev. Stat. (1883), c. 91, § 8.)

State of *Maine*.

Kennebec County, ss.

To the sheriff of our county of *Kennebec* or his deputy, Greeting:

(SEAL) We command you to attach the vessel (*Here give such a description of the vessel as will identify it*), and summon all persons

1. Warrant. — A warrant or writ of attachment will issue directing the attachment of the vessels upon the proper undertaking being given. *Langdon v. Wilcox*, 107 Ill. 606; *Seippel v. Blake*, 86 Iowa 51; *Gaddis v. Howell*, 31 N. J. L. 313.

Precedent. — In *Fuller v. Nickerson*, 69 Me. 228, the writ was as follows:

"We command you to attach ship or vessel now on the stocks at *Calais*, building by one *Nickerson & Rideout* of *Orrington* for the owners, and summon all persons interested, in the manner directed by law, to appear before our justices, etc., then and there to answer, etc., to *Robert O. Fuller* of —, *Eustace C. Fitz* of —, and *Charles S. Dana*, etc., copartners under the name of *Fuller, Dana & Fitz*, who claim a lien on said ship or vessel for materials furnished and used in the construction of said ship or vessel, to the amount of *twenty-eight hundred and thirteen* dollars

and *eighty-six* cents, according to the specification hereto annexed, together with *thirty-seven* dollars and *thirty-seven* cents for interest on same, which amount *Isaac H. Nickerson* and *Henry A. Rideout*, copartners in business under the firm name of *Nickerson & Rideout*, of *Calais*, aforesaid, who owe the same, neglect and refuse to pay, to the damage of said *Fuller, Dana & Fitz*, as they say."

2. Maine. — Rev. Stat. (1883), c. 91, § 8.

See also list of statutes cited *supra*, note 1, p. 181.

Signature and Seal. — The writ shall be signed, sealed and tested like other writs in civil actions and returned in the county where said vessel is. Me. Rev. Stat. (1883), c. 91, § 9. See also Form No. 6940 and notes thereto.

Specification annexed to the writ shall contain a just, true and particular account of the demand claimed to be due

interested, in the manner directed by law, to appear before our justice of our *Supreme Judicial* Court next to be held at *Augusta* within and for our county of *Kennebec*, on the *first Tuesday of March next*, then and there in our said court to answer to *John Doe*, of *Augusta*, who claims a lien on said vessel for (*Here describe briefly the nature of the lien*), to the amount of *five hundred dollars and fifty cents*, according to the specification hereto annexed, which amount *Richard Roe*, of *Augusta*, who owes the same, neglects and refuses to pay, to the damage of (*concluding as in Form No. 6940*).

Form No. 18651.¹

To the Sheriff of the County of *Suffolk*, Greeting:

Whereas *John Doe* has this day presented to me, a justice of the *Supreme* Court of the state of *New York*, an application in writing duly verified, whereby it appears that the said applicant has a lien upon a certain vessel, called "*The America*," and now lying in the waters of *Huntington* bay, in said county of *Suffolk* and state of *New York*, her tackle, apparel and furniture, for work done and material furnished for and toward the repair of said vessel, and that the amount of said applicant's claim is *five hundred dollars*; and whereas the said applicant has also delivered to me the undertaking required by law to be filed by me; and whereas said application is in all respects in accordance with the provisions of the statute providing for the collection of liens on vessels:

You are therefore hereby commanded to attach, seize and safely keep said vessel, her tackle, apparel and furniture, to satisfy said claim, if established to be a lien upon said vessel according to law, and to make return of this warrant with all proceedings thereunder to me within *ten* days after such seizure.

Witness my hand at *Riverhead*, in said county of *Suffolk*, this *tenth* day of *December*, 1899.

John Marshall, Justice of the *Supreme* Court.

(*Signature and office address of attorney as in Form No. 18648.*)

the plaintiff, with all just credits, the names of the persons personally liable to him, the names of the owners of the vessel, if known to him, and the specification shall be verified by the oath of the plaintiff or of some person in his behalf that the amount claimed in said specification is justly due from the persons named in the writ and specification as owning the vessel, and that he believes that by the law of the state he has a claim on such vessel for the whole or part thereof. Me. Rev. Stat. (1883), c. 91, § 10.

A specification is an essential part of the writ in an action to enforce a lien on a vessel. *Fuller v. Nickerson*, 69 Me. 228. And such a specification must have all the requisites therein specified to make it sufficient to lay the founda-

tion for an attachment of the vessel, and such as will authorize a judgment against the property to enforce a lien claim. *Fuller v. Nickerson*, 69 Me. 228. And a charge of sundry articles of iron and metals delivered by the plaintiffs to the builders "from time to time from *27th Jan'y* to *28th Oct.*, 1876, inclusive," is not sufficient. *Fuller v. Nickerson*, 69 Me. 228.

Omission to give a credit in the specification does not necessarily vitiate the specification, where such omission does not prejudice the rights of the parties. *Dyer v. Brackett*, 61 Me. 587.

1. *New York*. — Code Civ. Proc., § 3422.

See also list of statutes cited *supra*, note 1, p. 181.

(5) ORDER TO SHOW CAUSE WHY VESSEL SHOULD NOT BE SOLD.**Form No. 18652.¹***(Title as in Form No. 18649.)*

To *Samuel Short*, master (or other person in charge, as the case may be),
and to *Richard Roe*, the owner (or consignee) of the vessel named
"*The America*:"

Whereas a warrant of attachment in the above entitled proceeding has been this day granted and issued by me, upon the application of *John Doe*, and directed to the sheriff of the county of *Suffolk* and the state of *New York*, commanding said sheriff that he attach, seize and safely keep the said vessel "*The America*," her tackle, apparel and furniture, to satisfy a claim of the said *John Doe*, in said application stated, and specified therein at the sum of *five hundred* dollars, if established to be a lien upon said vessel, and to make return of said warrant with all proceedings thereunder within *ten* days after such seizure.

It is hereby ordered and directed, pursuant to the statute in such case made and provided, that you and each of you show cause before me, at my chambers, in the village of *Riverhead*, in said county of *Suffolk*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the forenoon of said day, why said vessel so seized should not be sold to satisfy the lien specified in the said application.

And it is further ordered and directed that a copy of this order and of the said application for the aforesaid warrant shall be served personally upon the master or other person in charge of said vessel at the time of the execution of said warrant and personally upon the owner and consignee of said vessel, if a resident of the state of *New York*, or, if not a resident of said state, then by mail addressed to such owner or consignee at his last known place of residence, within *ten* days after the execution of said warrant.

Dated this *first* day of *September*, 1899.

John Marshall, Justice of the *Supreme* Court.

(6) NOTICE OF ISSUANCE OF WARRANT AND OF ORDER TO SHOW CAUSE.**Form No. 18653.²***(Title as in Form No. 18649.)*

Notice is hereby given that on the *first* day of *September*, 1899, a warrant of attachment was granted and issued by the Honorable *John Marshall*, a justice of the *Supreme* Court, in the *second* judicial district, in the above entitled proceeding, upon the application of *John Doe*, and directed to the sheriff of the county of *Suffolk*, commanding said sheriff that he seize and safely keep the vessel named "*The America*," then lying in the waters of *Huntington* bay, in said county of *Suffolk*, her tackle, apparel and furniture, to satisfy a

1. *New York*. — Code Civ. Proc., § 3423.

See also list of statutes cited *supra*, note 1, p. 181.

2. *New York*. — Code Civ. Proc., § 3424.

See also list of statutes cited *supra*, note 1, p. 181.

claim of the said *John Doe*, specified in said warrant at the sum of *five hundred* dollars, and that, pursuant to the statute in such case made and provided, an order to show cause was, at the time of the issuing of the said warrant, by said justice granted, returnable before said justice at his chambers in the village of *Riverhead*, in said county of *Suffolk*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the forenoon of said day, why said vessel, seized by virtue of said warrant, should not be sold to satisfy the lien specified in the said application of *John Doe* in this proceeding.

(Date, signature and address of attorney as in Form No. 18648.)

(7) NOTICE TO OWNER OF SEIZURE OF VESSEL.¹

Form No. 18654.²

(Me. Rev. Stat. (1883), c. 91, § 12.)

Kennebec, ss.

To the owners of the ship or vessel (*describing it as in writ*), Greeting:

Take notice that the above described vessel is attached on a writ in favor of *John Doe*, who claims a lien thereon for the sum of *five hundred* dollars and *fifty* cents due him by *Richard Roe*, and that said writ is returnable to the *supreme judicial* court, at the term to be held at *Augusta* in and for the county of *Kennebec*, on the *first Tuesday* of *March*, A. D. 1899,³ when and where you may appear and defend if you see fit.

Dated at *Augusta*, this *first* day of *February*, A. D. 1899.

Simon Stevenson, Sheriff.

(8) ORDER FOR SALE OF VESSEL.

Form No. 18655.⁴

(Title as in Form No. 18649.)

Whereas a warrant of attachment was heretofore, to wit, on the *first* day of *September*, 1899, issued by me in the above entitled proceeding, pursuant to the provisions of title 4 of chapter 23 of the Code of Civil Procedure, upon the application of *John Doe*, a lienor, against the ship "*The America*," her tackle, apparel and furniture, and directed to the sheriff of the said county of *Suffolk*, and said sheriff having seized the said vessel, by virtue of said warrant, and it satisfactorily appearing that a notice required by section 3424 of the Code of Civil Procedure has been duly published *once* a week for *two* consecutive weeks in a newspaper published in said county of *Suffolk*, pursuant to law.

1. Notice of Attachment. — In proceedings by attachment against boats and vessels, a summons to the owner or notice by publication is necessary. *The Steamboat Clarion v. Moran*, 18 Ill. 501; *The Steamboat Clarion v. Harris*, 18 Ill. 502; *Sheridan v. Ireland*, 61 Me. 486; *Gaddis v. Howell*, 31 N. J. L. 313.

See also list of statutes cited *supra*, note 1, p. 181.

2. Maine. — Rev. Stat. (1883), c. 91, § 12. See also, generally, *supra*, note 1, p. 181.

3. Time of Notice. — Notice shall be fourteen days at least before the term of the court to which the writ is returnable. Me. Rev. Stat. (1883), c. 91, § 12. 4. New York. — Code Civ. Proc., § 3426.

See also list of statutes cited *supra*, note 1, p. 181.

And it further appearing by the affidavits of (*state the names of the affiants and date of the affidavits*), here read and filed, that due service of the order to show cause heretofore, to wit, at the time of the issuing of the said warrant, granted by me, and of the application for the said warrant, was duly served on (*state names of parties on whom service was made*).

And neither the master, owner, consignee, or other persons interested in the said vessel, having appeared and contested the claim of the said *John Doe*, lienor; and due proof having been made of the validity of the amount of the said claim,

It is hereby ordered that the said sheriff of the county of *Suffolk* be and he hereby is directed to sell the said vessel named "*The America*," her tackle, apparel and furniture, to satisfy the liens established upon this hearing, to wit, (*specifying liens*) and to pay the costs and expenses necessarily incurred in these proceedings, as prescribed in title 4 of chapter 23 of the Code of Civil Procedure.

Dated (*concluding as in Form No. 18652*).

(9) ORDER FOR NOTICE OF DISTRIBUTION OF PROCEEDS.

Form No. 18656.¹

(*Title of proceeding as in Form No. 18649.*)

An order having been heretofore, to wit, on the *first* day of *September*, 1899, made by me for the sale of the vessel named "*The America*," her tackle, apparel and furniture, by the sheriff of the county of *Suffolk*, by whom said vessel, her tackle, apparel and furniture, had been seized, by virtue of a writ of attachment issued by me, pursuant to title 4 of chapter 23 of the Code of Civil Procedure, upon the application of *John Doe*, a lienor, in this proceeding, and the said sheriff having, pursuant to said order, sold said vessel, her tackle, apparel and furniture, and having made a return to me of his proceedings under said order and paid into this court the proceeds of said sale remaining after deducting his fees and expenses in seizing, watching and selling said vessel: now, therefore, it is

Ordered, that, pursuant to section 3428 of the Code of Civil Procedure, a notice be published *once* a week for *three* consecutive weeks in the same newspaper in which the notice of the seizure of said vessel was published, requiring all persons having liens on said vessel, under article two of the lien law, and the master, owner, agent or consignee thereof, and all other persons interested therein, to appear before me (*or before Andrew Jackson, referee hereby appointed by me for that purpose*) at my chambers in the village of *Riverhead*, in said county of *Suffolk*, on the *tenth* day of *December*, 1899, at *ten* o'clock in the *forenoon* on said day, to attend a distribution of such proceeds.

Dated (*concluding as in Form No. 18652*).

(10) NOTICE OF DISTRIBUTION OF PROCEEDS.

1. *New York*. — Code Civ. Proc., § 3428. See also list of statutes cited *supra*, note 1, p. 181.

Form No. 18657.¹

(Title of proceeding as in Form No. 18649.)

Notice is hereby given that on the *tenth* day of *September*, 1899, the vessel named "*The America*," her tackle, apparel and furniture, was sold by the sheriff of the county of *Suffolk*, on board said vessel, at the port of *Northport*, in said county of *Suffolk*, by virtue of a warrant issued by the Honorable *John Marshall*, a justice of the *Supreme* Court in the *second* judicial district, pursuant to the provisions of title 4 of chapter 23 of the Code of Civil Procedure, and directed to the said sheriff, and that all persons having liens upon said vessel, under article two of the lien law, the master, owner, agent or consignee thereof, and all persons interested therein, are hereby required to appear before the Honorable *John Marshall*, a justice of the *Supreme* Court in the *second* judicial district, at his chambers in the village of *Riverhead*, in the county of *Suffolk*, on the *tenth* day of *December*, 1899, at *ten* o'clock in the forenoon, to attend a distribution of such proceeds.

(Signature and office address of attorney as in Form No. 6954.)

(11) ORDER FOR DISTRIBUTION OF PROCEEDS.

Form No. 18658.²

(Title of proceeding as in Form No. 18649.)

It satisfactorily appearing to me that the notice required by me to be published by an order by me made on the *tenth* day of *September*, 1899, pursuant to the provisions of section 3428 of the Code of Civil Procedure, requiring all persons having liens upon the vessel named "*The America*," under article two of the lien law, and the master, owner, agent or consignee thereof, and all other persons interested therein, to appear before me at my chambers in the village of *Riverhead*, in the county of *Suffolk*, on the *twelfth* day of *October*, 1899, at *ten* o'clock in the forenoon, to attend a distribution of the proceeds arising from the sale of said vessel, her tackle, apparel and furniture, has been duly published, and the said parties having appeared before me at the time and place stated in said notice, and the various claims found to be subsisting liens upon the said vessel having been exhibited to me:

Now, therefore, it is ordered that the claims aforesaid, amounting respectively to the sums hereinafter mentioned, be paid by the sheriff of the county of *Suffolk*, out of the proceeds of the sale of said vessel, in the following order:

1. To *John Doe*, the sum of *five hundred* dollars and interest thereon from the *first* day of *July*, 1899, and also the sum of *thirty* dollars, being the costs, expenses and allowances awarded to the said *John Doe* in this matter.

2. To *Samuel Short* (continuing as above).

Dated (concluding as in Form No. 18652).

1. *New York*. — Code Civ. Proc., § 3428.

See also list of statutes cited *supra*, note 1, p. 181.

2. *New York*. — Code Civ. Proc., § 3432.

See also list of statutes cited *supra*, note 1, p. 181.

(12) APPLICATION FOR WARRANT AGAINST PROCEEDS OF SALE.

Form No. 18659.¹*(Commencing as in Form No. 18648, and continuing down to *.)*

Your said applicant further says that by virtue of a warrant, issued on the *first* day of *September*, 1899, by the Honorable *John Marshall*, Justice of the *Supreme* Court in the *second* judicial district, on the application of *William West*, said vessel was seized by the sheriff of the county of *Suffolk*, and together with her tackle, apparel and furniture, has been sold by said sheriff; that the proceeds of said sale amount to *four thousand* dollars, and that said proceeds now stand in the place of said vessel and have not been distributed; that your applicant has made no application for a warrant thereon.

Wherefore *(concluding as in Form No. 18648)*.

(13) PROCEEDINGS TO DISCHARGE WARRANT.

(a) Notice of Application to Discharge Warrant.

Form No. 18660.¹*(Title as in Form No. 18649.)*

You will please take notice that an application will be made by the undersigned to the Honorable *John Marshall*, a justice of the *Supreme* Court, in the *second* judicial district, at the chambers of said justice, in the village of *Riverhead*, in the county of *Suffolk*, and state of *New York*, on the *tenth* day of *September*, 1899, at *ten* o'clock in the *forenoon*, or as soon thereafter as counsel can be heard, for an order discharging the warrant of attachment granted in this proceeding on the *first* day of *September*, 1899, upon the application of the said *John Doe*, upon the payment of the taxed fees of the sheriff upon the seizure and detention under said warrant, and upon the execution, approval and delivery to the said applicant, *John Doe*, the undertaking required by law with *Samuel Short*, whose place of residence is No. *10 Main* street, in the village of *Northport*, in said county of *Suffolk*, and *William West*, whose place of residence is No. *20 West* street, in the village of *Northport*, in said county of *Suffolk*, as sureties thereupon, and for such other and further relief as may be just.

(Signature, office address of attorney, date and address as in Form No. 6954.)

(b) Undertaking of Owner on Application to Discharge Warrant.

Form No. 18661.¹*(Title as in Form No. 18649.)*

Whereas the sheriff of the county of *Suffolk* has seized the vessel

1. *New York*. — Code Civ. Proc., § 3429. See also list of statutes cited *supra*, note 1, p. 181.

See also list of statutes cited *supra*, note 1, p. 181. 3. *New York*. — Code Civ. Proc., § 3436.

2. *New York*. — Code Civ. Proc., § 3435. See also list of statutes cited *supra*, note 1, p. 181.

"*The America*," her tackle, apparel and furniture, by virtue of a warrant of attachment issued on the application of *John Doe*, claiming to have a lien thereon, under the provisions of the act entitled "An Act in relation to liens, constituting chapter 49 of the General Laws," passed May 13, 1897:

Now therefore we, *John Jones*, of No. 310 Canal street, in the village of *Northport*, in the county of *Suffolk*, merchant, and *James Hudson*, of No. 93 West street, in the village of *Northport*, in the county of *Suffolk*, merchant, do hereby jointly and severally undertake in the sum of *one thousand* dollars, pursuant to the statute in such case made and provided, that the said *Richard Roe*, the person who has made application for the discharge of the above named vessel from said warrant, will pay the amount of all claims and damages which shall be established to be due to the said *John Doe*, the person in whose behalf the said warrant was issued, and to have been a subsisting lien on said vessel at the time of the issuing of the said warrant.

Dated this *twentieth* day of *September*, 1899.

In the presence of *Francis Fern*.

John Jones.

James Hudson.

(*Justification of sureties, acknowledgment or proof.*)

(*Approval.*)

(c) *Order Discharging Warrant.*

Form No. 18662.¹

(*Title as in Form No. 18649.*)

A warrant of attachment having been issued by me, in this proceeding, on the *first* day of *September*, 1899, pursuant to the provisions of an act entitled "An Act in relation to liens, constituting chapter 49 of the General Laws," passed May 13, 1897, on application of *John Doe*, against the said vessel "*The America*," her tackle, apparel and furniture, directed to the sheriff of the county of *Suffolk*, and the said vessel having been seized by the said sheriff, by virtue of said warrant, and *Richard Roe*, the owner of said vessel, having applied to me upon due notice to the said *John Doe*, the said lienor, for an order discharging the said vessel from said attachment, and having this *tenth* day of *September*, 1899, executed and delivered to said *John Doe* the undertaking required by law, and having paid the taxed fees of the sheriff for the seizure and detention of the said vessel: now, on motion of *Oliver Ellsworth*, attorney for the said *Richard Roe*, it is Ordered, that the said warrant be and it hereby is discharged.

Dated (*concluding as in Form No. 18652*).

(14) PROCEEDINGS TO DISCHARGE LIEN BEFORE ISSUANCE OF WARRANT.

(a) *Application to Discharge.*

1. *New York*. — Code Civ. Proc., § See also list of statutes cited *supra*,
3437. note 1, p. 181.

Form No. 18663.¹

(Title of proceeding as in Form No. 18648.)

The application of *Samuel Short*, of the village of *Northport*, county of *Suffolk* and state of *New York*, respectfully shows to your honor: That he is the owner (or state any other interest of the applicant) of the vessel "*The America*," now lying in the waters of *Huntington* bay, in said county of *Suffolk*;

That on the first day of *September*, 1899, *John Doe* filed in the clerk's office in the county of *Suffolk* a lien claimed to be subsisting in his favor, pursuant to the provisions of an act entitled "An Act in relation to liens, constituting chapter 49 of the General Laws," passed May 13, 1897, and that no warrant has yet been issued to enforce the same;

That the amount of the lien claimed by the said *John Doe* to be subsisting against said vessel is five hundred dollars, and interest thereon from the first day of *June*, 1899;

That your applicant has a defense to the said lien, and that the grounds of such defense are (set out the grounds of the defense);

That your applicant desires to discharge the said lien upon giving an undertaking therefor to the said *John Doe*, the said lienor, and his proposed sureties upon said undertaking are *William West*, merchant, who resides at No. 10 Main street, in the village of *Northport*, in said county of *Suffolk*, and whose place of business is No. 20 Main street, in the village of *Northport*, in said county of *Suffolk*, and *Francis Fern*, merchant, who resides at No. 20 West street, in the village of *Northport*, in said county of *Suffolk*, and whose place of business is No. 50 Main street, in the village of *Northport*, in said county of *Suffolk*.

Wherefore your applicant prays for leave to discharge said lien upon giving an undertaking therefor to the said lienor, as provided by section 3441 of the Code of Civil Procedure.

Dated (concluding as in Form No. 18648).

(b) Order Granting Leave to Discharge.

Form No. 18664.¹

(Title as in Form No. 18649.)

Upon reading and filing the application of *Samuel Short*, dated the first day of *September*, 1899, from which it appears that he is the owner of a vessel called the "*The America*," now lying in the

1. *New York*. — Code Civ. Proc., § 3441.

See also list of statutes cited *supra*, note 1, p. 181.

Notice of Application. — A notice of application, required by section 3441 of the Code of Civil Procedure, may be as follows:

(Title as in Form No. 18648.)

"You will please take notice that an application, of which the annexed is a copy, will be presented to the Hon.

John Marshall, a justice of the Supreme Court, at his chambers in *Riverhead*, in the county of *Suffolk*, on the seventh day of *September*, 1899, at ten o'clock in the forenoon."

(Date, signature, office address and address as in Form No. 6954.)

2. *New York*. — Code Civ. Proc., § 3441.

See also list of statutes cited *supra*, note 1, p. 181.

waters of *Huntington* bay, in the county of *Suffolk* and state of *New York*; that on the *first* day of *September*, 1899, one *John Doe* filed in the office of the clerk of the county of *Suffolk* a notice of a lien claimed to be subsisting in his favor upon said vessel, pursuant to the provisions of an act entitled "An Act in relation to liens, constituting chapter 49 of the General Laws," passed May 13, 1897, and that no warrant has been issued to enforce the same; that the amount of the lien claimed by the said *John Doe* against said vessel is *five hundred* dollars and interest thereon from the *first* day of *June*, 1899; that the said applicant, *Samuel Short*, has a defense to the said lien of the said *John Doe*, and that the grounds of said defense are (*setting out the grounds of the defense*); that the said applicant, *Samuel Short*, desires leave to discharge said lien upon giving an undertaking, as required by law, and prays for leave to discharge such lien upon giving such undertaking. And it appearing by due proof that a copy of said application, with notice of the time and place of presenting the same, was served on the said *John Doe* on the *first* day of *September*, 1899, and no just cause being shown in opposition to said application; now, on motion of *Jeremiah Mason*, attorney for said applicant, it is

Ordered, that the prayer of said applicant be granted and that the said *Samuel Short* have leave to discharge the said lien of the said *John Doe* for the sum of *five hundred* dollars and interest thereon from the *first* day of *June*, 1899, on the said vessel named "*The America*," the notice of which was filed in the office of the clerk of the county of *Suffolk* on the *first* day of *September*, 1899, by giving an undertaking as required by section 3441 of the Code of Civil Procedure in the sum of *one thousand* dollars.

Dated (*concluding as in Form No. 18652*).

b. By Seire Facias.¹

Form No. 18665.²

John Doe, plaintiff,
against
The Sloop "Maybelle," Richard Roe,
master, defendant.

In the *Superior Court* of
Baltimore City.

John Doe,³ of *Baltimore City*,⁴ and state of *Maryland*, files this his claim for lien on the sloop "*Maybelle*," of the port of *Baltimore*, whereof *Richard Roe*⁵ is reputed owner, for supplies and materials furnished for the use of the said sloop, a particular account or statement of which, with the value thereof, is herewith filed and annexed as a part of this claim. This claimant further states that said supplies and materials were furnished by him, the said claimant, at the instance and request of the said *Richard Roe*,⁶ master of said sloop,

1. For forms connected with seire facias, generally, see the title SCIRE FACIAS.

2. *Maryland*.—Pub. Gen. Laws (1888), art. 63, § 44 et seq.

3. Claimant's Name must be Stated.—Md. Pub. Gen. Laws (1888), art. 63, § 45.

4. Description of boat or vessel must

be given. Md. Pub. Gen. Laws (1888), art. 63, § 45.

5. Debtor's Name must be Stated.—Md. Pub. Gen. Laws (1888), art. 63, § 45.

6. Name of agent must be stated when the debt was contracted by agent and not by owner. Md. Pub. Gen. Laws (1888), art. 63, § 45.

in said *Baltimore City*,¹ and that they were furnished and supplied within six months last past.

And this claimant hereby delivers to the clerk of the *Superior Court of Baltimore City* this his claim for lien, and requests that the same may be recorded in accordance with the provisions of article 67 of the Revised Code of Public General Laws of the State of Maryland.

John Doe, Claimant.

Statement.

The Sloop "Maybelle" to John Doe, of Baltimore City, Maryland, Dr.
For supplies, to wit, (*itemizing supplies and the charge for each item*),
furnished the first day of September, A. D. 1899, amounting in all to the sum of three hundred dollars.

State of *Maryland, Baltimore City*, to wit:

I hereby certify that on this tenth day of September, in the year eighteen hundred and ninety-nine, before me, the subscriber, a justice of the peace of the state of *Maryland*, in and for *Baltimore City* aforesaid, personally appeared *John Doe*, the claimant in the foregoing lien claim, and made oath in due form of law that the facts stated in the said claim are true to the best of his knowledge and belief, and that the account or statement therein filed contains the correct particulars or terms of the supplies and materials furnished by the said *John Doe*, the claimant in the said lien claim, against said sloop "*Maybelle*," amounting in the whole to the sum of three hundred dollars (\$300), and that no part thereof has been paid.

Abraham Kent, Justice of the Peace.²

2. In Admiralty, for Seamen's Wages.

a. Libel.

Form No. 18666.³

District Court of the United States } In Admiralty.
for the }
Northern District of Ohio. } Of March Term, A. D. 1899.

To the Honorable *John Marshall*, Judge of the *District Court of the United States for the Northern District of Ohio*:

The libel of *John Doe*, of the city of *Cleveland*, in said district, late mariner of the vessel known as the "*America*," whereof *Richard Roe* was master, against the said "*America*," her boats, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of subtraction of wages, civil and maritime, alleges and articulately propounds as follows:

First. That at the dates set forth in the schedule hereto attached, and made part hereof, the said "*America*," whereof the said *Richard*

1. Place of equipment or furnishing Pub. Gen. Laws (1888), art. 63, § supplies must be stated. Md. Pub. 45.
Gen. Laws (1888), art. 63, § 45.

2. Verification. — Statement must be § 4547, as amended 30 Stat. at L. (1898), verified by oath of the claimant. Md. c. 28, § 6.

3. United States. — Rev. Stat. (1878),

Roe was master, being at the port of *Cleveland*, in the state of *Ohio*, and within the admiralty and maritime jurisdiction of the United States, the said master, by himself or his agent, did hire and ship this libellant to serve as able seaman on board the said vessel, at the rate of wages specified and set forth in full in the schedule hereto attached; that in pursuance thereof, this libellant went on board and entered into the service of said master, on said vessel, as such able seaman aforesaid, and served for the time and at the rate of wages set forth in said schedule.

Second. That during the whole time he was in the service of said "*America*," to wit, from the time when he went on board thereof to the time of his leaving the same, he well and truly performed his duty as mariner on board said vessel, according to the best of his ability, and was obedient to the lawful commands of the said master and the other officers of said vessel. Your libellant further shows that at the time he was discharged from the said vessel the wages earned by him as aforesaid were not paid to him, or any part thereof, except what was duly credited in the schedule hereto annexed; and that there is now due unto your libellant, by reason of his services, the sum of *two hundred* dollars and *fifty* cents, which the said *Richard Roe* hitherto hath altogether refused, and still doth refuse, to pay, although often thereto requested by your libellant.

Third. That the said "*America*," at the time when said services were rendered as hereinbefore set forth, was a vessel of more than *twenty* tons burthen, engaged in the business of foreign and domestic commerce and navigation upon the public and navigable waters of the United States; and that she now lies at the port of *Cleveland*, in said district, and within the reach of the process of this honorable court.

Fourth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court; in verification whereof, if denied, libellant craves leave to refer to depositions and other proofs to be by him exhibited in this cause.

Wherefore, the libellant prays that process in due form of law, according to the course and practice of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said vessel "*America*," her boats, tackle, apparel and furniture, wheresoever the same shall be found; and that all persons having or pretending to have any right, title or interest therein may be cited to appear and to answer all and singular the matters hereinbefore set forth; and that this honorable court would be pleased to pronounce for the wages aforesaid, and for such other relief in the premises as shall to law and justice appertain, and also to condemn the said "*America*," her boats, tackle, apparel and furniture, and the parties intervening therefor, in costs.

John Doe, Libellant.

Jeremiah Mason,
Proctor for Libellant.

(Verification.)
(Attach schedule.)

b. Bond.

Form No. 18667.¹

District Court of the United States }
 for the ss. In Admiralty.
 Northern District of Ohio.

On this *tenth* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-nine*, before *Charles Carroll*, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits and depositions, etc., within the *northern* district of *Ohio*, at *Cleveland*, in said district.

In the matter of the libel and claim of *John Doe* against the vessel "*America*," in a cause of contract, civil and maritime, moved and prosecuted in the *District* Court of the United States for the *northern* district of *Ohio*.

Which day appeared personally the above named *John Doe*, and produced for sureties *Samuel Short* and *William West*, both of the city of *Cleveland*, in said district. And the said *Samuel Short* and *William West*, submitting themselves to the jurisdiction of the aforesaid court, bound themselves, their heirs, executors and administrators, in the sum of *two hundred and fifty* dollars, for the benefit of whomsoever it may concern, that the said *John Doe* shall prosecute his action in this behalf, and abide by all orders, interlocutory and final, of the aforesaid court, and pay the costs and expenses, if any, which shall be awarded against him by the final decree of the aforesaid court or of any appellate court; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors and administrators' goods and chattels, wheresoever the same may be found, to the value or the sum above mentioned.

Samuel Short.
William West.

Taken, subscribed and acknowledged before me this *tenth* day of *March*, 1899.

Charles Carroll, U. S. Commissioner,
Sixth Circuit and *Northern* District of *Ohio*.

(*Justification of sureties.*)

c. Monition.

Form No. 18668.¹

Eastern District of *Michigan*, ss.

On reading the foregoing libel, for sufficient cause therein appearing, and on motion of *Jeremiah Mason*, libellant's proctor, it is ordered that an attachment do issue for the seizure of the said vessel "*America*," her boats, etc., and that a citation do issue to her master, and that the day of hearing of said libel be fixed for the *tenth* day of *June*, 1898, at *ten o'clock A. M.*, if that be a day of juris-

1. *United States*. — Rev. Stat. (1878), § 4547, as amended 30 Stat. at L. (1898), c. 28, § 6.

diction; if not, on the next day of jurisdiction thereafter, at which time the process will be made returnable.

Dated the *tenth* day of *May*, 1899.

John Marshall, United States District Judge,
Eastern District of *Michigan*.

II. PROCEEDINGS IN PERSONAM.

1. Against Charterer, for Sending Vessel on Voyage Other than That for Which She was Chartered, Whereby She was Lost.

Form No. 18669.¹

(Oliver's Prec. (1840), p. 365.)

(*Commencement as in Form No. 6934*) for that whereas the plaintiffs, being owners of a certain ship called the "*Vansittart*," by a certain charter party of affreightment, dated *August 13, 1788*, let the same to the *East India Company* to freight for a certain voyage with her to be made in trade and also in warfare, as the said company, or any of their governors, should require and direct; and therein and thereby the plaintiffs covenanted with the said company that the said ship should be used by the said company in trade or warfare, if required by the said company; that the master should observe the orders of the said company and that the said company should have power to displace him or any other officer or officers belonging to the said ship; and the plaintiff avers that afterwards, to wit, on *August 20, 1788*, the said ship sailed on her voyage aforesaid in the service of the said company, and that the said company afterwards and while the said ship was in the service of the said company as aforesaid, without the knowledge or consent and against the will of the plaintiffs, employed the said ship in and upon a certain voyage and service not being a voyage and service of trade or warfare and not being a voyage or service mentioned in or intended to be warranted by the charter party aforesaid, or upon which the said ship ought to have been employed, to wit, in and upon a certain voyage and service of observation and discovery in and to a certain dangerous sea, strait or passage situate to the eastward of a certain island, called the *Island of Banca*, for the purpose of exploring the said sea, strait or passage, and wrongfully and injuriously, without the knowledge or consent and against the will of the plaintiffs, kept and

1. This is the declaration in *Lewin v. East India Co.*, Peake N. P. (ed. 1795), p. 241. In that case the plaintiffs were nonsuited, on the ground that Mr. Lewin, who was the agent of the ship's husband, consented to the orders of the defendants to the captain to take the vessel on the voyage of discovery. It was further held that if a ship be chartered for the purpose of trade or warfare and the charterers order the vessel on a voyage of discovery against

the consent of the owners, whereby the ship is lost, the owners may maintain an action on the case. But see *Wheelock v. Wheelwright*, 5 Mass. 104, wherein it is held by Parson, C. J., that where one hires a horse to go a great distance, and goes beyond that distance, he is liable to the owner in an action of trover for a conversion, and not in case for improperly using the horse.

detained the said ship on the said voyage of observation and discovery for a great length of time, to wit, the space of *one* year; by reason whereof the said ship, in the course of the said voyage of observation and discovery, was stranded, sunk and lost, to wit, at the said *Island of Banca*, on *August 22, 1789*, to the damage (*concluding as in Form No. 6934*).

2. Against Master of Vessel.

a. By Owner, for Not Taking Proper Care of Goods.

Form No. 18670.

(Precedent in *Dickon v. Clifton*, 2 Wils. C. Pl. 319.)¹

[*(Commencement as in Form No. 6934.)*]² For that whereas he, the plaintiff, on the *28th* day of *August, 1764*, at the castle of *York*, was owner and proprietor of a certain boat or vessel called a keel, and being so, he afterwards, on the same day and year there, at the instance and request of the defendant, retained and employed him in the service of the plaintiff to be master and commander of the vessel, and to receive and take on board thereof from one *Matthew Johnson*, at a place called *Brough*, in the county of *York*, *fifty-six* quarters of malt of the plaintiff of the value of *100l.* and to carry and convey the same by water in the vessel from thence to *Horbury*, in *Yorkshire*, and at *Horbury* to deliver the same to one *Jonathan Crosland*, for certain wages, hire or reward to be therefor paid by the plaintiff to the defendant as master of the vessel; and although the defendant afterwards, on the *29th* of *August*, in year aforesaid, at *Brough*, in *Yorkshire*, had and received from the said *Matthew Johnson* the whole *fifty-six* quarters of malt of the plaintiff, and afterwards, on the same day and year last aforesaid, set sail and departed with the vessel from the said place where he, the defendant, had so received the malt from *Matthew Johnson*, towards and for *Horbury*; and afterwards, on the *21st* of *September*, in the year aforesaid, arrived with the vessel at *Horbury*, and afterwards, on the same day and year last aforesaid, at *Horbury*, delivered to the said *Jonathan Crosland* a part, to wit, *forty* quarters, of the said malt; yet the defendant, not regarding the duty of his employment, so badly, carelessly, negligently and improvidently behaved himself in his said employment, and took such little and such bad care of *sixteen* quarters of malt, residue of the said *fifty-six* quarters of malt so by him received as aforesaid, that the defendant did not deliver the same *sixteen* quarters of malt, or any part thereof, to the said *Jonathan Crosland*, or elsewhere (although often requested so to do), but the defendant, on the contrary thereof, by and through his

1. There was a third count, in trover, for sixty quarters of malt. It was moved in arrest of judgment, and objected, that the first two counts were in the nature of an action on the custom of the realm, which is founded in contract, and cannot therefore be joined with a count in trover, which is a tort; that

this action ought to have been laid upon a promise and undertaking, and not being so laid was ill. The court overruled the objections and declared the counts all well joined.

2. The matter to be supplied within [] will not be found in the reported case.

own mere neglect and default, and through his carelessness and improvidence, suffered the same, and every part thereof, while the same were and continued in his possession and custody for such carriage, to be embezzled and wholly lost, to wit, at the castle of *York* aforesaid.

And whereas the said plaintiff, on the *1st* day of *August*, 1764, and from thence until the *1st* day of *October*, in the same year, at the castle of *York*, was owner and proprietor of another vessel, and the defendant was during all that time master of the same vessel, retained and employed as such by the plaintiff, and in his service to navigate the same from place to place, and to take care of the last mentioned vessel, and of all goods delivered to him as such master, or put on board the same for carriage from place to place, for wages, hire or reward, to be therefor payable and paid by the plaintiff to him as such master of the vessel, to wit, at the castle of *York*; and whereas within the time aforesaid, and while the plaintiff was owner of the last mentioned vessel, and while the defendant was master thereof in the service of the plaintiff, to wit, on the *29th* of *August*, in the year aforesaid, he, the defendant, as master of the same vessel, received from the said *Matthew Johnson*, by order of the plaintiff, at *Brough* aforesaid, other *fifty-six* quarters of malt of the plaintiff of the value of other 100*l.* to be carried and conveyed by the defendant in the last mentioned vessel to *Horbury* aforesaid by water, to be there delivered to the said *Jonathan Crosland* for the plaintiff; and although the defendant afterwards, on the *29th* of *August*, in the said year, had and received from the said *Matthew Johnson* the said whole *fifty-six* quarters of other malt of the plaintiff, and on the same day and year set sail and departed with the said last mentioned vessel from said place where he had so received the said malt from *Matthew Johnson*, towards and for *Horbury*, and afterwards, on the *21st* of *September*, in the year aforesaid, arrived with the same vessel at *Horbury*, and afterwards, on the same day and year, there delivered to *Jonathan Crosland*, a part, to wit, *forty* quarters of the last mentioned malt; yet the defendant, not regarding the duty of his employment, so badly, carelessly, negligently and improvidently behaved himself in his said employment, and took such little and bad care of *sixteen* quarters, residue of the said *fifty-six* quarters of malt so by him received as last aforesaid, that the defendant did not deliver the same *sixteen* quarters, or any part thereof, to the said *Jonathan* at *Horbury*, or elsewhere, although often requested so to do; but the said defendant, on the contrary thereof, by and through his own mere neglect, carelessness and improvidence, suffered the same, while it continued in his possession and custody for such carriage, to be embezzled and wholly lost, to wit, at the castle of *York*, aforesaid, to the damage [(concluding as in Form No. 6934).]¹

b. For Running Foul of Plaintiff's Sloop at Anchor, with Special Damage.

1. The matter to be supplied within [] will not be found in the reported case.

Form No. 18671.

(Oliver's Prec. (1840), p. 360.)

(Commencement as in Form No. 6940) for that the plaintiff, on the tenth day of June, A. D. 1899, at Eastport, in the county of Washington and state of Maine, was master and owner of a sloop, called the "*Helen*," burthened about one hundred tons and worth fifteen thousand dollars, which said sloop was then and there riding at anchor, well secured and fastened, being then and there fully loaded and bound for sea. And the said Richard Roe was then and there master and on board of another sloop under sail and ought carefully to have conducted, guided and managed the same; but he, the said Richard Roe, careless of his duty as master of the said other sloop, so carelessly and negligently navigated, guided and steered her that the last mentioned sloop struck the sloop of which the plaintiff was master and owner, and in divers places rent and tore away the mainsail, parted the cable and broke away the anchor of the sloop of the plaintiff aforesaid; whereby the plaintiff was in great danger of losing his sloop aforesaid and the cargo of the same, and much other damage to the said Richard Roe, defendant, then and there did to the plaintiff, to the damage (concluding as in Form No. 6940).

3. Against Owner of Vessel.

a. For Carelessness of Master.

(1) IN RUNNING DOWN PLAINTIFF'S BOAT.¹

Form No. 18672.

(Oliver's Prec. (1840), p. 359.)

(Commencement as in Form No. 6940) for that the said plaintiffs, at Eastport, in the county of Washington and state of Maine, on the tenth day of June, A. D. 1899, were the owners and lawfully possessed of a certain fishing-boat, called the "*Helen*," burthened about thirteen tons, then and there lying at anchor and employed in the fishery, with the articles mentioned in the schedule hereto annexed, marked "*A*," on board the said boat, being also the property of the said plaintiffs; and the said Samuel Short and William West were then and there owners and possessed of a certain ship, called the "*America*," then and there being and sailing, of which one Francis Fern then and there had the care and management and was the master duly appointed by the said Samuel Short and William West, and for whose carelessness, negligence and unskillfulness as master of the said ship, the said Samuel Short and William West then were and now are answerable; and the said Samuel Short and William West, by the said Francis Fern, master of the said ship as aforesaid, then and there so negligently, carelessly and unskillfully managed

1. Collision. — An action in personam for damages occasioned by collision may be maintained in the state court. *Digby v. Kenton Iron Co.*, 8 Bush (Ky.) 166; *Stewart v. Harry*, 3 Bush (Ky.)

438; *U. S. Mail Line Co. v. McCracken*, (Ky. 1895) 33 S. W. Rep. 82; *Elwell v. Bender*, 79 Hun (N. Y.) 243; *Schoonmaker v. Gilmore*, 102 U. S. 118; *The Hine v. Trevor*, 4 Wall. (U. S.) 555.

and steered the said ship that the said ship, for want of good and sufficient care and management thereof, fell foul of, ran down and sunk the said boat, with the articles on board of her; by reason whereof the said plaintiffs have wholly lost the said boat, with the articles aforesaid, and also all the profit and benefit of the said boat in the fishing business; all of which is to the damage (*concluding as in Form No. 6940*).

(2) IN RUNNING FOUL OF PLAINTIFF'S BOAT, WHEREBY SHE WAS SUNK.

Form No. 18673.

(Oliver's Prec. (1840), p. 358.)

(*Commencement as in Form No. 6940*) for that the said plaintiffs, at *Eastport*, in the county of *Washington* and state of *Maine*, on the *tenth* day of *June*, 1899, were the owners and lawfully possessed of a certain fishing-boat, called the "*Helen*," burthened about *thirteen* tons, then and there lying at anchor and employed in the fishery, with the articles mentioned in the schedule, hereto annexed, marked "*A*," on board the said boat, being also the property of the said plaintiff; and the said *Samuel Short* and *William West* were then and there the owners and in possession of a certain ship called the "*America*," then and there being and sailing, of which one *Francis Fern* then and there had the care and management and was the master duly appointed by the said *Samuel Short* and *William West*, and for whose negligence, carelessness and unskilfulness as master of the said ship the said *Samuel Short* and *William West* then were and now are answerable; and the said *Francis Fern* then and there so negligently, carelessly and unskilfully managed and steered the said ship that the said ship, for want of good and sufficient care and management thereof, fell foul of, ran down and sunk the said boat, with the said articles on board of her, by reason whereof the said plaintiffs have wholly lost the said boat, with all the articles aforesaid, and also all the profit and benefit of the said boat in the fishing business, all of which is to the damage (*concluding as in Form No. 6940*).

(3) IN RUNNING FOUL OF PLAINTIFF'S BOAT, WITH SPECIAL DAMAGE.

Form No. 18674.

(Oliver's Prec. (1840), p. 360.)

(*Commencement as in Form No. 6940*) for that the plaintiff, at *Eastport*, in the county of *Washington* and state of *Maine*, on the *tenth* day of *June*, A. D. 1899, owned and was possessed of a certain fishing-schooner, called the "*Helen*," whereof one *John Doe* was skipper and master, which was then lying at anchor for the purpose of fishing there, and the said *Richard Roe* then and there owned and possessed a certain fishing schooner, called the "*Gypsy*," whereof one *Samuel Short* was skipper and master, then sailing on the high seas, and the said *Samuel Short*, his servant in that behalf, then and there had the

management of the said schooner, owned by the said *Richard Roe*, yet the said *Richard Roe*, by his said servant, so negligently navigated the said schooner that she, by the negligence of the said *Richard Roe*, said servant and skipper, with great force struck against the said schooner, owned by the plaintiff as aforesaid, then at anchor as aforesaid, and so damaged her that the bowsprit, *one* cable, *one* anchor and *one* anchor-stock of and belonging to her, were then and there wholly lost, and the said schooner, owned by the plaintiff as aforesaid, and her rigging were then and there so damaged by said striking that they became wholly unfit for pursuing her then fare of fishing, and the same was totally lost thereby; all of which is to the damage (*concluding as in Form No. 6940*).

b. For Death by Wrongful Act.

Form No. 18675.

(Precedent in *McDonald v. Mallory*, (Ct. App.) 7 Abb. N. Cas. (N. Y.), note 86.)¹

[(*Title of court and cause as in Form No. 5926*.)]

The complaint of the above named plaintiff respectfully shows to this court:]²

First. That at the time of the death of the above-named *Charles McDonald*, as hereinafter stated, and for a long time prior thereto, the said defendants were the owners of the steamer "*City of Waco*," to wit, at the port and city of *New York*, in the State of *New York*, of which said city and state said defendants were residents and citizens, and that said steamer was registered and belonged in the said port of *New York*, and was employed by said defendants in carrying passengers and freight up to the time of the burning thereof, as hereinafter mentioned, between said city of *New York* and the city of *Galveston*, in the State of *Texas*.

Second. That between and including the 30th day of *October*, 1875, and the 9th day of *November*, 1875, said steamer, by direction of said defendants, and while in said employment, proceeded on a voyage from the said city of *New York* to the said city of *Galveston*, and received on board at said city of *New York*, and carried on said voyage, a large number of passengers, and so far performed said voyage as to arrive near but outside of the bar and harbor of *Galveston*, where she came to anchor at a place where she was still upon the high seas, and where she was burned, as hereinafter more particularly described.

Third. That during all said voyage, so far as it was performed, as aforesaid, and at the time of the said burning of said steamer, said *Charles McDonald* was on board said steamer in the employment of said defendants in the capacity of fireman.

Fourth. That said *Charles McDonald* was engaged at the city and port of *New York* by said defendants, so to serve on said steamer as fireman, said steamer being then at said city and port, and owned and employed as above mentioned; and said *Charles McDonald*

1. This complaint was held sufficient. supplied within [] will not be found in

2. The matter enclosed by and to be the reported case.

entered into and performed the said service of fireman on board said steamer for said defendants, relying upon the understanding and agreement between him and said defendants, and on the representation made to him by said defendants, that said steamer was to be employed in the carrying of passengers, and would conform to all laws, regulations and obligations affecting steamers carrying passengers; but notwithstanding said understanding, agreement and representation, said defendants did knowingly receive on board said steamer, as freight, at the city of *New York*, to wit, on or about *October 30th, 1875*, to be carried from said city of *New York* to the said city of *Galveston*, or to be used as stores on said steamer, and did carry therein on said voyage, so far as the same was performed as aforesaid, among other things, *three hundred* cases of petroleum, all of which was crude petroleum, or if any of it was refined it was not such as would not ignite at a temperature of less than *one hundred and ten* degrees, Fahrenheit thermometer, nor was it to be carried upon a route where there was no other practical mode of transporting it, nor was its carriage under or sanctioned by any regulations prescribed by the board of supervisors' inspectors with the approval of the secretary of the treasury; and that the receiving and carrying of said petroleum on board said steamer, as aforesaid, was an act of culpable negligence on the part of said defendants, and in violation of section 4472 of the Revised Statutes of the United States, which *Charles McDonald*, in serving upon said steamer, had a right to assume that said defendants would obey.

Fifth. That on said *9th* day of *November, 1875*, while said steamer was lying at anchor at the place aforesaid, upon the high seas, with said passengers and said *Charles McDonald*, and her other crew on board, and said *three hundred* cases of petroleum also on board as aforesaid, a fire started on board said steamer, and by reason of the presence of said petroleum on board said steamer, which was reached by said fire, said fire could not be extinguished or checked; and the same spread with such force and rapidity, by reason of the burning of said petroleum, that it was impossible for any person on board to escape alive, and the death of all on board, including said *Charles McDonald*, was caused by the violence of the fire arising from the presence of said petroleum, and the burning and explosion of said petroleum, and that the death of said *Charles McDonald*, as aforesaid, was caused by the culpable negligence of the said defendants as aforesaid.

Sixth. Said plaintiff further says, that said defendants so negligently and unskilfully conducted themselves in receiving and carrying dangerous and combustible freight on board said steamer on the voyage aforesaid, and in guarding against fire on board said steamer, and in the care and management of said steamer, and of the furnace and fire and other matter on board said steamer, that through the said negligence of the defendants said steamer and said combustible and dangerous freight and other cargo on board took fire, and burned with such force and rapidity as to cause the death of all on board, including said *Charles McDonald*; said steamer being at the time of receiving such combustible matter at the city of *New York*,

and at the time of the burning of said steamer, and at the time of the death of *Charles McDonald*, upon the high seas, outside the harbor and bar at said *Galveston*.

Seventh. That said negligence of said defendants, whereby the death of *Charles McDonald* was caused, as hereinafter set forth, and also the said death, occurred within the territory of the State of *New York*, to wit, at the city of *New York*, and on board said steamer, belonging to the State of *New York* as aforesaid, and being at first at the city of *New York*, and thereafter upon the high seas as above described.

Eighth. That said *Charles McDonald* was, at the time of his engagement to serve on board said steamer, and during such service, and at the time of his death, a citizen of the State of *New York* and an inhabitant of the city of *Brooklyn*, and county of *Kings*, in said State.

That he left him surviving a widow, *Rose McDonald*, the above named plaintiff, and seven children, all of whom were under the age of *twenty-one* years, the oldest of whom was, at the time of the death of said *Charles McDonald*, of the age of *fourteen* years, which said widow and children were entirely dependent upon said deceased for their support, nurture and education, which they have lost by his death, and have been otherwise injured thereby to their damage in the sum of *five thousand* dollars, which the plaintiff claims to recover by virtue of the statute of the State of *New York* in such case made and provided.

Ninth. That on or about the *ninth* day of *March*, 1876, letters of administration of the goods, chattels and credit of said *Charles McDonald*, deceased, were duly issued and granted to said plaintiff by the surrogate of the county of *Kings*, in said State of *New York*, appointing the said plaintiff administratrix of all the goods, chattels and credits which were of said deceased, and that said plaintiff duly qualified as such administratrix, and entered upon the discharge of the duties of the said office.

Wherefore said plaintiff demands judgment against said defendants for the sum of *five thousand* dollars, with interest thereon from *November 9th*, 1875, and the costs of this action.

[(*Signature, office address of attorney, and verification as in Form No. 11457.*)]¹

c. For Embezzlement by Master and Crew.

Form No. 18676.

(*Oliver's Prec. (1840), p. 369.*)

(*Commencement as in Form No. 6940*) for that the plaintiff, at *Eastport*, in the county of *Washington* and state of *Maine*, on the *tenth* day of *June*, A. D. 1899, shipped on board the schooner of the said *Richard Roe*, called the "*Helen*," then bound on a voyage in the said *Richard Roe's* service, to the port of *Havana*, in the island of *Cuba*, a quantity of silver and gold, to wit, (*specifying the property*), all of the value of *two thousand* dollars, with the said *Samuel Short*, the said *Richard Roe's* servant, and commander of his said vessel for said voyage, and for

1. The matter to be supplied within [] will not be found in the reported case.

whose conduct in said service the said *Richard Roe* is answerable; to be transported in said vessel, on the plaintiff's account and risk, to said port of *Havana*, there to be delivered to the plaintiff, his order or assigns, he or they paying freight therefor, at the rate of *one* dollar per cent., with primage and average accustomed; and the said *Samuel Short*, in his said capacity, then and there signed a bill of lading, according to the custom of merchants, thereby engaging for the delivery of said gold and silver, in manner aforesaid, in consideration aforesaid; whereby the said *Richard Roe*, according to the custom of merchants, then and there became obliged, that the said gold and silver should be safely kept, the dangers of the sea only excepted, and transported, and delivered as aforesaid, and then and there promised the plaintiff accordingly. And the plaintiff in fact says, that the said *Samuel Short*, master of the said *Richard Roe's* vessel, in said *Richard Roe's* service as aforesaid, arrived safe at said port of *Havana*, with said gold and silver, and that the said gold and silver was not safely kept, but by the said *Richard Roe's* master aforesaid and by the crew of the said *Richard Roe's* vessel, for whom, in such respects, he is answerable, was there, on board said vessel, on the *twentieth* day of *July*, A. D. 1899, converted to their own use and embezzled and was never delivered to the said plaintiff, nor to his order, nor to his assigns, though often requested thereto, and though the plaintiff was ever ready to pay the freight, primage and average aforesaid; by means whereof the said *Richard Roe*, according to the usage and custom of merchants, became obliged to pay the plaintiff his damages thereby occasioned, which the plaintiff avers amount to *twenty-five hundred* dollars, on demand; yet though requested (*concluding as in Form No. 6940*).

d. For Negligence.

(1) IN RUNNING FOUL OF PLAINTIFF'S BOAT, WHEREBY SHE WAS SUNK.

Form No. 18677.

(*Oliver's Prec. (1840), p. 359.*)

(*Commencement as in Form No. 6940*) for that the said plaintiffs, at *Eastport*, in the county of *Washington* and state of *Maine*, on the *tenth* day of *June*, 1899, were the owners and lawfully possessed of a certain fishing-boat, called the "*Helen*," burthened about *thirteen* tons, then and there lying at anchor and employed in the fishery, with the articles mentioned in the schedule, hereto annexed, marked "*A*," on board the said boat, being also the property of the said plaintiff; and the said *Samuel Short* and *William West* were then and there the owners and in possession of a certain ship called the "*America*," then and there being and sailing, and the said *Samuel Short* and *William West* then and there so negligently, carelessly and unskillfully managed and steered the said ship that the said ship, for want of good and sufficient care and management thereof, fell foul of, ran down and sunk the said boat with the said articles on board of her, by reason whereof the said plaintiffs have wholly lost the said boat

with all the articles aforesaid, and also all the profit and benefit of said boat in the fishing business, all of which is to the damage (*concluding as in Form No. 6940*).

(2) IN TOWING PLAINTIFF'S VESSEL.

Form No. 18678.¹

(*Title of court and cause as in Form No. 5932.*)

The complaint of the above named plaintiff respectfully shows to this court:

1. That during all the times hereinafter mentioned the defendant was and now is a corporation created, organized and existing under and by virtue of the laws of the state of *South Carolina*, and as such corporation was the owner of a certain steamboat, known as the "*Louise*," and operated said steamboat in towing to the city of *Charleston*, in said state of *South Carolina*, boats containing vegetables from the neighboring country.

2. That on or about the *fifteenth* day of *May*, 1893, the plaintiff owned and operated a certain sailboat, known as the "*David St. John*," used by plaintiff for carrying vegetables to the city of *Charleston*; that said boat at the time of the collision hereinafter mentioned was tight, staunch, strong, and in every way suited for the purpose for which she was used as aforesaid.

3. That on or about the said *fifteenth* day of *May*, 1893, while plaintiff's said boat was on her way to *Charleston* loaded with vegetables for shipment, the defendant caused the said steamboat "*Louise*" to approach plaintiff's said boat, to stop, and defendant then and there offered to tow plaintiff's said boat to *Charleston*, the said steamboat having at said time the sloop "*Gipsy*" in tow.

4. That plaintiff accepted the offer so made, and in obedience to the directions of the defendant attempted to place his said boat to the stern of the said sloop "*Gipsy*" for the purpose of towing as aforesaid, but in consequence of the carelessness, negligence and improper and unskilful management of the defendant, its agents and servants, in running the said steamboat "*Louise*," plaintiff was prevented from carrying out the directions given, and his said boat was sunk and with the vegetables aforesaid entirely lost.

5. That said loss to plaintiff was caused by the careless, negligent, improper, unskilful, wrongful and unlawful conduct of the defendant and its agents and servants navigating the said steamboat "*Louise*," for the reason that, contrary to proper care, skill and caution, the said defendant and its agents and servants caused the said steamboat "*Louise*" to start off without having allowed plaintiff sufficient time for carrying out the directions given by the said defendant, its agents and servants, and without having seen, as the said defendant, its agents and servants, should have, that the said boat of plaintiff was properly in position and prepared for the said steamboat to start off.

6. That the said defendant, its agents and servants, by reason of

1. This is substantially the complaint Co., 42 S. Car. 447. The complaint in *Ross v. Charleston, etc.*, Transp. this case was held sufficient.

their neglect, inattention and improper conduct, prematurely and unexpectedly started the said steamboat "*Louise*" and caused the said sloop "*Gipsy*," towed as aforesaid, to run into and to strike with great force and violence the said boat of plaintiff, thereby capsizing and sinking her, loaded with vegetables as aforesaid, the property of the plaintiff, to his loss and damage *five hundred dollars*.

Wherefore (*concluding as in Form No. 6932*).

4. Against Pilot, for Running Vessel Aground.

Form No. 18679.

(*Oliver's Prec. (1840), p. 357.*)

(*Commencement as in Form No. 6940*) for that the said *Richard Roe*, at *Eastport*, in the county of *Washington* and state of *Maine*, on the *tenth* day of *June*, 1899, was one of the pilots of the port of *Eastport* aforesaid, duly appointed and sworn according to law in such case made and provided, with a branch or warrant for the due execution of the duties of said office, and entitled to the legal fees of pilotage, according to the law aforesaid; and for that the said plaintiff was then and there owner and in possession of a certain ship called the "*America*," burthened about *one hundred* tons, and laden with a valuable cargo of (*stating nature of cargo*), lying in the port of *Eastport*, which ship then and there drew more than *nine* feet of water, to wit, *eleven* feet of water, and was bound out of said port, with said cargo on board, to proceed on a voyage to the port of *Boston*, in the commonwealth of *Massachusetts*. And the said *Richard Roe* then and there, in the execution of his said office as one of the pilots aforesaid for the said port, and for the legal fees of pilotage, took upon him all the charge of piloting said ship out of said port, and promised the plaintiff that he would faithfully do the same; yet the said *Richard Roe*, not regarding the duties of his said office, nor the charge he had taken upon himself as aforesaid, so ignorantly, negligently, and unskilfully managed said ship, in piloting her out of said port, that he ran the said ship aground on certain rocks in the said port; by which means the said ship was greatly damaged in her bottom, sheathing, planks and timber, and great part of her cargo was damaged and wasted; and the plaintiff has been put to great expense in repairing and refitting the said ship, and unlading her cargo, and relading the same on board other vessels, and hath wholly lost the use of said ship from that time to this; all of which is to the damage (*concluding as in Form No. 6940*).

5. For Untieing Plaintiff's Boat, by Reason of Which it was Carried Against a Bridge and was Injured.

Form No. 18680.

(*Oliver's Prec. (1840), p. 363.*)

(*Commencement as in Form No. 6940*) for that whereas on the *tenth* day of *June*, A. D. 1899, at *Eastport*, in the county of *Washington* and

state of *Maine*, the plaintiff was possessed of a certain fishing-boat, called the "*Helen*," of the value of *three thousand* dollars, lying in the harbor of said *Eastport*, against the side of a certain wharf there called the *Key* and tied with a certain rope, called a fast, on to a certain post of said wharf, as of his proper fishing-boat, and being so possessed thereof said *Richard Roe*, contriving and maliciously intending to spoil and deprive said plaintiff of all benefit and advantage of his said boat, did then and there maliciously untie said rope, where-with said boat was tied as aforesaid; whereby the said boat did float with the stream and the water in said harbor and then running with great force toward a stone bridge at *Eastport* aforesaid; the said boat was thereby driven by the stream against said bridge with so great force that the same boat was thereby much broken and damaged; to the damage (*concluding as in Form No. 6940*).

SHORT CAUSE CALENDAR.

- I. AFFIDAVIT, 215.
- II. NOTICE OF AFFIDAVIT, 215.
- III. PROOF OF SERVICE OF AFFIDAVIT, 216.

I. AFFIDAVIT.¹

Form No. 18681.²

State of *Illinois*, }
Greene County. } ss. In the *Circuit Court of Greene County*.
John Doe }
against } *Assumpsit*.
Richard Roe. }
State of *Illinois*, }
Greene County. } ss.

Jeremiah Mason, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled suit at law, now pending in said court, and that he verily believes the trial of said suit will not occupy more than *one* hour's time.

Jeremiah Mason.

Subscribed and sworn to before me this *tenth* day of *September*,
A. D. 1899.

Calvin Clark,

Clerk of the *Circuit Court of Greene County*.

II. NOTICE OF AFFIDAVIT.

1. Affidavit Necessary.—In order to place a case upon the short cause calendar and to proceed with it to trial out of its order, the affidavit must be filed as provided by statute, and the filing of a copy is not sufficient. *Casey v. Jordan*, 94 Ill. App. 405; *Parsley v. Halloran*, 87 Ill. App. 581; *Donnerstag v. Loewenthal*, 77 Ill. App. 159.

For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. I, p. 548.

Precedents.—In *Angus v. Orr*, etc., *Hardware Co.*, 64 Ill. App. 378, the following affidavit was held sufficient:

"*William K. Lowrey*, being first duly sworn, deposes and says that he is the attorney for the plaintiff in the above entitled suit now pending in this court, and that he verily believes that the

trial of said suit will not occupy more than *one* hour's time.

William K. Lowrey."

In *Angus v. Sullivan*, 166 Ill. 461, the affidavit was as follows:

"*William C. Malley*, being first duly sworn, on oath deposes and says that he is the duly authorized agent in this behalf of the plaintiff in the above entitled cause, and that he verily believes the trial of the above entitled cause will not occupy more than *one* hour's time."

It was objected to this affidavit that it was ambiguous in that the pronoun "he," where it is used the second time, may refer to the plaintiff and not to the affiant. This objection was overruled and the affidavit held sufficient.

2. Illinois.—*Starr & C. Anno. Stat.* (1896), c. 110, par. 97.

Form No. 18682.¹

State of Illinois, } ss. In the Circuit Court of Greene County.
 Greene County. }

John Doe }
 against } *Assumpsit.*
 Richard Roe. }

To Oliver Ellsworth, Attorney for said Defendant:

Take notice, that on the *tenth* day of *September*, A. D. 1899, an affidavit, of which the foregoing is a copy, was duly filed in said suit, and that the clerk of said court will place said suit on the short cause calendar for trial, as by statute provided.

Dated *Carrollton*, *September 10*, 1899.

Jeremiah Mason, Attorney for Plaintiff.

III. PROOF OF SERVICE OF AFFIDAVIT.

Form No. 18683.¹

State of Illinois, } ss.
 Greene County. }

Samuel Short, being first duly sworn, on oath deposes and says that he served the above notice, by delivering to and leaving with *Oliver Ellsworth*, attorney for the above named defendant, personally, a copy of said notice on the *tenth* day of *September*, 1899.

Samuel Short.

Subscribed and sworn to before me this *tenth* day of *September*, 1899.

Norton Porter, Notary Public.

See also, generally, *supra*, note 1, 1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 110, par. 97.

SHORT PLEAS.

See the title PLEAS, vol. 13, p. 918.

SIDEWALKS.

See the title STREETS AND HIGHWAYS.

SIGNATURES.

See the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799;
COMPLAINTS, vol. 4, p. 1019; *PLEAS*, vol. 13, p. 918.

SIMILITER.¹

BY HAROLD N. ELDRIDGE.

- I. TO PLEA, 217.
- II. TO REPLICATION, 218.

CROSS-REFERENCES.

For other Forms of Joinder of Issue, see the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

I. TO PLEA.

1. When Proper. — Where a pleading properly concludes to the country, the plaintiff cannot, in general, reply otherwise than by adding what is termed the similiter. 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 549.

"Etc." Sufficient. — Etc. added to a plea concluding to the country has been construed to mean a similiter. Everitt v. De Groff, 1 Cow. (N. Y.) 213; Clark v. Nicholson, 6 C. & P. 712, 25 E. C.

L. 612; Sayer v. Pocock, 1 Cowp. 407. But see *contra* Dickerson v. Stoll, 24 N. J. L. 550.

Signature. — A similiter need not be signed by counsel. Davis v. Ransom, 26 Ill. 100.

Common Similiter. — A common similiter is in the following form, "and the said plaintiff (or defendant) doth the like." 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 570, 627.

Form No. 18684.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 641.)

(Title of court and cause as in Form No. 17802.)

And the said *John Doe*, as to the plea of the said *Richard Roe* by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

II. TO REPLICATION.

Form No. 18685.

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 706.)

(Title of court and cause as in Form No. 17802.)

And the said *Richard Roe*, as to the said replication of the said *John Doe* to the said second plea of him the said *Richard Roe*, and which the said *John Doe* hath prayed may be inquired of by the country, doth the like.

1. See, generally, *supra*, note 1, p. 217.

SIMULTANEOUS ACTIONS.

See the title *ABATEMENT, PLEAS IN*, vol. 1, p. 21.

SLANDER.

BY HAROLD N. ELDRIDGE.

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CROSS-REFERENCES.

For Forms relating to Libel, see the title LIBEL, vol. 11, p. 342.

For Forms relating to Slander of Title, see the title SLANDER OF TITLE, *post*, p. 287.

I. CIVIL ACTION.¹

1. **Statutes** relating to slander in civil cases exist as follows:

- Alabama*. — Civ. Code (1896), § 1437 *et seq.*
- Arizona*. — Rev. Stat. (1901), §§ 1285, 1286.
- Arkansas*. — Sand. & H. Dig. (1894), §§ 1727 *et seq.*, 4823.
- California*. — Code Civ. Proc. (1897), §§ 460, 461.
- Colorado*. — Mills' Anno. Code (1896), §§ 68, 69.
- Connecticut*. — Gen. Stat. (1888), § 1376.
- Florida*. — Rev. Stat. (1892), § 989, 1057, 1058, 1294.
- Georgia*. — 2 Code (1895), §§ 3833, 3837, 3841, 3900.
- Idaho*. — Code Civ. Proc. (1901), § 3231.
- Illinois*. — Starr & C. Anno. Stat. (1896), c. 126, par. 1 *et seq.*
- Indiana*. — Horner's Stat. (1901), §§ 285, 372, 373, 1351, 5131.
- Iowa*. — Code (1897), §§ 3592, 3593.
- Kansas*. — Gen. Stat. (1897), c. 95, §§ 125, 126, 421.
- Kentucky*. — Bullitt's Civ. Code (1895), §§ 74, 123, 124, 341.
- Maine*. — Rev. Stat. (1883), c. 81, § 84.
- Maryland*. — Pub. Gen. Laws (1888), art. 88, § 1 *et seq.*
- Massachusetts*. — Rev. Laws (1902), c. 168, § 3; c. 189, § 1; c. 202, § 4.
- Michigan*. — Comp. Laws (1897), §§ 704, 10216, 10401, 10415, 10423 *et seq.*, 11258, 11762.

1. Complaint, Declaration or Petition.¹

Minnesota. — Stat. (1894), § 6507 *et seq.*

Mississippi. — Anno. Code (1892), §§ 10, 680, 685, 878, 2742.

Missouri. — Rev. Stat. (1899), §§ 97, 635, 636, 2258, 2262, 2863, 2868, 3837, 4275.

Montana. — Code Civ. Proc. (1895), §§ 751, 752; Civ. Code (1895), §§ 31, 32, 33.

Nebraska. — Comp. Stat. (1899), §§ 2453, 3557, 5603, 5722, 5723, 6034, 6217, 6428.

Nevada. — Comp. Laws (1900), §§ 3157, 3158.

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 217, § 3; c. 223, § 6; c. 229, § 5.

New Jersey. — Gen. Stat. (1895), p. 1864, § 1; p. 1975, § 10; p. 2554, § 124; p. 2579, § 277.

New Mexico. — Comp. Laws (1897), § 2685, subs. 74, 75.

New York. — Code Civ. Proc., §§ 384, 484, 535, 536, 1906, 2863, 3215, 3223, 3228, 3343.

North Carolina. — Clark's Code Civ. Proc. (1900), §§ 157, 265, 266.

North Dakota. — Rev. Codes (1895), §§ 2716, 2717, 5203, 5288, 5289, 5579.

Ohio. — Bates' Anno. Stat. (1897), §§ 4983, 5093 *et seq.*, 5144, 5349.

Oklahoma. — Stat. (1893), §§ 2146 *et seq.*, 3618 *et seq.*, 4003, 4004.

Oregon. — Hill's Anno. Laws (1892), §§ 8, 90, 91, 549.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1921, §§ 1, 2.

South Carolina. — Code Civ. Proc. (1902), §§ 114, 185, 186, 323.

South Dakota. — Stat. (1901), §§ 3428, 6052, 6135, 6416.

Tennessee. — Code (1896), §§ 4468, 4559 *et seq.*, 4618, 4928, 5155.

Utah. — Rev. Stat. (1898), §§ 2879, 2994, 2995, 4206, 4207.

Vermont. — Stat. (1894), §§ 1040, 1206, 1676.

Virginia. — Code (1887), §§ 2897, 3375.

Washington. — Ballinger's Anno. Codes & Stat. (1897), §§ 4801, 4938, 4939.

West Virginia. — Code (1899), c. 130, § 47.

Wisconsin. — Stat. (1898), §§ 2345, 2655, 2677, 2678, 2918, 3252, 3573, 4201, 4224.

Wyoming. — Rev. Stat. (1887), §§ 2061, 2372, 2480, 2481, 2531.

1. Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Inducement — Generally. — In the absence of statutes, where the words alleged to have been spoken by the defendant are not slanderous *per se*, or do not refer to the plaintiff, or require explanation to render them actionable, extrinsic facts must be alleged by way of inducement to render the charge intelligible and certain. *Smith v. Gafford*, 31 Ala. 45; *Robinson v. Drummond*, 24 Ala. 174; *McGough v. Rhodes*, 12 Ark. 625; *Harris v. Zanone*, 93 Cal. 59; *Stancell v. Pryor*, 25 Ga. 40; *McLaughlin v. Fisher*, 136 Ill. 111; *Harrison v. Manship*, 120 Ind. 43; *Rock v. McClarnon*, 95 Ind. 415; *Wilson v. McCrory*, 86 Ind. 170; *Works v. Stevens*, 76 Ind. 181; *Dean v. Miller*, 66 Ind. 440; *Emmerson v. Marvel*, 55 Ind. 265; *Lipprant v. Lipprant*, 52 Ind. 273; *Jeffersonville, etc., R. Co. v. Bowen*, 40 Ind. 545; *Ward v. Colyhan*, 30 Ind. 395; *Jones v. Diver*, 22 Ind. 184; *Miles v. Vanhorn*, 17 Ind. 245; *Rodebaugh v. Hollingsworth*, 6 Ind. 339; *Cosand v. Lee*, 11 Ind. App. 511; *Beswick v. Chappel*, 8 B. Mon. (Ky.) 486; *Patterson v. Wilkinson*, 55 Me. 42; *Brown v. Brown*, 14 Me. 317; *Blumhardt v. Rohr*, 70 Md. 328; *Peterson v. Sentman*, 37 Md. 140; *Dicken v. Shepherd*, 22 Md. 399; *Dorsey v. Whippis*, 8 Gill (Md.) 457; *Jones v. Hungerford*, 4 Gill & J. (Md.) 402; *Young v. Cook*, 144 Mass. 38; *York v. Johnson*, 116 Mass. 482; *Brettun v. Anthony*, 103 Mass. 37; *Fowle v. Robbins*, 12 Mass. 498; *Tebbetts v. Goding*, 9 Gray (Mass.) 254; *Lee v. Kane*, 6 Gray (Mass.) 495; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Bloss v. Tobey*, 2 Pick. (Mass.) 326; *Taylor v. Kneeland*, 1 Dougl. (Mich.) 67; *Powell v. Crawford*, 107 Mo. 595; *Curry v. Collins*, 37 Mo. 324; *McManus v. Jackson*, 28 Mo. 56; *Harris v. Woody*, 9 Mo. 113; *Palmer v. Hunter*, 8 Mo. 512; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Wood v. Hilbish*, 23 Mo. App. 389; *Edgerley v. Swain*, 32 N. H. 478; *Sturtevant v. Root*, 27 N. H. 69; *Harris v. Burley*, 8 N. H. 256; *Joralemon v. Pomeroy*, 22 N. J. L. 271; *Kinney v. Nash*, 3 N. Y. 177; *Phinckle v. Vaughan*, 12 Barb. (N. Y.) 215; *Gilbert v. Field*, 3

Cal. (N. Y.) 329; *Bullock v. Koon*, 9 Cow. (N. Y.) 30; *Havemeyer v. Fuller*, (N. Y. Super. Ct. Tr. T.) 60 How. Pr. (N. Y.) 316; *Milligan v. Thorn*, 6 Wend. (N. Y.) 412; *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115; *Sluder v. Wilson*, 10 Ired. L. (32 N. Car.) 92; *Browne v. Dula*, 3 Murph. (7 N. Car.) 574; *Brown v. Kincaid*, *Wright* (Ohio) 37; *Stitzell v. Reynolds*, 59 Pa. St. 488; *Lukehart v. Byerly*, 53 Pa. St. 418; *Vanderlip v. Roe*, 23 Pa. St. 82; *Maxwell v. Allison*, 11 S. & R. (Pa.) 343; *Beirer v. Bushfield*, 1 Watts (Pa.) 23; *Power v. Miller*, 2 McCord L. (S. Car.) 220; *Ashbell v. Witt*, 2 Nott & M. (S. Car.) 364; *Bell v. Farnsworth*, 11 Humph. (Tenn.) 608; *Magee v. Stark*, 1 Humph. (Tenn.) 506; *Stanley v. Brit*, *Mart. & Y.* (Tenn.) 222; *Gibbons v. Tarter*, 5 Sneed (Tenn.) 644; *Cass v. Anderson*, 33 Vt. 182; *Smith v. Hollister*, 32 Vt. 695; *Nichols v. Packard*, 16 Vt. 83; *Wood v. Scott*, 13 Vt. 42; *Ryan v. Madden*, 12 Vt. 51; *Canton Surgical, etc., Chair Co. v. McLain*, 82 Wis. 93; *Karger v. Rich*, 81 Wis. 177; *Frank v. Dunning*, 38 Wis. 270; *Langton v. Hagerty*, 35 Wis. 150.

And see *McGough v. Rhodes*, 12 Ark. 625, where the court says: "Where the words do not naturally and *per se* convey the meaning the plaintiff would wish to assign to them, or are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to show that they were actionable, it must * * * be stated that such matter existed."

See also *Works v. Stevens*, 76 Ind. 181, where the court says: "It may * * * be shown by proper averments that words, seemingly innocent, and even commendatory on their face, were intended, and were in fact understood, to convey a meaning directly opposite to their ordinary signification."

Effect of Statutes.—In a few states, there are statutes which provide that it shall be sufficient for the plaintiff to aver that the alleged slanderous words were used in a defamatory sense, specifying such defamatory sense, without any prefatory averments to show how such words were used in that sense. Fla. Rev. Stat. (1892), § 1057; Iowa Code (1897), § 3593; *Swearingen v. Stanley*, 23 Iowa 115; Miss. Anno. Code (1892), § 680; N. J. Gen. Stat. (1895), p. 2554, § 124.

In many states, it is provided by statute that it shall not be necessary to

state in the pleading of the plaintiff any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose. Ariz. Rev. Stat. (1901), § 1285; Cal. Code Civ. Proc. (1897), § 460; Mills' Anno. Code Colo. (1896), § 68; Idaho Code Civ. Proc. (1901), § 3232; Horner's Stat. Ind. (1901), § 372; *Wilson v. McCrory*, 86 Ind. 170; *Hutchinson v. Lewis*, 75 Ind. 55; *Emig v. Daum*, 1 Ind. App. 146; Iowa Code (1897), § 3593; *Swearingen v. Stanley*, 23 Iowa 115; Kan. Gen. Stat. (1897), c. 95, § 125; Bullitt's Civ. Code Ky. (1895), § 123; Mo. Rev. Stat. (1899), § 635; *Curry v. Collins*, 37 Mo. 324; *Stieber v. Wensel*, 19 Mo. 513; *Boyce v. Aubuchon*, 34 Mo. App. 315; Mont. Code Civ. Proc. (1895), § 751; Neb. Comp. Stat. (1899), § 5722; Nev. Comp. Laws (1900), § 3157; N. Mex. Comp. Laws (1897), § 2685, subs. 74; N. Y. Code Civ. Proc., § 535; *Dias v. Short*, (Supreme Ct. Gen. T.) 16 How. Pr. (N. Y.) 322; *Pike v. Van Wormer*, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 99; *Fry v. Bennett*, 5 Sandf. (N. Y.) 54; Clark's Code Civ. Proc. N. Car. (1900), § 255; *Wozelka v. Hettrick*, 93 N. Car. 10; N. Dak. Rev. Codes (1895), § 5288; Bates' Anno. Stat. Ohio (1897), § 5093; Okla. Stat. (1893), § 4003; Hill's Anno. Laws Oregon (1892), § 90; S. Car. Code Civ. Proc. (1902), § 185; S. Dak. Stat. (1901), § 6135; Utah Rev. Stat. (1898), § 2995; Ballinger's Anno. Codes & Stat. Wash. (1897), § 4938; Wis. Stat. (1898), § 2677; Wyo. Rev. Stat. (1887), § 2480.

But statutes dispensing with the necessity of stating extrinsic facts for the purpose of showing the application of the defamatory words to the plaintiff do not dispense with the necessity of alleging extrinsic facts to show the meaning of the alleged slanderous words. *Harris v. Zanone*, 93 Cal. 59; *Emmerson v. Marvel*, 55 Ind. 265; *Ward v. Colyhan*, 30 Ind. 395; *Emig v. Daum*, 1 Ind. App. 146; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Dias v. Short*, (Supreme Ct. Gen. T.) 16 How. Pr. (N. Y.) 322; *Pike v. Van Wormer*, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 99; *Fry v. Bennett*, 5 Sandf. (N. Y.) 54.

Repeating Introductory Matter.—Matters of inducement, and not of the gravamen of the action, having been stated in the first count of the complaint, need not and should not be repeated, but merely referred to in

the subsequent counts. *Abendroth v. Boardley*, 27 Wis. 555.

Colloquium — *Generally*. — That the alleged slanderous words were spoken in reference to the extrinsic matter set out by way of inducement must be alleged. This is the office of the colloquium. *McGough v. Rhodes*, 12 Ark. 625; *Stancell v. Pryor*, 25 Ga. 40; *McLaughlin v. Fisher*, 136 Ill. 111; *Harrison v. Manship*, 120 Ind. 43; *Works v. Stevens*, 76 Ind. 181; *Dean v. Miller*, 66 Ind. 440; *Ward v. Colyhan*, 30 Ind. 395; *Patterson v. Wilkinson*, 55 Me. 42; *Dicken v. Shepherd*, 22 Md. 399; *York v. Johnson*, 116 Mass. 482; *Brettun v. Anthony*, 103 Mass. 37; *Fowle v. Robbins*, 12 Mass. 498; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Taylor v. Kneeland*, 1 Dougl. (Mich.) 67; *Curry v. Collins*, 37 Mo. 324; *Sturtevant v. Root*, 27 N. H. 69; *Milligan v. Thorn*, 6 Wend. (N. Y.) 413; *Brown v. Kincaid*, *Wright* (Ohio) 37.

In *York v. Johnson*, 116 Mass. 482, the court says: "These [extrinsic] facts should be connected with the words set forth as the substantial slander by a distinct averment that it was in a conversation in reference to such facts or in connection with them that such words were uttered, in this manner affixing to them their slanderous character." And see *Brettun v. Anthony*, 103 Mass. 37, where the court says: "it is no answer that facts and circumstances enough are stated, unless it is also averred that the speech of the defendant was with reference to such facts, or so many of them as are essential elements in the crime. Nor is this want supplied by alleging that the defendant, at the time of speaking the words, had knowledge of the particular circumstances which make the act of which he speaks criminal."

Of and Concerning the Plaintiff. — It must be alleged that the alleged slanderous words were spoken of and concerning the plaintiff. *Stancell v. Pryor*, 25 Ga. 40; *Young v. Cook*, 144 Mass. 38; *Cheney v. Goodrich*, 98 Mass. 224; *Baldwin v. Hildreth*, 14 Gray (Mass.) 221; *Osborn v. Forshee*, 22 Mich. 209; *Warner v. Lockerby*, 28 Minn. 28; *Curry v. Collins*, 37 Mo. 324; *Church v. Bridgman*, 6 Mo. 190; *Sturtevant v. Root*, 27 N. H. 69; *Sayre v. Jewett*, 12 Wend. (N. Y.) 135; *Brown v. Lamberton*, 2 Binn. (Pa.) 34; *Hurd v. Moore*, 2 Oregon 85; *Sabin v. Angell*, 46 Vt. 740; *Cave v. Shelor*, 2 Munf. (Va.) 193.

Or it must be alleged that the slanderous words were spoken in some conversation or colloquium respecting the plaintiff. *Cave v. Shelor*, 2 Munf. (Va.) 193. Unless the words, by fair construction, in themselves plainly and necessarily relate to the plaintiff. *Cave v. Shelor*, 2 Munf. (Va.) 193.

A declaration that the defendant "accused" the plaintiff of the crime of, etc., is insufficient to show that the words were spoken of the plaintiff. *Baldwin v. Hildreth*, 14 Gray (Mass.) 221. But a declaration that Osborn, "in the hearing of divers persons, falsely and maliciously uttered of and to the plaintiff," etc., has been held sufficient. *Osborn v. Forshee*, 22 Mich. 209.

A count alleging that the defendant, "in a certain discourse which he then and there had of and concerning the plaintiffs," did falsely speak and publish, "of and concerning the said *Elisabeth*," certain defamatory words, is a sufficient statement of a colloquium. *Sturtevant v. Root*, 27 N. H. 69.

Statutes doing away with the necessity of alleging extrinsic facts for the purpose of showing the application to the plaintiff of the alleged defamatory matter provide that it shall be sufficient to allege generally that the alleged slanderous words were spoken of and concerning the plaintiff. *Ariz. Rev. Stat. (1901)*, § 1285; *Cal. Code Civ. Proc. (1897)*, § 460; *Mills' Anno. Code Colo. (1896)*, § 68; *Idaho Code Civ. Proc. (1901)*, § 3232; *Horner's Stat. Ind. (1901)*, § 372; *Iowa Code (1897)*, § 3593; *Kan. Gen. Stat. (1897)*, c. 95, § 125; *Bullitt's Civ. Code Ky. (1895)*, § 123; *Mo. Rev. Stat. (1899)*, § 635; *Mont. Code Civ. Proc. (1895)*, § 751; *Neb. Comp. Stat. (1899)*, § 5722; *Nev. Comp. Laws (1900)*, § 3157; *N. Mex. Comp. Laws (1897)*, § 2685, subs. 74; *N. Y. Code Civ. Proc.*, § 535; *Clark's Code Civ. Proc. N. Car. (1900)*, § 265; *N. Dak. Rev. Codes (1895)*, § 5288; *Bates' Anno. Stat. Ohio (1897)*, § 5093; *Okla. Stat. (1893)*, § 4003; *Hill's Anno. Laws Oregon (1892)*, § 90; *S. Car. Code Civ. Proc. (1902)*, § 185; *S. Dak. Stat. (1901)*, § 6135; *Utah Rev. Stat. (1898)*, § 2995; *Ballinger's Anno. Codes & Stat. Wash. (1897)*, § 4838; *Wis. Stat. (1898)*, § 2677; *Wyo. Rev. Stat. (1887)*, § 2480.

Extent. — The colloquium must extend to the whole of the prefatory inducement necessary to render the words spoken actionable. *Brettun v. Anthony*, 103 Mass. 37.

Time — Generally. — The time when the alleged slanderous words were uttered must be alleged. *Cummins v. Butler*, 3 Blackf. (Ind.) 190; *Jean v. Hennessy*, 69 Iowa 373; *Haag v. Cooley*, 33 Kan. 387; *Doullutt v. McManus*, 37 La. Ann. 800; *Cole v. Babcock*, 78 Me. 41; *Burbank v. Horn*, 39 Me. 233; *Lanpher v. Clark*, 77 Hun (N. Y.) 506; *Gardinier v. Knox*, 27 Hun (N. Y.) 500; *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407. But the time need not be proved as alleged. *Norris v. Elliott*, 39 Cal. 72; *Hosley v. Brooks*, 20 Ill. 115; *Cassem v. Galvin*, 53 Ill. App. 419; *Smith v. Smith*, 76 Ind. 356; *Shigley v. Snyder*, 45 Ind. 543; *Cole v. Babcock*, 78 Me. 41; *Potter v. Thompson*, 22 Barb. (N. Y.) 87.

Definitely Stated. — It has been held that the time when the alleged slanderous words were uttered must be definitely alleged, and that where the words are alleged to have been uttered "about the first day of April, 1884," the declaration is insufficient. *Cole v. Babcock*, 78 Me. 41. But in *Lanpher v. Clark*, 77 Hun (N. Y.) 506, the complaint alleged that the slanderous words were uttered "in and about the month of July, 1892, the exact dates the plaintiff cannot now more particularly state," and the evidence was allowed stating conversations that occurred in May and June of that year. See, however, the case of *Gardinier v. Knox*, 27 Hun (N. Y.) 500, where the alleged slanderous words were alleged to have been uttered on or about a certain date, and a bill of particulars was ordered for the purpose, among other things, of making the time definite.

Continuando. — It has been held that the time when the alleged slanderous words were uttered may be alleged with a *continuando*. *Burbank v. Horn*, 39 Me. 233. But see *contra* *Swinney v. Nave*, 22 Ind. 178; *Cummins v. Butler*, 3 Blackf. (Ind.) 190.

In *Gray v. Nellis*, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 290, the court says that "it was not customary before the code to allege the speaking of slanderous words with a *continuando*." But it was not necessary to decide, and the court did not indicate, what the rule now is.

Reference to Previous Count. — A second count may refer to a previous count for the allegation of time. *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407.

Place — Generally. — The place of ut-

tering the alleged slanderous words must be stated. *Cassem v. Galvin*, 158 Ill. 30, 53 Ill. App. 419; *Owen v. McKean*, 14 Ill. 459; *Jean v. Hennessy*, 69 Iowa 373; *Haag v. Cooley*, 33 Kan. 387; *Doullutt v. McManus*, 37 La. Ann. 800; *Gardinier v. Knox*, 27 Hun (N. Y.) 500; *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457; *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407. But the allegation of place is not material, and the proof may differ from the allegation, notwithstanding the place is not alleged under a *videlicet*. *Cassem v. Galvin*, 158 Ill. 30, 53 Ill. App. 419; *Owen v. McKean*, 14 Ill. 459.

In *Burbank v. Horn*, 39 Me. 233, it was held that the place, when alleged with a *videlicet*, is sufficient, and even its omission is only a fault in form.

Insufficient Showing. — In *New York*, it is held that where the place is not sufficiently alleged a bill of particulars may be ordered. *Gardinier v. Knox*, 27 Hun (N. Y.) 500; *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457.

Within the State. — It is not generally necessary to the sufficiency of a complaint for slander that it should aver a speaking of the words within the state in which the suit is brought, the action of slander being transitory. *Emmerson v. Marvel*, 55 Ind. 265.

Reference to Previous Count. — The second count in slander may refer to a previous count for the allegation of place. *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407.

Spoken by Defendant — Generally. — That the slanderous words were spoken, uttered or published by the defendant must be alleged. *Watts v. Morgan*, 50 Ind. 318; *Roberts v. Lovell*, 38 Wis. 211; *Badcock v. Atkins*, Cro. Eliz. 416; *Pursell v. Archer*, Peck (Tenn.) 317. And the want of such an allegation cannot be supplied by either the colloquium or the innuendo. *Watts v. Morgan*, 50 Ind. 318.

Direct and Positive. — The allegation must be direct and positive, and not a mere recital. *Donaghe v. Rankin*, 4 Munf. (Va.) 261; *Roberts v. Lovell*, 38 Wis. 211; *Brown v. Thurlow*, 16 M. & W. 36.

In *Roberts v. Lovell*, 38 Wis. 211, the court says: "This complaint alleges that the plaintiffs were husband and wife on a certain day, 'when the slanderous words hereinafter mentioned were spoken by the defendant,' and then proceeds to charge that cer-

tain slanderous words were spoken on that day of and concerning the plaintiff wife; but it fails to state, directly and positively, by whom they were spoken. The words above quoted are a mere recital, not an averment of fact. They show that the pleader had it in his mind, when he inserted them in the complaint, to aver in a subsequent portion of the pleading that on the day mentioned the defendant spoke certain slanderous words of and concerning the plaintiff Mrs. Roberts. Having failed to aver, there is nothing in the pleading to which the recital can be referred. It is therefore inoperative, and necessarily goes for naught."

Publication—Generally.—That there was a publication of the slander must, in the absence of statutes to the contrary, be alleged. *Ware v. Cartledge*, 24 Ala. 622; *Goodrich v. Warner*, 21 Conn. 432; *Bradshaw v. Perdue*, 12 Ga. 510; *Marks v. Jacobs*, 76 Ind. 216; *Emmerson v. Marvel*, 55 Ind. 265; *Hutts v. Hutts*, 51 Ind. 581; *Richardson v. Hopkins*, 7 Blackf. (Ind.) 116; *Jean v. Hennessy*, 60 Iowa 373; *Haag v. Cooley*, 33 Kan. 387; *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Burbank v. Horn*, 39 Me. 233; *Perry v. Porter*, 124 Mass. 338; *Downs v. Hawley*, 112 Mass. 237; *Chapin v. White*, 102 Mass. 139; *Warner v. Lockerby*, 28 Minn. 28; *Atwinger v. Fellner*, 46 Mo. 276; *Gardiner v. Knox*, 27 Hun (N. Y.) 500; *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457; *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115; *Hurd v. Moore*, 2 Oregon 85; *Wright v. Percells*, 5 Pa. Dist. 158; *Brown v. Brashier*, 2 P. & W. (Pa.) 114; *Thacher v. Schaeffer*, 19 W. N. C. (Pa.) 566; *Curtis v. Moore*, 15 Wis. 134.

Effect of Statutes.—Where statutes provide that in an action of slander it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff, it is sufficient for the plaintiff to allege generally that the alleged slanderous words were spoken of him, without any averment as to their publication. *Hutts v. Hutts*, 51 Ind. 581; *Guard v. Risk*, 11 Ind. 156; *Atwinger v. Fellner*, 46 Mo. 276; *Stieber v. Wensel*, 19 Mo. 513.

In *Emmerson v. Marvel*, 55 Ind. 265, the court says, "that where the words charged in the complaint are actionable *per se*, it is not necessary to its sufficiency that it should contain an allegation that the words were spoken in the presence of some third person,

though such fact would have to be proved on the trial; yet where the words are not actionable *per se*, and a colloquium, etc., is required to appear in the complaint, such colloquium will necessarily disclose the fact of the publication of the words to third persons."

See also *Marks v. Jacobs*, 76 Ind. 216, which cites and follows *Emmerson v. Marvel*, 55 Ind. 265.

In Presence of Others.—It has been held that, in the absence of statutes doing away with the necessity of an allegation of publication, the plaintiff must allege that the alleged slanderous words were spoken in the presence and hearing of divers persons. *Atwinger v. Fellner*, 46 Mo. 276. Or in the presence and hearing of others. *Warner v. Lockerby*, 28 Minn. 28. But the weight of authority is to the effect that it is sufficient for the plaintiff to allege that the words were spoken in the "presence" of divers persons. *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Burbank v. Horn*, 39 Me. 233; *Brown v. Brashier*, 2 P. & W. (Pa.) 114. Or in the presence of divers good and worthy citizens of the commonwealth. *Wright v. Percells*, 5 Pa. Dist. 158; *Thacher v. Schaeffer*, 19 W. N. C. (Pa.) 566. Or in the presence of a person or persons named. *Burbank v. Horn*, 39 Me. 233. Without stating that the words were spoken in the "hearing" also of such persons. *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Burbank v. Horn*, 39 Me. 233. See also *Curtis v. Moore*, 15 Wis. 134, where it was held unnecessary to determine whether a count in slander alleging that the words complained of were spoken in the presence of certain persons, without saying that it was in their hearing, was good.

"Published."—The publication has been held to be sufficiently shown by the word "published." *Ware v. Cartledge*, 24 Ala. 622; *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115; *Hurd v. Moore*, 2 Oregon 85.

"Publicly."—The word publicly has been held sufficient to show publication. *Downs v. Hawley*, 112 Mass. 237.

"Conversations or Discourses."—It has been held that the word "conversations" or "discourses" is sufficient. *Hurd v. Moore*, 2 Oregon 85.

It is not sufficient, in the absence of statutes to the contrary, to aver merely that the alleged slanderous matter was spoken, omitting the words "and pub-

lished." *Hanning v. Bassett*, 12 Bush (Ky.) 361.

Names of Persons.—In *Georgia*, it was held in the case of *Bradshaw v. Perdue*, 12 Ga. 510, that a declaration alleging that the defendant spoke and published alleged slanderous words in the presence and hearing of S. and M., and divers other good citizens of the state, was sufficiently certain without specifying by name those other good citizens of the state. But in *Kansas*, in the case of *Haag v. Cooley*, 33 Kan. 387, the petition did not give the names of the persons to whom the alleged slanderous words were spoken, and a motion to make the petition more specific by naming such persons was allowed. And in *New York* the court may direct a bill of particulars where the names of the persons in whose presence the alleged slanderous words were spoken are not given. *Gardinier v. Knox*, 27 Hun (N. Y.) 500; *Stiebeling v. Lockhaus*, 21 Hun (N. Y.) 457.

Falsity of Words.—That the alleged slanderous words were false must be stated. *Warner v. Lockerby*, 28 Minn. 28; *Pursell v. Archer*, Peck (Tenn.) 317; *Born v. Rosenow*, 84 Wis. 620.

Malice—Generally.—Malice is an essential ingredient in an action of slander, and it is usual to allege it expressly. *Burton v. Beasley*, 88 Ind. 401. And it has been held that it must be alleged either expressly or substantially. *Dillard v. Collins*, 25 Gratt. (Va.) 343.

Where the words are spoken in the discharge of some public or private duty or in the exercise of some right, express malice must be shown. *Weaver v. Hendrick*, 30 Mo. 502.

Malice Implied.—It is generally held that malice need not be expressly averred where facts are alleged from which it may be implied. *Harris v. Zanone*, 93 Cal. 59; *Burton v. Beasley*, 88 Ind. 401; *Hanning v. Bassett*, 12 Bush (Ky.) 361; *Weaver v. Hendrick*, 30 Mo. 502; *Hudson v. Garner*, 22 Mo. 423.

Sufficient Averments.—Malice is sufficiently shown where it is alleged that the slanderous words were spoken falsely. *Harris v. Zanone*, 93 Cal. 59; *Burton v. Beasley*, 88 Ind. 401; *Hudson v. Garner*, 22 Mo. 423. Or wrongfully. *Warner v. Lockerby*, 28 Minn. 28. Or wrongfully or falsely. *Hanning v. Bassett*, 12 Bush (Ky.) 361.

Setting Out Words—Generally.—By

the greater weight of authority, the alleged slanderous words must, in the absence of statute, be set out in the pleading of the plaintiff. *Taylor v. Moran*, 4 Met. (Ky.) 127; *Watson v. Musick*, 2 Mo. 29; *Bassett v. Spofford*, 11 N. H. 127; *Parsons v. Bellows*, 6 N. H. 289; *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.*, 81 Hun (N. Y.) 49; *Fox v. Vanderbeck*, 5 Cow. (N. Y.) 513; *Haselton v. Weare*, 8 Vt. 480; *Schubert v. Richter*, 92 Wis. 199; *Cook v. Cox*, 3 M. & S. 110; *Gutsole v. Mathers*, 1 M. & W. 495. And it is not sufficient to set forth the tenor, import or effect of them. *Rock v. McClarnon*, 95 Ind. 415; *Taylor v. Moran*, 4 Met. (Ky.) 127; *Forsyth v. Edmiston*, 5 Duer (N. Y.) 653; *Ward v. Clark*, 2 Johns. (N. Y.) 10; *Schubert v. Richter*, 92 Wis. 199. Or to allege generally that the defendant charged the plaintiff with the commission of a crime, naming it. *Taylor v. Moran*, 4 Met. (Ky.) 127; *Bassett v. Spofford*, 11 N. H. 127; *Parsons v. Bellows*, 6 N. H. 289; *Kenyon v. Cameron*, 17 R. I. 122. But see *contra* the case of *Nye v. Otis*, 8 Mass. 122, which holds that an allegation that defendant charged the plaintiff with a certain crime, without setting forth the language of the slander, is sufficient.

The case of *Nye v. Otis*, 8 Mass. 122, was followed in *Massachusetts* until the legislature made a change in the manner of declaring in slander. *Payson v. Macomber*, 3 Allen (Mass.) 69; *Clay v. Brigham*, 8 Gray (Mass.) 161; *Lee v. Kane*, 6 Gray (Mass.) 495. And it is still followed in *Maine*, where, however, if the defendant desires, he may call for a specification of the language. *Kimball v. Page*, 96 Me. 487. But it has been criticized and not followed in *Parsons v. Bellows*, 6 N. H. 289, and *Kenyon v. Cameron*, 17 R. I. 122.

In *Parsons v. Bellows*, 6 N. H. 289, the court said: "It is true there are found in the books forms of general counts in slander, where the words are not set out. But if we except the case of *Nye v. Otis*, 8 Mass. 122, no adjudged case is found in the books sustaining such a count. And in that case we find nothing stated which tends in any degree to show the propriety of sustaining such a count; nor is there any attempt to reconcile that decision with the numerous cases found in the books, which seem to establish a different rule."

In Substance.—In *Pennsylvania*, it is sufficient to set out the substance of the alleged slanderous words. *Lukehart v. Byerly*, 53 Pa. St. 418; *Hersh v. Ringwalt*, 3 Yeates (Pa.) 508; *Kennedy v. Lowry*, 1 Binn. (Pa.) 393; *Cooper v. Bruce*, 2 Watts (Pa.) 109.

And see *Tipton v. Kahle*, 3 Watts (Pa.) 90, where the court said: "The meaning of the decision in *Kennedy v. Lowry*, 1 Binn. (Pa.) 393, that the substance of the words may be stated in the declaration, is that the plaintiff need not set out every identical word spoken by the defendant, but may give the purport of what was said by him. For example, words may be laid to have been spoken in the second person, and proved in the third: redundant epithets may be omitted; synonymous terms may, in some cases, be substituted conveying the same ideas: but it is not permitted to drop altogether both the language and ideas uttered, and sum up all in one round charge, and then leave it to the jury to say whether the words proved amounted to that charge."

In *Butler v. Gutheny*, 1 Blackf. (Ind.) 496, a declaration was sustained which set forth the words in substance, although the court said, "it is a loose unusual practice to set forth the words spoken in substance."

In *Massachusetts* and *Tennessee*, by statute, it is sufficient to state that the defendant falsely and maliciously charged the plaintiff with perjury, slander, or other crime, as the case may be, in substance as follows, setting it out. *Robbins v. Fletcher*, 101 Mass. 115; *Payson v. Macomber*, 3 Allen (Mass.) 69; *Clay v. Brigham*, 8 Gray (Mass.) 161; *Lee v. Kane*, 6 Gray (Mass.) 495; *Allen v. Perkins*, 17 Pick. (Mass.) 369; *Pond v. Hartwell*, 17 Pick. (Mass.) 269; *Whiting v. Smith*, 13 Pick. (Mass.) 364; *Tenn. Code* (1896), § 4618.

In *Wyoming*, by statute, it shall not be necessary to set out any obscene word, but it shall be sufficient to state its substance. *Wyo. Rev. Stat.* (1887), § 2480.

Alleging Whole Conversation.—The plaintiff may set out the whole conversation in his pleading, or he may set out only so much thereof as involves the slanderous charge. *Cracraft v. Cochran*, 16 Iowa 301; *Deyo v. Brundage*, (Supreme Ct. Spec. T.) 13 How. Pr. (N. Y.) 221. And it is sufficient to set out the words that are material,

without stating words which may qualify the objectionable ones. *Spencer v. McMasters*, 16 Ill. 405.

Repeated Words.—Where the defendant is charged with having adopted certain slanderous words used by another, those words must be set forth, and it is not enough to say that the speaker did charge and impute to the plaintiff the crime of perjury. *Blessing v. Davis*, 24 Wend. (N. Y.) 100.

Showing Mood.—Slanderous words spoken affirmatively in answer to a question shall be laid to have been spoken affirmatively; and if spoken in the form of a question, they must be laid to have been spoken interrogatively. *Yeates v. Reed*, 4 Blackf. (Ind.) 463.

Foreign Language.—Where the alleged slanderous words were uttered in a foreign language, the plaintiff's pleading must set forth the words in the foreign language, together with a translation into English. *Kerschbaugher v. Slusser*, 12 Ind. 453; *Hickley v. Grosjean*, 6 Blackf. (Ind.) 351; *Elfrank v. Seiler*, 54 Mo. 134; *Stieber v. Wensel*, 19 Mo. 513; *Demarest v. Haring*, 6 Cow. (N. Y.) 76; *Keenholts v. Becker*, 3 Den. (N. Y.) 346; *Lettman v. Ritz*, 3 Sandf. (N. Y.) 734; *Wormmouth v. Cramer*, 3 Wend. (N. Y.) 395; *Sticht v. State*, 25 Tex. App. 420; *Schild v. Legler*, 82 Wis. 73; *Pelzer v. Benish*, 67 Wis. 291; *Singer v. Bender*, 64 Wis. 169. And in *Pelzer v. Benish*, 67 Wis. 291, it is held that there must be an allegation of the correctness of such translation.

It must be further alleged that the persons in whose presence the words were spoken understood them. *State v. Matheis*, 44 Mo. App. 294; *Demarest v. Haring*, 6 Cow. (N. Y.) 76; *Lettman v. Ritz*, 3 Sandf. (N. Y.) 734; *Wormmouth v. Cramer*, 3 Wend. (N. Y.) 395; *Schild v. Legler*, 82 Wis. 73; *Singer v. Bender*, 64 Wis. 169; *K— v. H—*, 20 Wis. 239.

Innuendo—*Generally.*—The office of the innuendo is to explain the alleged slanderous words and to annex to them their proper meaning. *Coburn v. Harwood*, Minor (Ala.) 93; *Camp v. Martin*, 23 Conn. 86; *Patterson v. Edwards*, 7 Ill. 720; *Finnell v. Walker*, 48 Ill. App. 331; *Watson v. Hampton*, 2 Bibb (Ky.) 319; *Patterson v. Wilkinson*, 55 Me. 42; *Nolan v. Traber*, 49 Md. 460; *Peterson v. Sentman*, 37 Md. 140; *York v. Johnson*, 116 Mass. 482; *Goodrich v. Davis*,

11 Met. (Mass.) 473; Carter v. Andrews, 16 Pick. (Mass.) 1; Bloss v. Tobey, 2 Pick. (Mass.) 320; Christal v. Craig, 80 Mo. 367; Bundy v. Hart, 46 Mo. 460; Birch v. Benton, 26 Mo. 153; Boyce v. Aubuchon, 34 Mo. App. 315; Wood v. Hilbish, 23 Mo. App. 389; Sturtevant v. Root, 27 N. H. 69; Harris v. Burley, 8 N. H. 256; Mason v. Mason, 4 N. H. 110; Joralemon v. Pomeroy, 22 N. J. L. 271; Andrews v. Woodmansee, 15 Wend. (N. Y.) 232; Milligan v. Thorn, 6 Wend. (N. Y.) 413; Herst v. Borbridge, 57 Pa. St. 62; Gosling v. Morgan, 32 Pa. St. 273; Shaffer v. Kintzer, 1 Binn. (Pa.) 537; Sheridan v. Sheridan, 58 Vt. 504; Sabin v. Angell, 46 Vt. 740; Nichols v. Packard, 16 Vt. 83; Fitzsimmons v. Cutler, 1 Aik. (Vt.) 33; Taft v. Howard, 1 D. Chip. (Vt.) 275; Hansbrough v. Stinnett, 25 Gratt. (Va.) 495; Hogan v. Wilmoth, 16 Gratt. (Va.) 80; Moseley v. Moss, 6 Gratt. (Va.) 534; Weil v. Altenhofen, 26 Wis. 708; Cramer v. Noonan, 4 Wis. 231; Beardsley v. Tappan, 1 Blatchf. (U. S.) 588.

In *McLaughlin v. Fisher*, 136 Ill. 111, it is held that "an innuendo is properly used to point out the meaning of the words alleged to have been spoken, in view of the occasion and circumstances, whether appearing in the words themselves or extraneous prefatory matters alleged in the declaration. It is explanatory of the subject-matter already sufficiently stated." See also to the same effect *Sheridan v. Sheridan*, 58 Vt. 504.

"An innuendo means nothing more than the words 'id est,' 'scilicet,' or 'meaning,' or 'aforesaid,' as explanatory of a subject-matter sufficiently expressed before." *Bloss v. Tobey*, 2 Pick. (Mass.) 320.

Enlarging Sense of Words Spoken.—The innuendo cannot enlarge or extend the sense of the words beyond their usual and natural import. *Camp v. Martin*, 23 Conn. 86; *McLaughlin v. Fisher*, 136 Ill. 111; *Patterson v. Edwards*, 7 Ill. 720; *Finnell v. Walker*, 48 Ill. App. 331; *Harrison v. Manship*, 120 Ind. 43; *Seller v. Jenkins*, 97 Ind. 430; *Rock v. McClarnon*, 95 Ind. 415; *McFadin v. David*, 78 Ind. 445; *Ward v. Colyhan*, 30 Ind. 395; *Miles v. Vanhorn*, 17 Ind. 245; *Cosand v. Lee*, 11 Ind. App. 511; *Hays v. Mitchell*, 7 Blackf. (Ind.) 117; *Roella v. Follow*, 7 Blackf. (Ind.) 377; *Porter v. Hughey*, 2 Bibb (Ky.) 232; *Watson v. Hampton*, 2 Bibb (Ky.) 319; *Beswick v. Chappel*,

8 B. Mon. (Ky.) 486; *Brown v. Piner*, 6 Bush (Ky.) 518; *Caldwell v. Abbey*, Hard (Ky.) 539; *Patterson v. Wilkinson*, 55 Me. 42; *Haines v. Campbell*, 74 Md. 158; *Peterson v. Sentman*, 37 Md. 140; *Dorsey v. Whipps*, 8 Gill (Md.) 457; *Brettun v. Anthony*, 103 Mass. 37; *Goodrich v. Davis*, 11 Met. (Mass.) 473; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Sturtevant v. Root*, 27 N. H. 69; *McCuen v. Ludlum*, 17 N. J. L. 12; *Joralemon v. Pomeroy*, 22 N. J. L. 271; *Vaughan v. Havens*, 8 Johns. (N. Y.) 109; *Blaisdell v. Raymond*, (Supreme Ct. Spec. T.) 14 How. Pr. (N. Y.) 265; *Brown v. Moore*, 90 Hun (N. Y.) 169; *Andrews v. Woodmansee*, 15 Wend. (N. Y.) 232; *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115; *Herst v. Borbridge*, 57 Pa. St. 62; *Gosling v. Morgan*, 32 Pa. St. 273; *Shaffer v. Kintzer*, 1 Binn. (Pa.) 537; *Beirer v. Bushfield*, 1 Watts (Pa.) 23; *Nichols v. Packard*, 16 Vt. 83; *Fitzsimmons v. Cutler*, 1 Aik. (Vt.) 33; *Hansbrough v. Stinnett*, 25 Gratt. (Va.) 495; *Hogan v. Wilmoth*, 16 Gratt. (Va.) 80; *Moseley v. Moss*, 6 Gratt. (Va.) 534; *Frank v. Dunning*, 38 Wis. 270; *Weil v. Altenhofen*, 26 Wis. 708; *Cramer v. Noonan*, 4 Wis. 231; *Beardsley v. Tappan*, 1 Blatchf. (U. S.) 588. Unless something is put upon the record by way of introductory matter with which it can be connected. *McLaughlin v. Fisher*, 136 Ill. 111; *Patterson v. Edwards*, 7 Ill. 720; *Harrison v. Manship*, 120 Ind. 43; *Ward v. Colyhan*, 30 Ind. 395; *Roella v. Follow*, 7 Blackf. (Ind.) 377; *Patterson v. Wilkinson*, 55 Me. 42; *Haines v. Campbell*, 74 Md. 158; *Peterson v. Sentman*, 37 Md. 140; *Dorsey v. Whipps*, 8 Gill (Md.) 457; *Brettun v. Anthony*, 103 Mass. 37; *Goodrich v. Davis*, 11 Met. (Mass.) 473; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Sturtevant v. Root*, 27 N. H. 69; *McCuen v. Ludlum*, 17 N. J. L. 12; *Joralemon v. Pomeroy*, 22 N. J. L. 271; *Blaisdell v. Raymond*, (Supreme Ct. Spec. T.) 14 How. Pr. (N. Y.) 265; *Brown v. Moore*, 90 Hun (N. Y.) 169; *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115; *Herst v. Borbridge*, 57 Pa. St. 62; *Gosling v. Morgan*, 32 Pa. St. 273; *Beirer v. Bushfield*, 1 Watts (Pa.) 23; *Fitzsimmons v. Cutler*, 1 Aik. (Vt.) 33; *Hogan v. Wilmoth*, 16 Gratt. (Va.) 80; *Pandow v. Eichstedt*, 90 Wis. 298; *Frank v. Dunning*, 38 Wis. 270; *Beardsley v. Tappan*, 1 Blatchf. (U. S.) 588.

Then, words which are equivocal or ambiguous or fall short in their natural sense of imputing any slanderous charge may have fixed to them a meaning certain and defamatory extending beyond their ordinary import. *Cosand v. Lee*, 11 Ind. App. 511; *Henicke v. Griffith*, 29 Kan. 516; *Haines v. Campbell*, 74 Md. 158; *Dorsey v. Whipps*, 8 Gill (Md.) 457; *Hemmens v. Nelson*, 138 N. Y. 517; *Herst v. Borbridge*, 57 Pa. St. 62; *Gosling v. Morgan*, 32 Pa. St. 273; *Dottarer v. Bushey*, 16 Pa. St. 204; *Beardsley v. Tappan*, 1 Blatchf. (U. S.) 588.

In *Coburn v. Harwood*, Minor (Ala.) 93, it is held that the innuendo may give a technical meaning to a slanderous charge, from the obvious import of the words spoken, taken in connection with the introductory matter.

Must Not State Facts.—If extrinsic facts are needed to make the alleged slanderous words actionable, it is not sufficient to supply them by way of innuendo. *Rock v. McClarnon*, 95 Ind. 415; *Miles v. Vanhorn*, 17 Ind. 245; *Powell v. Crawford*, 107 Mo. 595; *Church v. Bridgman*, 6 Mo. 190; *Wood v. Hilbish*, 23 Mo. App. 389. For it is not the office of the innuendo to aver facts. *Miles v. Vanhorn*, 17 Ind. 245; *Hays v. Mitchell*, 7 Blackf. (Ind.) 117; *York v. Johnson*, 116 Mass. 482; *Christal v. Craig*, 80 Mo. 367; *Bundy v. Hart*, 46 Mo. 460; *Boyce v. Aubuchon*, 34 Mo. App. 315; *Moseley v. Moss*, 6 Gratt. (Va.) 534.

Innuendo Unnecessary.—When the alleged slanderous words are actionable *per se*, no innuendo is necessary. *Lewis v. Hudson*, 44 Ga. 568; *Pollock v. Hastings*, 88 Ind. 248; *Cosand v. Lee*, 11 Ind. App. 511; *Blumhardt v. Rohr*, 70 Md. 328; *Nolan v. Traber*, 49 Md. 460; *Gay v. Homer*, 13 Pick. (Mass.) 535; *Carter v. Andrews*, 16 Pick. (Mass.) 1; *Carroll v. White*, 33 Barb. (N. Y.) 615; *Walrath v. Nellis*, (Supreme Ct. Gen. T.) 17 How. Pr. (N. Y.) 72.

In *Harris v. Burley*, 8 N. H. 256, the court says: "It is undoubtedly best in all cases of doubt to insert an innuendo, in order clearly to affix the slanderous meaning of the words uttered; but where the interpretation of the language used is apparent of itself an innuendo is useless."

In *Massachusetts*, it is held that innuendoes are no longer necessary in any case, it being sufficient simply to

aver that the alleged slanderous words were spoken of and concerning the plaintiff. *Young v. Cook*, 144 Mass. 38; *Chenery v. Goodrich*, 98 Mass. 224.

Innuendoes Held Sufficient.—The following are examples of innuendoes held good as not too broad: "If *Ayres* hadn't gone away we should issue warrants for him;" thereby meaning that he had absconded, and had been guilty of some offense for which he was liable to arrest. *Ayres v. Toulmin*, 74 Mich. 44. "She keeps a common open house; she is nothing but a whore, anyway," meaning that plaintiff keeps a house of ill fame. *Posnett v. Marble*, 62 Vt. 481.

Innuendo Too Broad.—The following are examples of innuendoes which were held bad as too broad: "He has burnt my barn;" meaning a barn full of corn. *Barnham's Case*, 4 Coke 20. "There is no doubt in my mind that he burnt his store in *Alford*; he would not have got his goods insured if he had not meant to burn it;" meaning goods which the plaintiff had caused to be insured and which were lodged in the said store. *Bloss v. Tobey*, 2 Pick. (Mass.) 320. "She (meaning the plaintiff) is a bad girl;" then and thereby meaning and intending that the plaintiff was a prostitute, and had committed the atrocious crime of fornication. *Snell v. Snow*, 13 Met. (Mass.) 278. "Mrs. *Edwards* (meaning the plaintiff's wife) has raised a family of children by a negro, and I (meaning said defendant) can prove it;" meaning that said Mrs. *Edwards* had been guilty of the crime of fornication. *Patterson v. Edwards*, 7 Ill. 720. "You hooked my geese;" meaning that the plaintiff had stolen the defendant's geese. *Hays v. Mitchell*, 7 Blackf. (Ind.) 117. "That he, the said *Thomas*, had sworn to a lie;" meaning that the plaintiff had sworn falsely when testifying as a witness in a suit pending in court. *Watson v. Hampton*, 2 Bibb (Ky.) 319. "He sheared two of *Zack Austin's* sheep;" meaning to charge that the plaintiff had stolen the wool from two of *Zack Austin's* sheep. "*Jesse Piner* sheared *Zack Austin's* sheep, and kept the wool;" thereby meaning to charge plaintiff with the crime of larceny; all of which was slanderous. *Brown v. Piner*, 6 Bush (Ky.) 518. "You (meaning the plaintiff) are a bad woman, and keep a bad house, and I can prove it;" mean-

ing thereby to charge that the plaintiff was not a chaste woman, was a whore, and kept a common bawdy-house. *Peterson v. Sentman*, 37 Md. 140. "I never put my name to that note, nor gave him (meaning the plaintiff) liberty to do it in God's world;" meaning thereby that the plaintiff had been guilty of forgery, and feloniously signed the defendant's name to the note without his consent. *Andrews v. Woodmansee*, 15 Wend. (N. Y.) 232. "All *Watt's* girls are big," meaning big with child by his negro Ben. *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 115. "She (the said *Lucy M. Morgan* meaning) is a damned rascal;" meaning and intending thereby that the said *Lucy M. Morgan* was a thief. *Gosling v. Morgan*, 32 Pa. St. 273. "She (meaning the said *Barbara*, wife of the said *Peter Spangler*) swore a false oath;" meaning that the said *Barbara* had been guilty of the crime of wilful and corrupt perjury. *Packer v. Spangler*, 2 Binn. (Pa.) 60. "Why is the character of Mrs. *Posnett* not in good standing?" "I do not think she is." "Is she in the habit of having men come there to her house and lounge around and stay for hours at a time?" "I am sure she does that. She has men enough there most any time;" meaning that the plaintiff kept a house of ill fame. *Posnett v. Marble*, 62 Vt. 481. "*Dick Stinnett* killed my beef;" meaning thereby that the plaintiff had killed and carried off feloniously a beef, which some person or persons had shortly before that killed and stolen from the field of the defendant. "He (meaning the plaintiff) killed the beef;" meaning that the plaintiff had clandestinely and feloniously killed and carried off a beef belonging to the said Ann. *Hansbrough v. Stinnett*, 25 Gratt. (Va.) 495.

Understanding of Hearers — As to Meaning of Words. — Where words not actionable *per se* are sought to be made actionable by averring such extrinsic facts as will show that the words were intended to be slanderous, it must be alleged that the words were understood by the hearers to convey a slanderous sense. *Harris v. Zanone*, 93 Cal. 59; *Works v. Stevens*, 76 Ind. 181; *Cosand v. Lee*, 11 Ind. App. 511; *Unterberger v. Scharff*, 51 Mo. App. 102. And see *Walrath v. Nellis*, (Supreme Ct. Gen. T.) 17 How. Pr. (N. Y.) 72.

where it was held that, in pleading ambiguous, ironical or insinuated words, it is necessary to aver that the defendant, by means of such words, meant them to be understood by the hearers, and was understood by them, as charging the plaintiff with the crime imputed.

As to Application of Words to Plaintiff. — In the absence of statutes doing away with the necessity of alleging extrinsic facts for the purpose of showing the application of the slanderous words to the plaintiff, it must be alleged that such words were understood by the hearers to refer to the plaintiff. *Harris v. Zanone*, 93 Cal. 59; *De Witt v. Wright*, 57 Cal. 576. But where such statutes exist, an allegation that the slanderous words were understood by the hearers to refer to the plaintiff is unnecessary. *Harris v. Zanone*, 93 Cal. 59 (*overruling De Witt v. Wright*, 57 Cal. 576).

In *Harris v. Zanone*, 93 Cal. 59, the court says, "whether those who heard the words understood that they had reference to the plaintiff is one of the 'extrinsic facts' by which the application of the defamatory matter to the plaintiff, if controverted, must be established on the trial, but need not be alleged."

Joinder of Different Sets of Words — Spoken at One Time. — Different sets of words importing the same charge and laid as spoken at the same time must be included in one action. *Coleman v. Playsted*, 36 Barb. (N. Y.) 26. And they may be included in a single count. *Patterson v. Wilkinson*, 55 Me. 42; *Walter v. Hoeffner*, 51 Mo. App. 46; *Casey v. Aubuchon*, 25 Mo. App. 91; *Rathbun v. Emigh*, 6 Wend. (N. Y.) 407; *Churchill v. Kimble*, 3 Ohio 409. And see *Cracraft v. Cochran*, 16 Iowa 301, where it is held that the entire conversation in which the slanderous words are published constitutes but one cause of action, and can properly be made the basis of but one count in a petition, notwithstanding it may set out several distinct charges, any of which is actionable.

Spoken at Different Times. — Different sets of words used on different occasions must not be recited in the same count, as two distinct causes of action are stated. *Patterson v. Wilkinson*, 55 Me. 42; *Downs v. Hawley*, 112 Mass. 237; *Darling v. Clement*, 69 Vt. 292. But see *contra*, to the effect that

a. Words Actionable as Charging a Criminal Offense.¹

(1) IN GENERAL.

Form No. 18686.²

(Ala. Civ. Code (1896), § 3352, No. 16.)

(*Venue and title of court and cause as in Form No. 5907.*)

The plaintiff claims of the defendant *two hundred dollars*, damages

different sets of words spoken on different occasions may be set forth in one count, *Lewis v. McDaniel*, 82 Mo. 577; *Pennington v. Meeks*, 46 Mo. 217. And see *Hoyt v. Smith*, 32 Vt. 304, to the effect that it is proper to include in a single count different words spoken at different times and to different persons, in relation to the same subject.

In *Darling v. Clement*, 69 Vt. 292, the court said: "The second count is bad for duplicity. It declares upon three sets of words, spoken at different times on the same day to the same person concerning different subjects, namely, the plaintiff's habitual intemperance, his lack of riches with many creditors, and his knowing that certain boys in his care and control were accustomed to steal defendant's apples and not trying to stop them. The plaintiff's trade and business and his fitness therefor are not, as claimed, the subject of the words, though they may have been their object, although they are not connected therewith by averment or implication. Whether it would have been proper, had the different sets of words related to the same subject, to join them in one count, we need not decide. That was held proper in *Hoyt v. Smith*, 32 Vt. 304. But no case goes the length of holding that words spoken at different times, imputing different charges, can thus be joined."

Actionable and Nonactionable Words.

— The plaintiff may in the same count charge words not actionable *per se* with words actionable in themselves in aggravation of damages. *Dioyt v. Tanner*, 20 Wend. (N. Y.) 190.

Special Damages. — Where words are not actionable *per se* and are not made actionable by averments of extrinsic facts, but become so by reason of some special damage, such special damage must be particularly averred. *Frolich v. McKiernan*, 84 Cal. 177; *Rock v. McClarnon*, 95 Ind. 415; *Barnes v. Trundy*, 31 Me. 321; *Dicken v. Shepherd*, 22 Md. 399; *Bassell v. Elmore*, 48

N. Y. 561; *Hallock v. Miller*, 2 Barb. (N. Y.) 630; *Havemeyer v. Fuller*, (N. Y. Super. Ct. Tr. T.) 60 How. Pr. (N. Y.) 316; *Bell v. Farnsworth*, 11 Humph. (Tenn.) 608. But where such words are actionable *per se* no special damage need be alleged. *Trimble v. Tantlinger*, 104 Iowa 665; *Wilson v. Beighler*, 4 Iowa 427; *Truman v. Taylor*, 4 Iowa 424; *Hicks v. Walker*, 2 Greene (Iowa) 440; *Noyes v. Hall*, 62 N. H. 594.

Joinder of Causes of Action. — A cause of action for slander may be joined with a cause of action for false imprisonment. *Harris v. Avery*, 5 Kan. 146. Or with a cause of action for libel. *Hargan v. Purdy*, 93 Ky. 424; *Martin v. Mattison*, (Supreme Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 3; *Noonan v. Orton*, 32 Wis. 106. Or with a cause of action for malicious prosecution. *Martin v. Mattison*, (Supreme Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 3; *Dinges v. Riggs*, 43 Neb. 710; *Shore v. Smith*, 15 Ohio St. 173; *Bible v. Palmer*, 95 Tenn. 393; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357. But in *New York* it is held, under section 484 of the Code of Civil Procedure, that a cause of action for slander cannot be joined with a cause of action for injury to real property. *Dodge v. Colby*, 108 N. Y. 445.

1. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 1, p. 221.

Good Character of Plaintiff. — It is usual, though unnecessary, for the plaintiff to commence his declaration with a statement of his good character, and of his innocence of the crime imputed to him by the defendant. 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 365, 382; *Burbank v. Horn*, 39 Me. 233.

Malice. — Where the allegation of good character is omitted, the declaration may commence with a statement of defendant's malicious intention to injure the plaintiff. *Burbank v. Horn*, 39 Me. 233.

2. Alabama. — Civ. Code (1896), § 1437 *et seq.*

for falsely and maliciously charging the plaintiff with perjury (or larceny, or as the case may be), by speaking of and concerning him in the presence of divers persons, in substance, as follows: (*Here set out the defamatory language*), viz, on the *tenth* day of *May*, 1902.

Jeremiah Mason, Att'y for Pl'ff.

Form No. 18687.¹

(Bullitt's Civ. Code Ky. (1895), p. 563, No. 49.)

(*Title of court and cause as in Form No. 5918.*)

The plaintiff, *John Doe*, says that the defendant, *Richard Roe*, who resides in *Lee* county (or in *Lee* county), on or about the *tenth* day of *May*, 1900, falsely and maliciously spoke and published, in the presence and within the hearing of *Samuel Short* (or of *Samuel Short and William West* or of *divers persons*), of and concerning the plaintiff, these words: "He stole *John Doe's* horse" (or "*He forged John Doe's signature to a note to John Smith for five hundred dollars,*" or "*He committed perjury by swearing, in my suit against Brown, that he saw Brown pay me five hundred dollars,*" or "*You are a felon,*" or "*You are a thief;*" or maliciously spoke and published in the presence (etc., as above), of and concerning the plaintiff, these words: "*I believe that it was he that stole John Smith's money,*" thereby falsely imputing to the plaintiff the crime of larceny; or these words: "*I suspect you of having burnt my barn,*" thereby falsely imputing to the plaintiff the crime of barn-burning).

And the plaintiff further says that, by reason of said slander, he was on the *tenth* day of *May* aforesaid discharged from the employment of *Samuel Smith*, for whom he was working at *thirty* dollars per month, and he has not since been able to get any other employment.

Wherefore, (*concluding as in Form No. 5918*).

Form No. 18688.²

(Tenn. Code (1896), § 4660, No. 20.)

(*Commencing as in Form No. 6949*) for *five hundred* dollars, as damages, for falsely and maliciously charging the plaintiff with perjury (or larceny, or other crime, as the case may be), by speaking of and concerning him, in the presence of divers persons, on the *tenth* day of *May*, 1902, and at divers other times, in substance, as follows: (*Here set out the defamatory language*).

Jeremiah Mason, Attorney for the Plaintiff.

(2) ARSON.³

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

1. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

2. *Tennessee*. — Code (1896), § 4618.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

3. *Requisites of Complaint, Declaration or Petition, Generally*. — See *supra*, note 1, p. 221.

Alleging Burning to be Arson. — In

Bundy v. Hart, 46 Mo. 460, it was held that, in a suit for slander brought in that state, an allegation in the petition that the defendant said of plaintiff, "he had to leave *Indiana* for burning a barn," without the further averment that, by the law of *Indiana*, burning a barn would be arson, was fatally defective.

Precedents — Sufficient. — In *Logan v. Steele*, 1 Bibb (Ky.) 593, the first count in the petition, after stating a colloquium concerning a barn of the defendant, which had lately been burned, charged the defendant with having spoken and published of and concerning the plaintiff the following words, to wit, "that he had every reason to believe that the said plaintiff had burnt the barn aforesaid." The third count, after stating a similar colloquium, alleged the words spoken by the defendant of the plaintiff to be the following, to wit, "from the evidence he had concerning the burning of said barn, he, the said defendant, believed that the said plaintiff had burnt the said barn."

It was contended by the defendant's counsel that the words laid in these counts were not actionable, because they did not necessarily import guilt, as the barn might have been burned by accident and not by design. The court said: "This objection is predicated upon the old rule of construing words *in mitiori sensu*. But this rule has long since been exploded, and has given way to one which accords more with reason and the common sense of mankind. It is now settled that words are to be taken in that sense in which they would be understood by those who hear or read them. The judge will neither torture them into guilt nor explain them into innocence, but take them in their usual acceptation, and understand them according to their obvious import and meaning. Tested by this doctrine, the words in question are clearly actionable. They carry with them an evident imputation of guilt, and it requires the most forced and far-fetched construction to give to them an innocent meaning."

In *Belcher v. Whitlock*, 6 Okla. 691, the material averments of the plaintiff's petition were as follows:

"Plaintiff further says that he has never been guilty of, nor, until the speaking and publishing by defendant of the false, scandalous and malicious

words hereinafter mentioned, was ever suspected to have been guilty of arson. By reason whereof the said plaintiff, before said grievance of defendant, had gained the good opinion of all his neighbors and associates.

And whereas, on or about the first day of *February*, 1894, in *Canadian* county, *Oklahoma Territory*, a certain house owned and occupied by defendant as a dwelling-house was consumed by fire; and the defendant, well knowing the premises, but wickedly and maliciously intending to injure the good name of this plaintiff among his neighbors and associates, accused him, the said plaintiff, of arson, as herein-after more fully set out, to-wit:

On or about the 5th day of *February*, 1895, at *El Reno*, in said county of *Canadian*, *Oklahoma Territory*, in a certain discourse which the said defendant then and there had concerning plaintiff and concerning said burning of said dwelling-house, in the presence of one *Price Ferguson*, and one — *Duval*, and one — *Haynes*, and one *N. F. Dawson*, and one *F. Lewis*, and one — *Dayton*, and one *McDonald*, etc., neighbors of him, the said plaintiff, falsely and maliciously spoke and published of and concerning said plaintiff, and of and concerning said burning of said dwelling-house, the false and scandalous words following, to wit: '*Ridge Whitlock* (meaning plaintiff) burned my house;' meaning that plaintiff was guilty of the crime of arson in burning defendant's dwelling-house."

There was no objection made to the sufficiency of this petition. The defendant answered by way of a general denial, and on trial had there was a verdict and judgment for the plaintiff.

See also precedents in *Clugston v. Garretson*, 103 Cal. 441, and *Tuttle v. Bishop*, 30 Conn. 80. The precedent in the former case was held good on general demurrer and the precedent in the latter case was held sufficient after a verdict.

Insufficient. — In *Emig v. Daum*, 1 Ind. App. 147, the plaintiff, *Mary E. Daum*, alleged that on the fifth day of *November*, 1885, the barn of her husband, *Philip L. Daum*, of the value of eight hundred dollars, situate in *Union* township, *Bartholomew* county, in the neighborhood where the defendant, *William Emig*, resided, was destroyed by fire, and her husband at the time

held a policy of fire insurance on said barn for five hundred dollars; that the next day after said fire the defendant, moved and instigated by malice, and intending greatly to injure the plaintiff in her good name and reputation, and to prevent her said husband from collecting said insurance policy, did, at the town of Edinburgh, in the county of Johnson, in this state, in the presence and hearing of divers good citizens of this state, speak of and concerning the plaintiff the following false and scandalous words: "We had a fire in our neighborhood last night: *Lu Daum's* barn (the said *Philip L. Daum's* barn meaning) burned. I don't know anything, but the report is that *Mary Daum* (the plaintiff meaning) burned the barn;" thereby charging that the plaintiff was guilty of the crime of arson, to the plaintiff's damage, etc. A demurrer to this paragraph was sustained. The court said, "the words set out in the first paragraph indicate that the barn spoken of was the barn of another person than the appellee [plaintiff], and if the offense of arson could be committed by the burning of the barn of another person without regard to its value, perhaps the words charged in the first paragraph would be actionable words. But it is not alleged in the first paragraph that these words were spoken of and concerning the barn whose value is stated, or of and concerning the burning thereof. Under the strict principles of pleading in actions for slander, which still obtain in this state, it must be said that the first paragraph is * * * defective."

In *Brettun v. Anthony*, 103 Mass. 37, the third count of the declaration alleged that the plaintiff was the owner of a certain building in Raynham, and occupied it, for the purposes of his trade, with goods, wares, merchandise and other chattels, his property, and for a store; that said building, and also said goods, wares, merchandise and other chattels therein, were insured against loss or damage by fire, and were destroyed by fire during the time they were insured; that "after said destruction by fire, the defendant, speaking with reference thereto, well knowing that said building, and also said goods, wares, merchandise and other chattels therein, were insured against loss or damage by fire as aforesaid, publicly, falsely and maliciously accused the plaintiff of the crime of wilfully burn-

ing said building, and the goods, wares, merchandise and other chattels therein, at the time they were so insured against loss or damage by fire, with the intent to injure the insurers thereof, by words spoken of the plaintiff, substantially as follows: 'Some of the folks up your way think that *Henry* (meaning the plaintiff) burned the store.' 'I (meaning the defendant) have no doubt but what he (meaning the plaintiff) burned it.'" A demurrer to this count was sustained. The court said: "The first count avers, in substance, the destruction of the plaintiff's building, with the goods therein, and the fact that the building and goods were at the time of the loss insured against damage by fire. It then charges that the defendant, speaking with reference to said destruction by fire, and knowing of the insurance, accused the plaintiff of the crime of burning with intent to injure the insurer, by the words recited. The difficulty is, that the words thus spoken are, by reasonable construction, connected with only one of the prefatory allegations, namely, the burning of the building, and not with the circumstance of the insurance. They do not therefore impute a crime. In other words, the colloquium is not coextensive with the whole inducement which the pleader thought necessary to set out."

In *Tebbetts v. Goding*, 9 Gray (Mass.) 254, the declaration was as follows:

"And the plaintiff says that on the twelfth day of July, 1855, he was the owner of a certain building, to wit, an oakum mill, at *Lowell*, and that said building was insured against loss and damage by fire, and was consumed; and that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building with intent to injure the insurers, by words spoken of the plaintiff substantially as follows: '*Tebbetts* was seen in the engine room late in the afternoon before the fire scattering oakum around the engine, by a man who looked through the cracks of the partition.' 'I have no doubt about the burning of the mill.' 'I think it was burned by *Tebbetts*.' '*Tebbetts* burnt the mill himself.'" A demurrer to the declaration was sustained. The court said: "The declaration in the present case is insufficient in this particular. The words spoken by the defendant import no

Form No. 18689.

(Precedent in *Nolan v. Traber*, 49 Md. 461.)¹[[*Title of court as in Form No. 6941.*)]

Michael J. Nolan and Bridget Nolan, his wife, the plaintiffs, by *Jeremiah Mason*, their attorney, sue *Gottlieb Traber*]² for that before the committing by the defendant of the grievances hereinafter mentioned, a certain stable in *Baltimore* county, state of *Maryland*, which was the property of one *Frederick Traber*, having therein goods, wares and merchandise, had been burned by fire; and the said defendant, contriving and wickedly and maliciously intending to injure the said *Bridget Nolan* in her good name, fame and credit, and to bring her into public scandal, infamy and disgrace with and among her neighbors and other good citizens of the state, and to cause it to be believed and suspected by them that the said *Bridget* had been guilty of the crime of wickedly, wilfully and maliciously burning said stable, and to subject her to the pains and penalties by the laws of this state made and provided against, and to be inflicted upon, persons guilty thereof in the premises, and to vex and harass the said *Bridget*, [on the *tenth* day of *June*, 1877, at (*stating place*)] in a certain discourse which the said defendant had with one *Francis Zabinsky*, of and concerning the said *Bridget*, and of and concerning the said burning of the said stable, which had therein goods, wares and merchandise, falsely and maliciously spoke and published of and concerning the said *Bridget*, in the presence and hearing of the said *Zabinsky*, these false, scandalous, malicious and defamatory words, that is to say: "Those damned *Irish* people, the *Nolans*, set it on fire;" meaning that the plaintiffs set on fire the said stable, which had therein goods, wares and merchandise; and also these false, scandalous, malicious and defamatory words: "They have been waiting for a favorable windy night to set it on fire;" meaning that the plaintiffs had been delaying to set the said stable on fire until a favorable windy night should occur, which would be favorable to

charge of crime. Standing by themselves, they do not even indicate whether the burning was intentional or the result of carelessness. This amounts to nothing more than that the act of the plaintiff caused his own mill to be destroyed, which might have been lawfully and innocently done. Nor is the meaning of these words enlarged or changed by the preliminary averments in the declaration. It is not made to appear by them that the defendant at the time the words were uttered was speaking of the insurance on the building, or even that he knew that any such insurance existed. If that was not the subject of conversation at the time, and, *a fortiori*, if the defendant did not know of the insurance, he could not by the words charged have

intended to accuse the plaintiff of setting fire to the building, with intent to injure and defraud the insurers."

See also precedents in *Jones v. Hungerford*, 4 Gill & J. (Md.) 402, and *Bloss v. Tobey*, 2 Pick. (Mass.) 320, which were held insufficient.

1. It was held in this case that the offense with which the wife was alleged to have been charged was one for which she was liable to be prosecuted and punished, if found guilty. This was the only objection made to the sufficiency of the declaration.

See also, generally, *supra*, note 3, p. 232.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

the destruction of the said stable by fire; and meaning also that the said plaintiffs had set said stable on fire.

[And the plaintiffs claim (*concluding as in Form No. 6941*).]¹

(3) BLACKMAIL.

Form No. 18690.¹

(Precedent in *Hess v. Sparks*, 44 Kan. 466.)²

(*Commencement as in Form No. 5917*.)]⁴

First: That the defendant on the 1st day of *February*, 1887, in the presence and hearing of divers persons, did falsely and maliciously speak and publish of and concerning the plaintiff the following false, malicious and defamatory words, that is to say, "What are you doing with that *nine-dollar* blackmailer here?" meaning thereby that the said plaintiff had committed the offense of extortion of money from a person or persons, by threats of accusation or exposure, or opposition in the public prints, and that she was a common black-mailer and extortioner.

Second: That on the 1st day of *February*, 1887, in the presence and hearing of divers persons, said defendant did falsely and maliciously speak and publish of and concerning the said plaintiff the following false, malicious and defamatory words, to wit: "She (meaning the plaintiff) tried to blackmail someone over at *Dr. Sparks's*;" meaning thereby that said plaintiff had tried to levy black-mail or to extort money from some person or persons at *Dr. Sparks's* in *Arkansas City* [in said county of *Cowley*] by threats of accusation or exposure, or of opposition in the public prints, for the purpose of obtaining money thereby.

[Wherefore, (*concluding as in Form No. 5917*).]¹

(4) BRIBERY.

Form No. 18691.¹

(Precedent in *Cole v. Woodson*, 32 Kan. 272.)²

(*Commencement as in Form No. 5917*.)]⁴

1. The said *W. D. Woodson*, plaintiff, complains of the said *D. J.*

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. *Kansas*. — Gen. Stat. (1897), c. 95, § 125.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

3. It was objected to this petition that it did not state facts sufficient to constitute a cause of action, and that the matters charged in the petition were not actionable *per se*. The objections were overruled. The court said that "taking the innuendo in connection with the words charged, we

think the language imputed an offense which was punishable under the laws of this state, and the petition stated facts sufficient to constitute a cause of action."

4. The matter to be supplied within [] will not be found in the reported case.

5. *Kansas*. — Gen. Stat. (1897), c. 95, § 125.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

6. No objection was made to the sufficiency of this petition.

Cole, defendant, for that the plaintiff, before and at the time of the committing by the defendant of the grievances hereinafter mentioned, sustained a good name and character amongst his neighbors and acquaintances for moral worth and integrity, and was never suspected of the crime of bribery or attempting or offering to bribe any officer or other person; yet the defendant, well knowing the premises, and maliciously intending to injure the good name and character of the plaintiff, and to cause it to be believed that the plaintiff had been guilty of the crime of offering and attempting to bribe, did, on or about the *12th* day of *December*, 1881, in a certain discourse which he then had with plaintiff about a certain proceeding then and for a long period theretofore pending before the board of county commissioners of *Reno* county, *Kansas*, under road petition No. *128*, to vacate and relocate a county road, under which petition and proceeding *T. C. Gillick* and *W. H. McMurray* had been appointed and duly qualified as viewers, and of and concerning the plaintiff and in the presence and hearing of divers good people, falsely and maliciously spoke and published of and concerning the plaintiff the false, scandalous and defamatory words following, that is to say, "You (meaning the plaintiff) tried to bribe the viewers;" thereby saying, meaning and intending to mean that the plaintiff had unlawfully, wilfully and feloniously offered and attempted to bribe the said viewers while so acting as such viewers in said proceeding so as aforesaid pending before said board of county commissioners, whereby and by reason of the aforesaid false, malicious and defamatory words so as aforesaid spoken, this plaintiff has been damaged in his good name, fame and character in the sum of *two thousand five hundred* dollars.

2. And for a further and second cause of action this plaintiff complains of the defendant, for that on or about the *fifth* day of *February*, 1882, the defendant, still further intending to injure the good name, fame and character of the plaintiff, and to cause it to be believed that the plaintiff had been guilty of the crime of offering or attempting to bribe, did, in a certain discourse which he then had with this plaintiff about and concerning the said proceedings and road petition No. *128*, so as aforesaid pending before the board of county commissioners of *Reno* county, *Kansas*, as alleged in plaintiff's first cause of action, and of the said viewers appointed and qualified in said proceedings, so as aforesaid alleged in said cause of action, and of and concerning the plaintiff and in the presence and hearing of divers good people, falsely and maliciously speak and publish of and concerning the said plaintiff the false, scandalous and defamatory words following, that is to say, "Yes, sir! I do say you (meaning the plaintiff) tried to bribe the viewers;" thereby saying, meaning and meaning to say that the plaintiff had wilfully, unlawfully and feloniously offered and attempted to bribe the said viewers while so acting as such viewers, whereby and by reason of said false, malicious, scandalous and defamatory words so as aforesaid spoken, the plaintiff has been damaged in his good name, fame and character in the sum of *two thousand five hundred* dollars.

Wherefore, plaintiff prays judgment against the defendant for

the sum of *five thousand* dollars, his damages so as aforesaid sustained, and costs of suit.

[(Signature and verification as in Form No. 5917.)]¹

(5) FORGERY.²

Form No. 18692.³

(Precedent in *Sheek v. Sain*, 127 N. Car. 267.)⁴

[(Venue and title of court and cause as in Form No. 5927.)]¹

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Complaint, Declaration or Petition, Generally.** — See *supra*, note 1, p. 221.

Precedent. — In *Arnold v. Cost*, 3 Gill & J. (Md.) 219, the first count, after the inducement of good character, proceeded as follows: "and whereas also before the committing of the several grievances by the defendant, as in the first, second and third counts herein-after mentioned, the defendant was possessed of, and owned a certain negro, named *Jerry*, the slave and the property of the defendant, and in his service and employment, to wit, at, etc., to which negro slave, to enable him to escape from the service of his master (the defendant), some person unknown to the plaintiff, delivered a paper written in the following words and figures, to wit: 'Know all men by this present that the said negro boy was the property of my onkle, *Richard Johnson*, living near the mouth of *Monocosa*. He deceased 1821. He died without any airs. He never was married. Therefore he maid all his negroes free by his will and testament. This boy name is *Sam Waker*. He always behaved onest, and industrust, and is a good hand about horses, and a good wagoner. The farmers in our part has for common all slaves or hands of their own, therefor he wants to dry some other part, the commosary offis ad *Frederick* town will proof his freedom, herewith I haf sat my hand and seal, *Thomas Johnson*, (Seal) near the mouth of *Monocosa*, *Frederick County, Maryland*, date 25th September, 1826:' and which paper the defendant had often, before the committing of the several grievances by him, as in the first, second and third counts, herein-after mentioned, declared, to wit, at, etc., to be a forgery, and not written or signed by the said *Thomas Johnson*, whose name is subscribed to the same:

and the said plaintiff further saith, that *David Arnold*, well knowing the premises, but greatly envying, etc., and contriving, and maliciously intending, etc., and to bring him into public scandal, etc., and to cause it to be suspected, etc., that the plaintiff had been, and was guilty of forgery, and to subject him, etc., and also to vex, harass, etc., hereinafter, to wit, on, etc., in a certain discourse which the said *David Arnold* then and there had in the presence and hearing of one *Henry Koontz*, and of divers good and worthy citizens of this state, he, the defendant, in the presence and hearing of the said *Henry Koontz*, as also of the said last mentioned citizens, falsely and maliciously spoke, and published, of and concerning the said plaintiff, and of and concerning the said paper, and of and concerning the writing and forging the same, the false, scandalous, malicious and defamatory words following, that is to say: 'He (meaning the plaintiff) wrote it (meaning the said paper), and I (meaning the said defendant) will swear to it; and I (meaning the said defendant) can get others who will swear to it;' meaning that the said *George Cost* had wrote and forged said paper, and was guilty of the crime of forgery, and that the said *David Arnold* would swear to it, and could get other persons who would swear to it.'

The second and third counts alleged that the defendant had charged the plaintiff in the German language, setting out the words and translating them, with the crime of having forged the paper referred to in the first count.

There was a general demurrer and joinder. The demurrer was overruled.

3. *North Carolina*. — Clark's Code Civ. Proc. (1900), § 265.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

4. No objection was made to the sufficiency of this complaint.

The plaintiff complains and alleges:

1. That on the 31st day of *October*, 1898, at and in the county of *Davie*, and state of *North Carolina*, and at divers other times and places, the defendant, *Wiley E. Sain*, with intent to injure the good name and character of plaintiff, wilfully, falsely, and maliciously spoke of and concerning the plaintiff, in the presence of, and hearing of, *J. M. Call*, and divers other good citizens of the state, in substance and tenor the following words, to-wit: "*Jim Sheek* (meaning the plaintiff) forged my name to a check;" intending thereby to impute to the plaintiff the crime of forgery.

2. That the said charge and imputation was untrue.

3. That on the ——— day of *October*, 1898, at and in the county of *Davie*, and the state of *North Carolina*, and at divers other times and places, the defendant, *Wiley E. Sain*, with intent to injure the good name and character of plaintiff, wilfully, falsely, and maliciously spoke of and concerning the plaintiff, in the presence of *J. M. Call*, and divers other good citizens of the state, in substance and tenor, the following words, viz., "*Jim Sheek* (meaning the plaintiff) forged a check." "Who would vote for *Jim Sheek*—any man that would forge a check?" That he (meaning the plaintiff) had forged one on him (meaning the defendant). "No man ought to vote for him" (meaning the plaintiff, who was then a candidate for sheriff); intending thereby to charge that plaintiff had forged a bank check on the defendant, and to impute to this plaintiff the crime of forgery.

4. That said charge and imputation was untrue.

5. That on the ——— day of *October*, 1898, at and in the county of *Davie*, and state of *North Carolina*, and at divers other times and places, the defendant, *Wiley E. Sain*, with intent to injure the good name and character of plaintiff, wilfully and falsely and maliciously spoke of and concerning the plaintiff, in the presence and hearing of *William McDaniel*, and divers other good citizens of the state, in substance and tenor the following words, to wit: "*Jim Sheek* (meaning the plaintiff) has forged a check on me for *ten* dollars, on one of the *Winston* banks;" intending thereby to impute to plaintiff the crime of forgery.

6. That the said charge and imputation was untrue.

7. That by reason of the said charges the plaintiff has sustained damage to the amount of *five thousand* dollars. Therefore, plaintiff demands judgment against the defendant in the sum of *five thousand* dollars, and for costs.

[(*Signature and verification as in Form No. 5927.*)]¹

(6) KEEPING GAMING-HOUSE.

Form No. 18693.²

(Precedent in *Buckley v. O'Niel*, 113 Mass. 193.)³

1. The matter to be supplied within [] will not be found in the reported case.

2. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

3. The defendant demurred to this declaration on the ground that the

[(Title of court and cause as in Form No. 6942.)]¹

And the plaintiff says the defendant publicly, falsely and maliciously accused the plaintiff of the crime of keeping and maintaining a common nuisance, to wit, a place and building resorted to for illegal gaming, by words spoken of the plaintiff substantially as follows, viz.: "*Buckley* (meaning the plaintiff) keeps a gaming hell." "*Dan Buckley* (meaning the plaintiff) makes his money easy, he (meaning the plaintiff) keeps a gambling place." "My husband don't visit *Dan Buckley's* (meaning the plaintiff's) gambling den." [Jeremiah Mason, Attorney for Plaintiff.]²

(7) KEEPING HOUSE OF PROSTITUTION.

Form No. 18694.³

(Precedent in *Fitzgerald v. Robinson*, 112 Mass. 377.)⁴

[(Title of court and cause as in Form No. 6942.)]¹

(First, second, third and fourth counts.)

Fifth count. And the plaintiff further says, that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of keeping a house of ill fame, by words spoken of the plaintiff substantially as follows, to wit: "He (meaning the said plaintiff) keeps a bad house; that it (meaning the plaintiff's house) is a bad house, and not a proper place of resort; that he (meaning the plaintiff) keeps bad girls there;" meaning that the said plaintiff kept girls there at his, the said plaintiff's house, for the purpose of prostitution.

[Jeremiah Mason, Attorney for Plaintiff.]²

(8) LARCENY.⁵

words therein set up did not, when taken in their natural sense, impute a crime. The court sustained the demurrer, whereupon the plaintiff alleged exceptions, which were sustained and the declaration held sufficient.

1. The matter to be supplied within [] will not be found in the reported case.

2. The matter enclosed by [] will not be found in the reported case.

3. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220, and, generally, *supra*, note 1, p. 221.

4. A demurrer to this fifth count of the declaration was overruled. The court said, "if we take the well established rule that words complained of as slanderous are to be understood in their natural and obvious sense, and to receive the construction which the persons to whom they are addressed would ordinarily and reasonably attach to them, the words charged in

this count plainly convey a criminal imputation. To say of any one, 'He keeps a bad house,' 'not a proper place of resort,' 'he keeps bad girls there,' would be substantially equivalent to saying that he keeps a house of ill fame. In *Snell v. Snow*, 13 Met. (Mass.) 273, it was held that to say of a woman, 'She is a bad girl,' does not necessarily import that she was unchaste, or a prostitute, and that such a meaning could not be attached to the words by the innuendo. But the language in this count goes much further. Taken together, it hardly admits any other construction than that which the plaintiff has given it."

5. *Requisites of Complaint, Declaration or Petition, Generally*. — See *supra*, note 1, p. 221.

Intent to Charge Larceny. — Where the alleged slanderous words set out in the pleading clearly impute the crime of larceny, an averment that the defendant intended to charge the plaintiff with larceny is unnecessary. *Gal-*

Form No. 18695.¹

(Conn. Prac. Act, p. 159, No. 280.)

(Commencement as in Form No. 5912.)

1. On *February 19th*, 1878, at *Hartford*, the defendant spoke, in the hearing of *John Doe*, the following words concerning the plaintiff: "He is a thief."

loway v. Courtney, 10 Rich. L. (S. Car.) 414.

Calling Plaintiff a "Thief"—Generally. A declaration that sets forth the calling of the plaintiff a thief by the defendant, to, or in the hearing of, others, without any inducement or colloquium more than that the words were spoken of the plaintiff, is sufficient. *Burbank v. Horn*, 39 Me. 233; *Fredrickson v. Johnson*, 60 Minn. 337; *Sabin v. Angell*, 46 Vt. 740; 1 Chit. Pl. (3d Am. from 2d Lond. ed.) 381.

Equivalent to Charge of Larceny.—An accusation that a person is a thief is equivalent in its legal effect to a specific charge that he is guilty of larceny. *McNamara v. Shannon*, 8 Bush (Ky.) 557.

Injury to Character.—Though it is usual, in an action on the case for calling the plaintiff a "thief," to state that, by reason of the speaking of the words, the plaintiff's character was injured, yet the statement appears unnecessary, because it is an intendment of law that the plaintiff was injured by the speaking of such words. *Hicks v. Walker*, 2 Greene (Iowa) 440.

Precedents.—In *Hinesley v. Sheets*, 18 Ind. App. 612, the material parts of the first paragraph of the complaint were as follows:

"That on or about the 14th day of July, 1894, the said defendant, in a certain discourse by him had in the presence and hearing of *Charles Gerard* and divers other persons, falsely and maliciously spoke and published of and concerning this plaintiff the following false, scandalous, defamatory and slanderous words and language, that is to say: 'I know that *Sheets* (meaning plaintiff, who was then a tenant on a farm owned by defendant and had grown a crop of wheat thereon) took wheat that did not belong to him.' 'I know that *Sheets* (meaning plaintiff) has taken wheat that does not belong to him.' 'I saw the wagon go across the field again, and I know that *Sheets* (meaning plaintiff, who was then a tenant on defendant's land and had

grown a crop of wheat thereon, and was at said time engaged in threshing said wheat) has took wheat that did not belong to him.' Then and there and thereby meaning and charging, and was understood by said *Gerard* and divers other persons then present to mean and charge that said plaintiff had feloniously stolen, taken and hauled away of the personal goods and chattels of said defendant one load of wheat, and was guilty of the crime of larceny. Wherefore," etc.

It was held on demurrer that the paragraph was sufficient.

In *Hicks v. Walker*, 2 Greene (Iowa) 440, the declaration, excepting the formal parts, was as follows:

"*John Walker*, the above named defendant, was summoned to answer *William Hicks*, the above named plaintiff, in a plea of the case, whereupon the said plaintiff, by *M. D. Ives*, his attorney, complains; for that whereas the said defendant did, on or about the twelfth day of July, 1890, at *Pleasant township, Monroe* [county] maliciously, falsely, and openly utter and publish, in the hearing of sundry persons, the following false and scandalous words of and concerning the plaintiff, to wit: '*William Hicks* (meaning the plaintiff) will steal, and did steal in *Pennsylvania*, and had to leave that state for stealing,' which is to the damage of the plaintiff of the sum of \$500, and therefore he sues." A special demurrer to this declaration was overruled.

In *Robinson v. Keyser*, 22 N. H. 323, the declaration alleged that, "on the 20th day of June, A. D. 1850, at *Wendell*, in said county, in the presence of divers persons, citizens of this state," the defendant "did speak and publish of, and concerning the plaintiff, the false, scandalous and malicious words following, to wit, 'he (meaning the said *Robinson*) is a thief and a liar, and I (meaning the defendant) can prove it.'" A general demurrer to this declaration was overruled.

1. See, generally, *supra*, note 5, p. 240.

2. Said words were false and malicious.
The plaintiff claims \$1,000 damages.
(Conclusion as in Form No. 5912.)

Form No. 18696.¹

(Precedent in *Harrington v. Miles*, 11 Kan. 481.)²

[(Commencement as in Form No. 5917.)

That said *Eldred Harrington*, the defendant herein]³ maliciously intending to injure the good name and character of the said plaintiff, and to cause it to be believed that he had been guilty of the crime of larceny, on the *twentieth of July, 1871*, in a certain discourse which he then had of and concerning the plaintiff, and in the presence and hearing of divers good people, falsely and maliciously spoke and published of and concerning the said plaintiff the false, scandalous, and malicious words following, that is to say: "*Miles* (meaning the plaintiff) stole my dog;" "he (meaning the plaintiff) stole my dog;" "*Miles* (meaning the plaintiff) came to my house and stole my dog;" "*Miles* (meaning the plaintiff) horsewhipped me, and dragged my property off;" meaning thereby that the said plaintiff had stolen his (the said defendant's) dog. * * * By means of the speaking of which said defamatory words the said plaintiff hath been greatly injured in his good name and character, to the damage of said plaintiff of \$2,000.

[(Signature and verification as in Form No. 5917.))⁴

Form No. 18697.⁵

(Bullitt's Civ. Code Ky. (1895), p. 564.)

(Title of court and cause as in Form No. 5918.)

The plaintiff, *John Doe*, says that, before the defendant, *Richard Roe*, published the slander herein complained of, a *hundred dollars* had been stolen from *John Brown*, and the plaintiff had been charged with stealing it (or *it had been charged that a hundred dollars had been stolen from John Brown and that the plaintiff had stolen it*); and that, on or about the *tenth day of May, 1900*, the plaintiff had a conversation with the defendant concerning the stealing (or *the alleged stealing*) of said money and the charge that the plaintiff had stolen it, in which conversation the plaintiff asked the defendant if he had made such charge against the plaintiff, and the defendant falsely and maliciously spoke, and published in the presence and within the hearing of *William West* (or of *William West and Samuel Short*, or of *divers per-*

1. *Kansas*. — Gen. Stat. (1897), c. 95, § 125.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 5, p. 240.

2. It was held, against objection, that the alleged slanderous words charged a crime involving moral turpitude and were actionable. No other objection was made to the sufficiency of the petition.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

4. The matter to be supplied within [] will not be found in the reported case.

5. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 5, p. 240.

sons), these words of and concerning the stealing (or the alleged stealing) of said money and the charge that the plaintiff had stolen it: "You did take it;" meaning thereby that the plaintiff had stolen a hundred dollars from John Brown.

2. (A paragraph may be added asserting a right to special damages.)

And the plaintiff says that the defendant resides in Lee county (or that the aforesaid slander was published by the defendant in Lee county).

Wherefore, (concluding as in Form No. 5918).

Form No. 18698.¹

(Md. Pub. Gen. Laws (1888), art. 75, § 23, No. 34.)

(Commencing as in Form No. 6941) that the defendant falsely and maliciously spoke and published of the plaintiff the words following, that is to say: "He is a thief;" (if there be any special damage, here state it with such reasonable particularity as to give notice to the defendant of the particular injury complained of, for instance) whereby the plaintiff lost his situation of book-keeper in the bank of Washington.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 18699.²

(Precedent in Mahoney v. Belford, 132 Mass. 393.)³

[(Commencing as in Form No. 18700)]⁴ that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff, substantially as follows: "You (meaning the plaintiff) stole from Mr. Weld, that man there (pointing to Mr. Francis M. Weld, who was standing near the plaintiff and defendant), as much as would make three men rich."

[(Signature as in Form No. 18694.)]⁴

Form No. 18700.⁵

(Precedent in Perry v. Porter, 124 Mass. 338.)⁶

[(Title of court and cause as in Form No. 6942.)]

The plaintiff says that the defendant publicly, falsely and maliciously⁷ accused the plaintiff of the crime of larceny by words spoken of and concerning the plaintiff, substantially as follows: "He (meaning the plaintiff) is a rascal, a villain and a thief."

[(Signature as in Form No. 18694.)]⁴

(9) MURDER.⁸

1. See, generally, *supra*, note 5, p. 240.

2. Massachusetts. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 240.

3. The defendant answered by a general denial, and on trial had judgment was entered for the plaintiff.

4. The matter to be supplied within [] will not be found in the reported case.

5. Massachusetts. — Rev. Laws (1902), c. 173, § 130.

6. No objection was made to the sufficiency of this declaration. The evidence, however, did not sustain the charge.

7. The matter enclosed by and to be supplied within [] will not be found in the reported case.

8. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 1, p. 221.

Name of person murdered need not be

(a) *In General.*Form No. 18701.¹(Precedent in *Thomas v. Blasdale*, 147 Mass. 438.)²[[*Title of court and cause as in Form No. 6942.*]]³

And the plaintiff says the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of murder, by words spoken of the plaintiff, substantially as follows, to wit: "He (meaning the plaintiff) knows how she (meaning the plaintiff's wife) came to her death (meaning the death of the plaintiff's wife). He (meaning the plaintiff) killed her (meaning the plaintiff's wife). He (meaning the plaintiff) is to blame for her death (meaning the death of the plaintiff's wife). There was foul play there." To the great damage of the plaintiff.

[*Jeremiah Mason*, Attorney for Plaintiff.]⁴

alleged. *Langton v. Hagerty*, 35 Wis. 150.

Precedents. — In *Harper v. Harper*, 10 Bush (Ky.) 447, the petition consisted of two paragraphs. The first contained this language:

"The plaintiff, *Adam W. Harper*, states that on the — day of *September*, 1871, in the county of *Woodford*, *Jacob* and *Betsy Harper* were murdered; and afterward, on the — day of —, the defendant, *J. Wallace Harper*, when speaking of said murder in the presence and hearing of divers persons, spoke concerning the plaintiff these slanderous words: '*Adam W. Harper* and *John Harper* were at the head of the murder of *Jacob* and *Betsy Harper*.'"

In the second paragraph it was charged that "on another occasion, when speaking of said murder of *Jacob* and *Betsy Harper*, the defendant *J. Wallace Harper*, in the presence of divers other persons, spoke concerning the plaintiff these other slanderous words: 'I believe *Adam W. Harper* and his son *John* murdered *Jacob* and *Betsy Harper*, and all the neighbors believe it; and I told *Adam W. Harper* I believed it was so.'"

The sufficiency of this petition was not questioned. A judgment for the defendant was reversed.

In *Thomas v. Blasdale*, 147 Mass. 438, is set out the following declaration:

"And the plaintiff says the defendant publicly, falsely, and maliciously accused the plaintiff of the crime of murder, by words spoken of the plaintiff substantially as follows, to wit: 'He (meaning the plaintiff) killed her (meaning the plaintiff's wife, *Mary J.*

Thomas) by his bad conduct (meaning the bad conduct of the plaintiff), and I (meaning the defendant) think he knows more about her being drowned than anybody else. He (meaning the plaintiff) is to blame for it.'"

A demurrer to this declaration was sustained on the ground that the declaration set forth no extrinsic circumstances which might give significance to the words alleged to have been spoken by the defendant, and that the words themselves, taken in their natural sense, and without a forced or strained construction, did not fairly import a charge of criminal homicide.

1. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 8, p. 243.

2. The defendant demurred to this declaration on the ground "that the declaration does not state a legal cause of action substantially in accordance with the rules of law, in that the alleged slanderous words do not, by their natural import, or in connection with any facts or explanations stated in the declaration, in any manner charge or impute the crime of murder, and are not in themselves actionable." This demurrer was sustained by the superior court, but on appeal to the supreme court it was held that the demurrer should have been overruled.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by [] will not be found in the reported case.

(b) *And Larceny.*Form No. 18702.¹(Precedent in *Langton v. Hagerty*, 35 Wis. 153.)²

[(Commencing as in Form No. 5937)]³ that on or about the 12th day of *October*, 1872, at the city of *Green Bay*, in said *Brown* county, the defendant, wilfully and maliciously designing and intending to injure and degrade this plaintiff in his character, and to bring plaintiff into public infamy and disgrace, wilfully and maliciously spoke, published and declared of and concerning this plaintiff, in the presence and hearing of one *N. L. Barber* and divers other persons, the false, scandalous and defamatory words following, to-wit: "He (meaning the plaintiff) murdered the man (meaning one *Michael Nehill*),⁴ and stole all of his money from him, and I saw him do it;" meaning, intending and charging thereby, that this plaintiff had been guilty of the crimes of murder and of larceny; that plaintiff was thereby greatly injured in his good name, fame and character, to his damage *three thousand* dollars.

[Wherefore, (concluding as in Form No. 5937).]⁵

(10) OBTAINING GOODS UNDER FALSE PRETENSES.

Form No. 18703.⁶

(Bullitt's Civ. Code Ky. (1895), p. 564.)

(Commencing as in Form No. 5918) that the defendant, *Richard Roe*, on or about the *tenth* day of *May*, 1900, falsely and maliciously spoke and published in the presence and within the hearing of *William West* (or of *William West* and *Samuel Short*, or of *divers persons*), these words of and concerning the plaintiff: "Last year he got *five hundred* dollars worth of goods from a man in *Nashville* by false pretenses;" meaning thereby that, in the year 1899, the plaintiff obtained *five hundred* dollars worth of goods from a man in the state of *Tennessee*, by false pretenses; and the plaintiff says that, under a statute of the state of *Tennessee*, the obtaining of goods by false pretenses has been, since the *ninth* day of *April*, 1896, when said statute

1. *Wisconsin*. — Stat. (1898), § 2677.

See also list of statutes cited *supra*, note 1, p. 221; and, generally, *supra*, note 8, p. 243.

2. The defendant answered the declaration in this case, but before any testimony was received on the trial his counsel objected to the admission of any evidence under the complaint, for the reason that it failed to state a cause of action against the defendant, in that it stated nothing by way of inducement or otherwise to show the meaning of the slanderous words alleged to have been spoken by the defendant. This objection was overruled, the court holding that an inducement was unnecessary, as the words were actionable *per se*.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Unnecessary Innuendo*. — It was held that the innuendo that the man whom the plaintiff was accused of murdering was *Michael Nehill* was unnecessary. The court said, "omit the innuendo entirely, and the complaint will be good on demurrer."

5. The matter enclosed by and to be supplied within [] will not be found in the reported case.

6. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

took effect, a felony, punishable by confinement in the penitentiary of said state for a term of not less than *six* years.

2. (*A paragraph may be added asserting a right to special damages.*)
Wherefore, (*concluding as in Form No. 5918*).

(11) PERJURY.¹

1. **Requisites of Complaint, Declaration or Petition, Generally.** — See *supra*, note 1, p. 221.

Inducement — Words Not Actionable Per Se. — Words charging the plaintiff with swearing falsely or swearing a lie do not, in themselves, constitute a crime of perjury, and in order for such words to be actionable there must be set out in the pleading of the plaintiff, by way of inducement, extrinsic facts for the purpose of showing that such words were spoken with reference to some proceeding before a court or tribunal created by law or in relation to some matter or thing where an oath is authorized by law. *Hall v. Montgomery*, 8 Ala. 510; *McGough v. Rhodes*, 12 Ark. 625; *Harbison v. Shook*, 41 Ill. 141; *Dean v. Miller*, 66 Ind. 440; *Roella v. Follow*, 7 Blackf. (Ind.) 377; *Martin v. Melton*, 4 Bibb (Ky.) 99; *Watson v. Hampton*, 2 Bibb (Ky.) 319; *Small v. Clewley*, 60 Me. 262; *Lewis v. Black*, 27 Miss. 425; *Harris v. Woody*, 9 Mo. 113; *Palmer v. Hunter*, 8 Mo. 512; *McManus v. Jackson*, 28 Mo. 56; *Kern v. Towsley*, 51 Barb. (N. Y.) 385; *Phincle v. Vaughan*, 12 Barb. (N. Y.) 215; *Browne v. Dula*, 3 Murph. (7 N. Car.) 574; *Sluder v. Wilson*, 10 Ired. L. (32 N. Car.) 92; *Barger v. Barger*, 18 Pa. St. 489; *Bricker v. Potts*, 12 Pa. St. 200; *Shaffer v. Kintzer*, 1 Binn. (Pa.) 537; *Power v. Miller*, 2 McCord L. (S. Car.) 220; *Ashbell v. Witt*, 2 Nott & M. (S. Car.) 364; *Bell v. Farnsworth*, 11 Humph. (Tenn.) 608; *Sharp v. Wilhite*, 2 Humph. (Tenn.) 434; *Magee v. Stark*, 1 Humph. (Tenn.) 506; *Sanderson v. Hubbard*, 14 Vt. 462; *Wood v. Scott*, 13 Vt. 42; *Hogan v. Wilmoth*, 16 Gratt. (Va.) 80.

In *McManus v. Jackson*, 28 Mo. 56, the court says, "it is well settled that it is not actionable to charge a person with swearing a lie, unless the petition shows that the speaking of the offensive words had reference to a judicial proceeding (*Harris v. Woody*, 9 Mo. 113). The reason is that the words standing alone do not impute a crime, for a man may swear falsely without even having taken an oath in any court or before

any officer authorized to administer one. Such words, however, may be rendered actionable, if by way of inducement it is set out that there had been a trial or other proceeding in which the plaintiff was sworn as a witness."

In *Illinois*, by statute, it is made actionable to charge a person with swearing falsely or having sworn falsely, and therefore it is unnecessary to aver that the words had reference to a judicial proceeding. *Harbison v. Shook*, 41 Ill. 141; *Wolbrecht v. Baumgarten*, 26 Ill. 291.

Words Actionable Per Se. — But where the words in themselves convey to the minds of the hearers, either expressly or by implication, an imputation of perjury, they are actionable without stating extrinsic facts by way of inducement. *Hall v. Montgomery*, 8 Ala. 510; *McGough v. Rhodes*, 12 Ark. 625; *Watson v. Hampton*, 2 Bibb (Ky.) 319; *Burbank v. Horn*, 39 Me. 233; *Kern v. Towsley*, 51 Barb. (N. Y.) 385; *Phincle v. Vaughan*, 12 Barb. (N. Y.) 215.

The following charges have been held sufficient to impute perjury without the allegation of extrinsic facts: "He has sworn falsely and I will attend to the grand jury respecting it." *Gilman v. Lowell*, 8 Wend. (N. Y.) 573. That the plaintiff "had sworn false when under oath, and that if he had his deserts he would have been dealt with in the time of it." *Phincle v. Vaughan*, 12 Barb. (N. Y.) 215. "You swore a damned lie, and you know it, for which you now stand indicted." *Pelton v. Ward*, 3 Cai. (N. Y.) 73. "I had a lawsuit with *Thomas G. Denning* about a hog, and *Thomas Stark* swore falsely against me, and I have advertised him as such." The words "I had a lawsuit" necessarily imply a judicial proceeding, and the words "*Thomas Stark* swore falsely" necessarily imply that the oath was administered and that in giving his evidence he stated a falsehood. *Magee v. Stark*, 1 Humph. (Tenn.) 506.

Cause Pending. — That a cause was pending must be alleged. *Wood v. Scott*, 13 Vt. 42.

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matter. — In *Lewis v. Black*, 27 Miss. 425, it was held that the declaration need not allege that the court had jurisdiction of the subject-matter of the suit during the trial of which the perjury was committed.

To Administer Oath. — A declaration charging the plaintiff with swearing to a lie as a witness in a proceeding before a justice of the peace must allege that the justice had jurisdiction or power to administer the oath, and an allegation that on the trial the plaintiff was examined as a witness on oath is not enough. *Palmer v. Hunter*, 8 Mo. 512.

Trial Had. — That a trial was had must be alleged. *Wood v. Scott*, 13 Vt. 42.

Testimony Given by Plaintiff — *Generally.* — That testimony was given by the plaintiff must be alleged. *Wood v. Scott*, 13 Vt. 42.

Testimony Material. — It must be alleged further that the testimony was given upon a material matter. *Harris v. Woody*, 9 Mo. 113; *Palmer v. Hunter*, 8 Mo. 512; *Sherwood v. Chace*, 11 Wend. (N. Y.) 38; *Sharp v. Wilhite*, 2 Humph. (Tenn.) 434; *Magee v. Stark*, 1 Humph. (Tenn.) 506. But see *contra Lewis v. Black*, 27 Miss. 425.

In *Illinois*, by reason of a statute making it a slander to untruly charge another with swearing falsely, it is unnecessary to aver that the matter charged to be false was material. *Harbison v. Shook*, 41 Ill. 141; *Wolbrecht v. Baumgarten*, 26 Ill. 291.

Connecting Words Spoken with Testimony. — That the alleged slanderous words were spoken by the defendant in a conversation concerning the testimony of the plaintiff in the judicial proceeding must be alleged. *McManus v. Jackson*, 28 Mo. 56; *Sanderson v. Hubbard*, 14 Vt. 462; *Wood v. Scott*, 13 Vt. 42.

Intent to Charge Perjury. — It must be shown by way of innuendo that the defendant by the alleged slanderous words intended to charge the plaintiff with having committed the crime of perjury. *McManus v. Jackson*, 28 Mo. 56; *Wood v. Scott*, 13 Vt. 42. But the general averment by way of innuendo that the defendant intended thereby to charge the plaintiff with the crime of perjury is not sufficient without extrinsic facts. *Small v. Clewley*, 60 Me. 262; *Bricker v. Potts*, 12 Pa. St. 200; *Shaffer v. Kintzer*, 1 Binn. (Pa.) 537.

Where the alleged slanderous words sufficiently show a charge of perjury, it is unnecessary for the complaint to contain the innuendo that by the speaking of the words charged the defendant meant, and was understood to mean by those who heard them uttered, a charge that the plaintiff committed the crime of perjury in the alleged judicial proceedings. *Dean v. Miller*, 66 Ind. 440.

Proceeding Before Arbitrators. — Where the words relate to testimony given before arbitrators, the want of an averment that the plaintiff was legally sworn is fatal. *Sanderson v. Hubbard*, 14 Vt. 462.

Precedents. — In *Sanford v. Gaddis*, 13 Ill. 329, the first, fifth and seventh counts of the declaration were as follows:

"And whereas, also, before the commitment of the several grievances, by the said defendant, as in the *first* and *fifth* counts hereinafter mentioned, a certain action had been depending before one *David M. Wycoff*, Esquire, a justice of the peace within and for the county of *Fulton* and state of *Illinois* aforesaid, of which said action the said justice had then and there jurisdiction, to wit, at *Fairview*, in said county, wherein the defendant in this suit was plaintiff, and the plaintiff in this suit was defendant, and which said action had then and there been lately tried by the said *David M. Wycoff*, justice of the peace as aforesaid, and on said trial the said plaintiff in this suit had been and was examined on oath (he, the said defendant in this action, then and there, before said oath was administered, having waived any preliminary oath, and having consented that the said plaintiff in this action should be examined on oath, and testify in said cause), in a matter material to the issue in said trial, and having given his evidence as a witness (as by the laws of this state he had a right to do), to wit, at *Fairview*, to wit, at the county and state aforesaid, yet the said defendant, well knowing the premises, but greatly envying the happy state and condition of the said plaintiff, and contriving and wickedly and maliciously intending to injure the said plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace, with and amongst all his neighbors, and other good and worthy citizens of this

state, and cause to be suspected and believed by those neighbors and citizens that he, the said plaintiff, had been and was guilty of the offenses and misconduct hereinafter mentioned to have been charged upon and imputed to the said plaintiff, or any other such offenses and misconduct, and to subject him to the pains and penalties by the laws of this state made and provided against and inflicted upon persons guilty thereof, and to vex, harass, oppress, impoverish and wholly ruin him, the said plaintiff, heretofore, to wit, on the 10th day of February, A. D. 1850, at Fairview, to wit, at the county and state aforesaid, in a certain discourse which he, the said defendant, then and there had with the said plaintiff of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence of him the said plaintiff, given on the said trial, as such witness as aforesaid, in the presence and hearing of divers good and worthy citizens of this state, then and there in the presence and hearing of the said last-mentioned citizens, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence by him, the said plaintiff, given on the said trial as such witness as aforesaid, these false, scandalous, malicious and defamatory words following, that is to say: 'You (meaning the said plaintiff) swore false;' meaning that he, the said plaintiff, in giving his evidence as such witness, on the said trial, before said justice of the peace as aforesaid, had committed wilful and corrupt perjury.

And afterwards, to wit, on the 15th day of February, 1850, to wit, at the county and state aforesaid, in a certain other discourse which the said defendant then and there had with Simon P. Purney and divers good and worthy citizens and friends and neighbors of him, the said plaintiff, then and there present, and in hearing of the same, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the evidence by him, the said plaintiff, given on the said trial as such witness as aforesaid, before the said David M. Wycoff, Esquire, justice of the peace as aforesaid, these other false, scandalous and malicious and defamatory words

following, that is to say: 'He (meaning the said plaintiff) swore a lie.' 'He (meaning the said plaintiff) perjured himself.' 'He (meaning the said plaintiff) swore false;' meaning that he, the said plaintiff, in giving his evidence as such witness on the said trial, before the said David M. Wycoff, Esquire, justice of the peace as aforesaid, had sworn falsely.

Also for that whereas, heretofore, to wit, at Fairview, in the county of Fulton aforesaid, and before the speaking of the words in this count mentioned, a certain action had been depending and was tried before one David M. Wycoff, a justice of the peace in and for said county, who had jurisdiction of the said action, in which the said John V. D. Gaddis was plaintiff, and the said Nathan P. Sanford was defendant, in which said action, on the trial thereof, the said Nathan P. Sanford was sworn as a witness, and then and there gave evidence and testified in a manner material to the issue in said action. Yet the said defendant, well knowing the premises, but contriving to injure and ruin the said plaintiff in his reputation and good name, heretofore, to wit, on the 10th day of February, A. D. 1850, at and within the said county, and in the presence of divers citizens, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said action, and of and concerning the said evidence by him, the said plaintiff, given on the said trial as such witness as aforesaid, these other false, scandalous, malicious and defamatory words, that is to say: 'He (meaning the said plaintiff) swore a lie.' 'He (meaning the said plaintiff) swore false.' 'He (meaning the said plaintiff) perjured himself;' meaning that the said plaintiff, in giving his evidence as such witness on the trial of said action, before the said David M. Wycoff, justice of the peace as aforesaid, had been guilty of swearing falsely, and which said words, in their common acceptation, do amount to such charge, viz., that said plaintiff had sworn falsely on said trial."

In the lower court, a demurrer to these counts was sustained, but on appeal the judgment sustaining the demurrer was reversed. The court said, "we are of opinion that the first count, to which the demurrer was sustained, is good at the common law, and that

the fifth and seventh are good under the statute."

In *Shellenbarger v. Norris*, 2 Ind. 285, the first count was substantially as follows:

For that whereas, etc., a certain action of assumpsit was depending in the Court of Samuel G. Campbell, an acting justice of the peace within and for said county of Delaware, wherein one Abraham Shellenbarger was plaintiff and said John Norris was defendant, and which action was tried before said justice, on, etc., at the county aforesaid, and within the jurisdiction of said justice, and, on said trial, the plaintiff was, at the instance of the defendant, examined on oath administered by said justice, according to law, as a witness for the defendant; which testimony was material to the issue then and there being tried. Yet the defendant, well knowing the premises, etc., on, etc., at, etc., falsely and maliciously spoke and published to and of and concerning the plaintiff, and of and concerning said trial, and of and concerning the said evidence so given by the plaintiff, which was then and there material to the issue then being tried, the false, scandalous, malicious and defamatory words following, that is to say: "You (meaning the plaintiff) swore to a lie;" then and there meaning that the plaintiff had been guilty of perjury. And again, these words: "You (the plaintiff meaning) committed perjury." By means whereof, etc.

An objection to this count, on the ground that there was no averment that the justice had jurisdiction of the cause of action, was overruled. The court said, "the declaration before us shows with sufficient certainty (the objection being made on general demurrer) that the cause was within the justice's jurisdiction. The allegation that the plaintiff was examined on oath, administered by the justice according to law, is saying in substance that the justice had jurisdiction of the cause. He could not have administered an oath to the witness according to law unless the cause in which the oath was administered was within his jurisdiction. If the trial was *coram non judice*, the oath to the witness was administered, not according to law, but in violation of it."

In *Wood v. Southwick*, 97 Mass. 354, the declaration alleged, "that the de-

fendant publicly, falsely and maliciously accused the plaintiff of the crime of perjury, by words spoken of the plaintiff substantially as follows: 'You (meaning the plaintiff) swore to a God damn lie last spring in that case of *Obe's* about the poor-farm house, and I (meaning the defendant) can prove it;' and that these words referred to the plaintiff's testimony as a witness for the prisoner at the trial before Zadok A. Taft, esquire, a trial justice for Worcester, of a complaint against one Obadiah A. Wood for a criminal offense of which said trial justice had jurisdiction. The court said of this declaration, "the words set forth in this declaration and alleged to have been spoken by the defendant of the plaintiff are: 'You swore to a — lie last spring in that case of *Obe's* about the poor-farm house, and I can prove it.' This language would seem to be in itself actionable, as amounting to an accusation of the crime of perjury, without the aid of any colloquium or averments of extrinsic facts in explanation of the circumstances under which the words were uttered. In such a case the materiality of the false testimony with which the defendant has charged the plaintiff may well be presumed, in the absence of anything to show that it was known or understood to relate to an immaterial matter at the time by those in whose presence the defamatory accusation was made."

In *Gardner v. Dyer*, 5 Gray (Mass.) 22, the declaration was as follows:

"And the plaintiff says, the defendant publicly, falsely and maliciously charged the plaintiff of the crime of perjury, by words spoken of the plaintiff substantially as follows, viz: '*Walter* has been to *New Bedford*, and sworn to a damned pack of lies;' '*Walter* has been to *New Bedford*, and sworn to a pack of damned lies.' And the plaintiff says, that during a term of the *supreme judicial* court for the county of *Bristol*, holden at *New Bedford* in said county in the month of *November* last past, and by adjournment in the month of *February* last, he, the plaintiff, was summoned as a witness in the case of a libel for divorce, pending in said court at said *November* term, and did in said case of libel, before the *Hon. P. Merrick*, one of the judges of said court,

Form No. 18704.¹

(Ark. Dig. (1884), p. 1274, No. 86.)

Richard Roe, plaintiff, } *Pulaski Circuit Court.*
 } *Complaint at Law.*
 John Doe, defendant.

The plaintiff, *Richard Roe*, states that he was sworn as a witness and testified on the trial of an action in the *Pulaski Circuit Court* between *David Oliphant*, plaintiff, and *Thomas Story*, defendant, and afterward, about the *third day of August, 1884*, the defendant, *John Doe*, in the presence of divers persons, spoke concerning the plaintiff and his said testimony these slanderous words: "He swore a lie on the trial of the suit of *Oliphant* against *Story*;" thereby meaning that the plaintiff had committed the crime of perjury in his testimony on the trial of said action.

Wherefore, he prays judgment for the sum of *five thousand* dollars damages, and for other proper relief.

(Verification.)

*Richard Roe.*Form No. 18705.²(Precedent in *Dean v. Miller*, 66 Ind. 441.)³

[[Commencing as in Form No. 5915)]⁴ that at a term of the *Knox Circuit Court*, begun and held at the city of *Vincennes*, in *Knox county*, in the state of *Indiana*, on the ——— day of ———, ———, a certain action was pending, wherein the *State of Indiana* was plaintiff, and this defendant was defendant, wherein the defendant was prosecuted for keeping and maintaining a gambling house, and that, on the trial thereof in said court, and in due course of legal

testify as a witness, having been first sworn to testify in said matter to the truth, and being so under oath as a witness as aforesaid he did swear, and it is to this subject the defendant's malicious declarations refer."

A demurrer to this declaration was overruled. The court said: "It is quite unnecessary to examine minutely whether, under the former mode of declaring in actions of slander, this declaration would have been deemed sufficient; for the new practice act fully sanctions and authorizes this form of declaring."

In *Sharp v. Wilhite*, 2 *Humph. (Tenn.)* 434, the declaration alleged that, "*Wilhite*, on the *1st day of May, 1839*, in the county of *Campbell*, in a certain discourse which said *Wilhite* then and there had in the presence and hearing of divers good and worthy citizens, of and concerning the plaintiff, and concerning a trial that had been between the said plaintiff and defendant, before one *Matthew Douglass*, a justice of the peace for *Campbell county*, and of and concerning an oath which said plaintiff

had taken on said trial before *Matthew Douglass*, a justice of the peace as aforesaid, in proving an account of him, the said plaintiff, on said trial, before said justice of the peace, then and there in the presence, etc., did falsely and maliciously speak and publish the following false and slanderous words of and concerning the plaintiff, and of and concerning his having proven his account by his oath before said justice of the peace on said trial, that is to say, 'you (meaning the plaintiff) have sworn a lie knowingly.'" It was held that there was "no defect in this declaration."

1. See, generally, *supra*, note 1, p. 246.

2. *Indiana*. — *Horner's Stat. (1901)*, § 372.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 246.

3. On demurrer, this complaint was held sufficient.

4. The matter to be supplied within [] will not be found in the reported case.

proceedings therein, this plaintiff, being duly sworn, made oath and testified touching the guilt of the defendant in said cause, and material to the issue joined therein; and the defendant, wickedly intending to injure and defame the plaintiff's character, did afterward, in the presence of *Dexter Gardener, William McChrisogen*, and divers other citizens, falsely and maliciously speak, of and concerning the plaintiff and his said oath and testimony in said cause, as aforesaid, the following false and slanderous words, to wit: "You (the plaintiff meaning) swore to a lie." "You (the plaintiff meaning) swore against me (the defendant meaning) what was not true." "You (the plaintiff meaning) swore false against me" (the defendant meaning). Whereby the defendant meant to charge, and was understood by those who then and there heard said conversation to charge, that the plaintiff had committed the crime of perjury. Wherefore, [(concluding as in Form No. 3915).]¹

Form No. 18706.²

(Mass. Pub. Stat. (1882), c. 167, § 94.)

(Title of court and cause as in Form No. 6942.)

And the plaintiff says that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of perjury, by words spoken of the plaintiff substantially as follows: (*Here set forth the words — no innuendoes are necessary*).

Jeremiah Mason, Attorney for Plaintiff.

Form No. 18707.³

(Title of court as in Form No. 6951.)

John Doe complains of *Richard Roe* of a plea of trespass on the case, for this, to wit: that whereas the said plaintiff is a good, true, just and honest citizen of this commonwealth, and as such hath always behaved and conducted himself, and until the committing of the grievances by the said defendant as hereinafter mentioned was always reputed, esteemed and accepted by and amongst all his neighbors, and other good and worthy citizens of this commonwealth to whom he was known, to be a person of good name, fame and credit; and whereas also the said plaintiff hath never been guilty, nor until the time of the committing of the said several grievances by the said defendant, as hereinafter mentioned, been suspected to have been guilty of perjury or false swearing (*the crime charged*), or of any other crime, as hereinafter stated to have been charged upon or imputed to him by the said defendant; by means whereof the said plaintiff, before the committing of the several grievances by the said defendant, as hereinafter mentioned, had deservedly obtained the good opinion and credit of all his neighbors, and other good and worthy citizens of this commonwealth, to whom he was known (*Here state*

1. The matter to be supplied within [] will not be found in the reported case.

2. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 246.

3. See, generally, *supra*, note 1, p. 246.

the special inducement to explain the slander, as thus: "and whereas also, before the committing of the several grievances by the said defendant, as hereinafter mentioned, to wit, on the tenth day of May, in the year 1902, a certain suit had been and was depending in the Circuit Court of Albemarle county, to which one Samuel Short was plaintiff and the said Richard Roe was defendant; and whereas the said Samuel Short, having given due notice to the said Richard Roe of the time and place of taking the deposition of the said plaintiff, to be used and read as evidence according to law on the trial of the said suit, called upon and required of the said plaintiff afterwards, to wit, on the eleventh day of May, 1902, to give his deposition, to be read and used as evidence as aforesaid on the trial of the said suit; and the said plaintiff being so called on and required, was duly sworn, and did take his corporal oath upon the Holy Gospel of God, before one Abraham Kent, a justice of the peace (or commissioner in chancery), duly commissioned and qualified in and for the county of Albemarle, and then and there having lawful power and authority to administer an oath to the said plaintiff in that behalf; and the said plaintiff being so sworn, and having taken his corporal oath, was then and there examined, and did proceed to answer to certain written interrogatories propounded to him by the said Samuel Short, and to declare and state in writing the truth, the whole truth, and nothing but the truth, in reference to the subject-matter of the said interrogatories, which evidence and statement of the said plaintiff, in answer to the said interrogatories, were pertinent and material to the said suit of Samuel Short against the said Richard Roe, then pending as aforesaid.") And the said plaintiff says that the said defendant, well knowing the premises, but maliciously and wickedly contriving and intending to injure the said plaintiff in his aforesaid good name, fame and character, and bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed by and amongst his neighbors, and other good and worthy citizens of this commonwealth, to whom he was known, that the said plaintiff had been, and was, guilty of perjury, and to subject him to the penalties prescribed by law therefor, and also to vex, harass, oppress and impoverish and wholly ruin the said plaintiff, heretofore, to wit, on the first day of June, 1902, in a certain discourse which the said defendant then and there had with the said plaintiff, in the presence and hearing of divers good and worthy citizens of this commonwealth, the said defendant, in the presence and hearing of the said last mentioned citizens, falsely and maliciously spoke and published of and concerning the said plaintiff, and of and concerning the said plaintiff's answers to the said interrogatories in the deposition aforesaid contained, the false, scandalous, malicious and defamatory words following, that is to say, "beautiful deposition" (meaning the answers aforesaid); "there is not one word of it (meaning the said deposition) true, and you (meaning the said plaintiff) know it, Mr. Doe (meaning the plaintiff); you are a most infamous man." By means of which said premises, the said plaintiff says that he has been greatly injured in his said name, fame and credit, insomuch that divers good and worthy citizens of this commonwealth, and especially

one *Samuel Smith* and one *Charles Hatch*, and others, who before and at the time of committing of the said grievances by the said defendant had been used and accustomed to deal with, and who would otherwise have continued to deal with the said plaintiff in the way of his trade and business as a factor or commission merchant, have, and each of them hath, from thence hitherto wholly failed and refused so to do, and also, by means of the premises aforesaid, the said plaintiff hath been and is otherwise greatly injured and damnified, to the damage of the said plaintiff *five thousand* dollars; and therefore he brings his suit.

Jeremiah Mason, p. q.

(12) REMOVAL OF BOUNDARY MARK.¹

Form No. 18708.²

(Bullitt's Civ. Code Ky. (1895), p. 564.)

(Commencing as in Form No. 5918) that, (when and) before the defendant *Richard Roe*, published the slander herein complained of, *John Brown* claimed (as patentee) a tract of land in *Lee* county bounded as follows: (*describe it by abutments or by metes and bounds*), and containing, according to the survey thereof, *forty* acres; and a corner-tree to said survey had been removed (or *and it had been charged that a corner-tree to said survey had been removed*), which removal the defendant charged to have been made wilfully and fraudulently; and that, on or about the *tenth* day of *May*, 1900, the plaintiff had a conversation with the defendant concerning the removal (or *the alleged removal*) of a corner-tree to said survey, and the charge that it had been wilfully and fraudulently removed, in which conversation the defendant falsely and maliciously spoke and published in the presence and within the hearing of *William West* (or of *William West and Samuel Short*, or of *divers persons*) these words of and concerning the plaintiff and the wilful and fraudulent removal of a corner-tree to said survey: "You removed it;" meaning thereby that the plaintiff had wilfully and fraudulently removed a corner-tree to said survey.

2. (*A paragraph may be added asserting a right to special damages.*)

And the plaintiff says that the defendant resides in *Lee* county (or that the aforesaid slander was published by the defendant in *Lee* county).

Wherefore, (*concluding as in Form No. 5918*).

(13) UNCHASTITY.³

1. **Requisites of Complaint, Declaration or Petition, Generally.** — See *supra*, note 1, p. 221.

Insufficient Precedent. — In *Beswick v. Chappel*, 8 B. Mon. (Ky.) 486, the words alleged to be slanderous were, "you moved the corner tree." The innuendo was as follows, "the defendant thereby referring to and speaking of a corner tree between said plaintiff and the survey of said Chappel." It was held that the words were not actionable, because

there was no distinct averment showing that the words were used in reference to some corner tree of a particular survey.

2. *Kentucky.* — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 221.

3. **Requisites of Complaint, Declaration or Petition, Generally.** — See *supra*, note 1, p. 221.

(a) *Adultery.*¹

Inducement — *Generally.* — If the words charged do not *per se* impute a want of chastity, they must be connected with an averment of the extrinsic facts necessary to show that they contained such imputation; *e. g.*, where the words charge a past pregnancy and miscarriage, the complaint must aver that the plaintiff was unmarried at such a time as would make the pregnancy charged an imputation on her chastity; and this, notwithstanding it is alleged that she is an infant and unmarried. *Smith v. Gaffard*, 31 Ala. 45.

The word "screwed" does not of itself import sexual intercourse, but it may, in certain localities, be used to impute the charge of whoredom, and where that is the case a complaint for slander founded upon such a use of the word should affirmatively allege its import at the time when and place where it is used. *Miles v. Vanhorn*, 17 Ind. 245.

Reference to Statute. — In an action for slander for words charging the plaintiff with adultery or fornication, no reference need be made in the declaration to the statute making such words actionable. *Elam v. Badger*, 23 Ill. 445.

Special Damages. — In *New York*, it is provided by statute that in an action for slander, brought by a woman, for words imputing unchastity to her, it is not necessary to allege or prove special damages. If the plaintiff is married, the damages recovered are her separate property. *N. Y. Code Civ. Proc.*, § 1906.

In *Brown v. Moore*, 90 Hun (N. Y.) 169, the court said, "this section [section 1906] is the substance of chapter 219 of the laws of 1871. Prior to that time, words imputing unchastity to a woman were not actionable *per se*; but if special damage, as a result of such words, was alleged in the complaint and proved upon the trial, it might be recovered by the party aggrieved."

1. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 3, p. 253.

Married. — That the plaintiff was married must be alleged. *Christal v. Craig*, 80 Mo. 367.

Special Damage. — Where the words involve a charge of adultery, special damage need not be alleged. *Stieber v. Wensel*, 19 Mo. 513.

Precedents — *Sufficient.* — In *Brown v. Lamberton*, 2 Binn. (Pa.) 34, the declaration, which contained but one count, stated, "that whereas *William Brown*, the plaintiff, was an upright and virtuous man, and was married and had a wife in full life, yet the defendant, *Simon Lamberton*, intending to bring him into disgrace, and to cause him to suffer the punishment which the law inflicts upon the heinous crime of adultery, did falsely, maliciously and wickedly utter and publish the following false, scandalous and opprobrious English words, in the presence and hearing of divers good citizens of this commonwealth, '*William Brown* played with *Mary Parkinson* in the fother room' (meaning thereby that the said *William* had committed the heinous crime of adultery in the fodder-room with the said *Mary*, 'and that he could prove it by *Sally Davidson*' (meaning thereby that the said *Simon* could prove by *Sally Davidson* that he, the said *William* and *Mary*, had committed the heinous crime of adultery), 'and that *Robert*, the second son of *Parkinson*, was belonging to *Brown*' (meaning thereby that the said *William* was the father of and did beget the said *Robert*, the son of the said *Mary Parkinson* and *Richard Parkinson*, her husband), 'and that one or two of the other children was *Brown's*' (meaning thereby that the said *William* was the father of and did beget one or two of the other children of the said *Mary Parkinson* and *Richard Parkinson*, her husband)."

The jury having found a verdict for the plaintiff, the defendant moved in arrest of judgment, 1. Because the defendant was not charged in the declaration with having spoken the supposed slanderous words in the declaration mentioned, of and concerning the said *William Brown*, the plaintiff. 2. Because the words in the declaration mentioned were not actionable in themselves, and no special damage was laid; and the court below accordingly arrested the judgment; but the supreme court reversed the judgment of the court below.

In *Sturtevant v. Root*, 27 N. H. 69, the third count alleged that the defendant spoke of and concerning *Elizabeth*, wife of the plaintiff, *George Sturtevant*, the following words: "*Paget*

Form No. 18709.¹(Precedent in *Downing v. Wilson*, 36 Ala. 718.)²

[(*Venue and title of court and cause as in Form No. 5907.*)]³
Elizabeth Wilson } The plaintiff claims of the defendant *twenty*
 vs. } *thousand* dollars, as damages for falsely and
Matthew Downing. } maliciously charging plaintiff with a want of
 chastity, by speaking of and concerning her, in the presence of divers
 persons, in substance as follows: "I am not afraid to say that
Jemison Ware is keeping her (meaning plaintiff) in adultery; I believe
 that *Jemison Ware* kept her in adultery; I believe that *Jemison Ware*
 keeps her in adultery; I believe that *Ware* keeps her; *Bud* (mean-
 ing defendant's son) and *Edmund Wilkinson* acknowledged that they
 gave it as their opinion that *Jemison Ware* was keeping the widow
Wilson (meaning plaintiff), and I am not afraid to say so myself, for
 I believe it, and if she wants her character, she shall have it;" there-
 by, and by each and all of the foregoing expressions, imputing to
 plaintiff a want of chastity, on (to-wit) the *1st August, 1856*, and on
 divers other days between that time and the commencement of this
 suit.

[*Jeremiah Mason*, Att'y for Pl'ff.]⁴Form No. 18710.⁵(Precedent in *Steinbuechel v. Wright*, 43 Kan. 308.)⁶

[(*Venue and title of court and cause as in Form No. 5917.*)]³
 Said *Ida A. Wright* now comes by leave of court, and for amended
 petition herein says: That she is and at the time of the grievances

left his wife at my father's, and then went down to *George's* with his horse and sleigh, and wanted *George* to take care of his horse, and while he was gone *Paget* and his wife went into the bed-room together; and when *George* came back from the barn he found them both there." It was held that the words imputed the crime of adultery to the plaintiff's wife and were actionable.

Insufficient. — In *Adams v. Stone*, 131 Mass. 433, the declaration alleged that the defendant, on November 10, 1879, at Springfield, "publicly, falsely and maliciously accused the plaintiff of the crime of adultery, by words spoken of the plaintiff to one Mrs. *William Brown*, substantially as follows, to wit: 'Mr. *Harvey Adams* was intimate with his brother's wife for a number of years' (meaning thereby that the plaintiff had committed adultery with his brother's wife for a number of years, meaning the wife of *Lewis Adams*)." A demurrer to this declaration was sustained.

1. *Alabama.* — Civ. Code (1896), § 1440.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 254.

2. The defendant demurred to the entire complaint and to each specification thereof separately; the plaintiff waiving a specification of the grounds of demurrer and joining in the demurrer. The demurrer was overruled and this judgment was affirmed.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by [] will not be found in the reported case.

5. *Kansas.* — Gen. Stat. (1897), c. 95, § 125.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 254.

6. No objection was made to the sufficiency of this amended petition. The defendant answered and a verdict was rendered for the plaintiff; which was overturned, however, on the ground that it was excessive.

hereinafter mentioned was a married woman, and the wife of said plaintiff, *John H. Wright*; that said *Herman Steinbuchel*, well knowing the premises, on or about the 1st day of June, 1886, in a certain discourse in the presence and hearing of divers persons, maliciously spoke and published of and concerning said *Ida A. Wright* the false and malicious words following, to wit: "She (meaning said *Ida A. Wright*) is a common strumpet. He (meaning said *Ida A. Wright's* said husband) has picked her (meaning said *Ida A. Wright*) up to ride around with him (meaning said *John H. Wright*) for his (meaning said *John H. Wright's*) own use. They (meaning said *Ida A. Wright* and her said husband) are not married." By means whereof *Ida A. Wright* has been damaged in her reputation in the sum of \$10,000. Wherefore, said *Ida A. Wright* prays for judgment against said defendant for said sum of \$10,000.

[(Signature and verification as in Form No. 5917.)]¹

Form No. 18711.²

(Precedent in *Henicke v. Griffith*, 29 Kan. 517.)³

[(Commencement as in Form No. 5917.)]¹

That the defendant, prior to the commencement of this action, and at a time when the plaintiff was, as she now is, a married woman, as the defendant well knew, in a certain discourse which she, the defendant, had in the presence and hearing of divers persons, maliciously spoke and published of the plaintiff the false and malicious words following, that is to say: "I do not visit Mrs. *Henicke*" (meaning the plaintiff); "would be ashamed to be associated with her" (meaning the plaintiff); "Mrs. *Henicke* keeps that

1. The matter to be supplied within [] will not be found in the reported case.

2. *Kansas*. — Gen. Stat. (1897), c. 95, § 125.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 1, p. 254.

3. This is the first count of the petition. There was a second count, substantially like it. A decision of the trial court sustaining a demurrer to this first count was overruled and the count held sufficient. The court said, "the only real question * * * is whether the words used impute the crime. Obviously they do not in terms charge it. The charge specifically is, that the plaintiff, a married woman, keeps a man other than her husband. This, by innuendo, plaintiff alleges, charges adultery. Now the office of the innuendo is to explain doubtful words or phrases, and annex to them their proper meaning. Townsh. Sland. & Lib., § 335, and cases cited in note; 12 Abb. U. S. Dig. (1st S.), p. 510,

par. 546, and cases cited. The words charging that a married woman keeps some man other than her husband are, to say the least, of doubtful import; and whether they were spoken by the speaker, and understood by the hearers, as charging the crime of adultery, or a mere ordinary employment of help, is a question of fact to be settled by a jury. The innuendo alleges the former interpretation, and taking all the language charged to have been used by defendant, it cannot be held, as matter of law, that such an interpretation must be rejected. It seems to us very probable that the language charged, taken as a whole, would be understood by an ordinary hearer as imputing the crime; and the innuendo in effect alleges that it was so used and understood. The pleading, therefore, presents a question of fact which cannot be disposed of by the court, but must be submitted to a jury, to determine whether the crime was so intended and understood."

grocer man, *Broadwell* — he calls two or three times a day; she (meaning the plaintiff) thinks more of *Broadwell* than she does of her husband; *Henicke* (meaning the husband of the plaintiff) is a mere ornament which she keeps there for certain purposes; *Broadwell* remains in the house for hours when *Henicke* (meaning the husband of the plaintiff) is away, alone with Mrs. *Henicke*" (meaning the plaintiff); — the defendant meaning by such false and malicious words, that the plaintiff was an unfaithful wife, and an unchaste woman; and that she, the plaintiff, had been guilty of the crime of adultery. By means of the publishing of said false and malicious words the plaintiff is generally and greatly injured in her good name and reputation, and has been rendered liable to prosecution for adultery, to the damage of the plaintiff of \$5,000.

[(*Signature and verification as in Form No. 5917.*)]¹

Form No. 18712.³

(Precedent in *Marble v. Chapin*, 132 Mass. 225.)³

[(*Commencing as in Form No. 18701*)]¹ that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of adultery by words spoken of the plaintiff substantially as follows: "Mr. *Marble* has had intercourse with you" (meaning a certain woman to whom said words were spoken by the defendant, the person so addressed by said defendant being a married woman, and said *Marble* being an unmarried man).

[(*Signature as in Form No. 18701.*)]¹

(b) *Fornication.*⁴

1. The matter to be supplied within [] will not be found in the reported case.

2. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

3. The sufficiency of this declaration was not objected to. On trial had, judgment was entered for the plaintiff.

4. *Requisites of Complaint, Declaration or Petition, Generally*. — See *supra*, note 3, p. 253.

Precedents. — In *Truman v. Taylor*, 4 Iowa 424, the petition averred in substance that the plaintiff, Rebecca Truman, in the year 1852, was unmarried and resided with her father in the state of Illinois; that in 1853 she removed with her father to this state, and in October, 1854, was married to her present husband, John T. Truman. It was also averred that while the said Rebecca resided in said state of Illinois she was unmarried and single, and that she did not marry until after her removal to Iowa as aforesaid; that in June, 1856, the wife of the defendant spoke and published of and concerning the said Rebecca the following

words in the presence of one Eliza J. England and others (the persons to whom said words were spoken having knowledge that said Rebecca was unmarried while in said state of Illinois), to wit: "*Rebecca Truman* had a child in *Illinois*, and it was buried, and the tale was buried with it. It is not the first one she has had" (alluding to a child of said *Rebecca* born after marriage); "she had one in *Illinois*, and it was buried, and the tale was buried with it. You (meaning the persons in hearing) would believe it if you were to hear *Sarelda Rawlins* tell it." It was objected to this petition that the words spoken were not actionable *per se*, and that as no special damages were claimed the verdict and the judgment should have been for the defendant. But the court said, "the words spoken are actionable *per se*, not upon the ground that they import a charge of some punishable offense or crime, but on the simple and, as we think, salutary ground, that words imputing to the female a want of chastity are actionable without any proof of special

Form No. 18713.¹(Precedent in *Page v. Merwin*, 54 Conn. 427.)²[[*Commencement as in Form No. 5912.*]]³

1. On or about *December 21st*, 1882, to *May 1st*, 1883, the plaintiff was in the employ of the defendant at work upon his farm, and the plaintiff during the time of the employment aforesaid lived in the family of the defendant at his house in said *Woodbridge*.

2. On *September 8th*, 1879, the defendant was duly appointed by the probate court for the district of *New Haven*, the guardian over the person and estate of one *Jenny L. Downs*, then of *Hamden* in said county, a minor female, and from the time of such appointment up to the date of this writ and complaint, has been her lawful guardian as aforesaid. And during all the said time up to or about the *6th* day of *December*, 1883, the said *Jenny L. Downs* has resided with the defendant at his said house in *Woodbridge*.

3. On *December 6th*, 1883, the said *Jenny L. Downs* was delivered of an illegitimate child in the town of *Hamden* in said county.

4. On or about *December 10th*, 1883, the defendant spoke in the hearing of *Frederick Goodwin*, of said *Woodbridge*, and of other persons, the following words: "The child (meaning the illegitimate child aforesaid delivered of said *Jenny L. Downs*) is *Page's*" (meaning the plaintiff's). "*Page* (meaning the plaintiff) is the father of the child" (meaning the illegitimate child as aforesaid). "The young one (meaning the illegitimate child aforesaid) is *Page's*" (meaning the plaintiff's, and meaning to impute thereby that the plaintiff had committed the crime of fornication with the said *Jenny L. Downs*).

5. Said words were false and malicious.

[The plaintiff claims (*concluding as in Form No. 5912.*)]⁴

damage. However much other, and perhaps a majority, of states may have hesitated in adopting this rule, in ours, at least, it may now be regarded as settled."

In *Robbins v. Fletcher*, 101 Mass. 115, the declaration alleged that the defendant accused the plaintiff, being a single woman, of the crime of fornication, by words substantially as follows: "*Maria Robbins* (meaning the plaintiff) has had a baby." The sufficiency of this declaration was not questioned.

In *Doherty v. Brown*, 10 Gray (Mass.) 250, the declaration averred:

"1st. That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows, viz: 'That you (meaning the plaintiff) are a whore and a common prostitute, and you (meaning the plaintiff) associate with prosti-

tutes.' 2d. That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows: 'She (meaning the plaintiff) is a whore, a damned whore, and a common prostitute.'" The sufficiency of this declaration was not questioned.

1. See, generally, *supra*, note 4, p. 257.

2. A demurrer to this complaint on the ground that the words uttered by defendant were not slanderous *per se*, and that there was no allegation that the plaintiff had sustained any loss or damage by reason of their utterance, was overruled.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [] will not be found in the reported case.

Form No. 18714.¹

(Bullitt's Civ. Code Ky. (1895), p. 565.)

(Title of court and cause as in Form No. 5918.)

The plaintiff, *Fannie Roe*, says that when and during several years (or months) before the defendant, *John Doe*, published the slander herein complained of, Mrs. *Susan Hall* kept a house in the town of *Frankfort*, which, as the defendant knew when he published said slander, was generally reputed in said town to be kept for the meeting of men and women for the purpose of having illicit sexual intercourse; and that, as the defendant knew when he published said slander, *Samuel Short* resided in said town during the above mentioned period (and several years before); and that, on or about the tenth day of *May*, 1900, the defendant, in *Lee* county, falsely and maliciously spoke and published in the presence and within the hearing of the said *Samuel Short* these words of and concerning the plaintiff in the said house: "She met *John Brown* at *Mistress Hall's* last Monday night;" meaning thereby that the plaintiff had committed fornication with *John Brown* on said night.

Wherefore, (concluding as in Form No. 5918).

Form No. 18715.²

(Bullitt's Civ. Code Ky. (1895), p. 565.)

(Title of court and cause as in Form No. 5918.)

The plaintiff, *Fannie Roe*, says that, on or about the tenth day of *May*, 1900, the defendant, *John Doe*, who resides in *Lee* county, (or in *Lee* county) falsely and maliciously spoke and published in the presence and within the hearing of *Samuel Short* (or *Samuel Short and William West*, or of divers persons), of and concerning the plaintiff, these words: "She is a whore" (or these words: "*I have had sexual intercourse with her divers times*").

Wherefore, (concluding as in Form No. 5918).

Form No. 18716.³(Precedent in *Barnett v. Ward*, 36 Ohio St. 107.)⁴*[(Commencement as in Form No. 5929).]⁵*

That the plaintiff, at the time of the committing by the said defendant of the grievances hereinafter named, was, and still is, an unmarried woman, and did then sustain a good name and character among her neighbors and acquaintances for virtue and chastity, and was

1. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 4, p. 257.

2. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 4, p. 257.

3. *Ohio*. — Bates' Anno. Stat. (1897), § 5093.

See also list of statutes cited *supra*, note 1, p. 220; and generally, *supra*, note 4, p. 257.

4. It was held that the words set forth imported the crime of fornication and that the petition stated facts sufficient to constitute a cause of action.

5. The matter to be supplied within [] will not be found in the reported case.

never suspected of the crime of fornication. Yet the said defendant, well knowing the premises, and maliciously intending to injure the good name and character of the said plaintiff, and to cause it to be believed that she had been unchaste and guilty of fornication, on, to wit, *October 20, A. D. 1873, at Warren county, Ohio*, in a certain discourse which he there had, of and concerning the plaintiff, and in the presence and hearing of divers good people, falsely and maliciously spoke and published, of and concerning the said plaintiff, the false, scandalous and malicious words following:

1. That is to say, "She (meaning the plaintiff) slept with *John Fox*."

2. "*Angeline Ward* (meaning the plaintiff) was sleeping with *John Fox* (meaning an unmarried man) when her watch was stolen."

3. "*Fox* (meaning an unmarried man, as aforesaid) said he was sleeping with *Angeline* (meaning the plaintiff) when her watch was stolen."

4. "She (meaning the plaintiff) was sleeping with *John Fox* (a man having that name) when her watch was stolen."

5. "*Angeline Ward* (meaning the plaintiff) was sleeping with *John Fox* (meaning a man who had before that time stolen the plaintiff's watch) when her watch was stolen."

6. "She (meaning the plaintiff) was sleeping with *Fox* (meaning a man by the name of *John Fox*) the night her (the plaintiff's) watch was stolen."

7. "*John Fox* (meaning a man who has stolen plaintiff's watch) was sleeping with *Angeline* (meaning the plaintiff) when her watch was stolen."

And by means of the speaking of said defamatory words the said plaintiff hath been greatly injured in her good name and character, to the damage of the plaintiff \$10,000.

[Wherefore, (concluding as in *Form No. 5929*).]¹

b. Words Actionable as Imputing a Loathsome Disease.²

Form No. 18717.³

(Precedent in *Golderman v. Stearns*, 7 Gray (Mass.) 181.)⁴

[(*Title of court and cause as in Form No. 6942*).]⁵

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. **Action Lies.**—An action will lie, without proof of special damage, for speaking words charging the plaintiff with having a loathsome or contagious disease, the effect of which imputation would be to exclude the plaintiff from society. *Bruce v. Soule*, 69 Me. 562; *Golderman v. Stearns*, 7 Gray (Mass.) 181.

Requisites of Complaint, Declaration or Petition, Generally.—See *supra*, note 1, p. 221.

Charging Offense in Past Tense.—The offense must not be charged in the past

tense, as the ground of the action is not that the plaintiff has been charged with a legal or moral offense, but that he has been charged with an offense which tends to exclude him from society. *Bruce v. Soule*, 69 Me. 562; *Golderman v. Stearns*, 7 Gray (Mass.) 181.

3. *Massachusetts*.—Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 2, this page.

4. No objection was made to the sufficiency of this complaint.

5. The matter to be supplied within [] will not be found in the reported case..

And the plaintiff says, that the female defendant accused him of having had a loathsome venereal disease, and, with that disease upon him, having contracted marriage, and given the disease to his wife, by words spoken of the plaintiff, who was then and there lately married to his wife, substantially as follows: "*Golderman* has the venereal disease. It is an old affair, and being married has brought it on again. He is the guilty one. He has given it to his wife."

[(*Signature as in Form No. 6942.*)]¹

c. Words Actionable as Injurious to a Person in His Business, Trade or Profession.²

(1) CHARGING BUTCHER WITH SELLING DISEASED MEAT.

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Complaint, Declaration or Petition, Generally.** — See *supra*, note 1, p. 221.

Inducement — Respecting Trade. — Where the alleged slanderous words are actionable *per se* because spoken of the plaintiff in regard to his trade, office or profession, his pleading must commence with an inducement respecting such trade, office or profession. *Pollock v. Hastings*, 88 Ind. 248; *Burbank v. Horn*, 39 Me. 233; *Dicken v. Shepherd*, 22 Md. 399; *Burtch v. Nickerson*, 17 Johns. (N. Y.) 217; *Gilbert v. Field*, 3 Cal. (N. Y.) 329; *Carroll v. White*, 33 Barb. (N. Y.) 615; 1 Chit. Pl. (3d. Am. from 2d Lond. ed.) 365.

Good Character. — Where the alleged slanderous words merely impute to the plaintiff insolvency or incapacity in the way of his trade, etc., and do not affect him in his moral character, the inducement of good character is inapplicable. *Burbank v. Horn*, 39 Me. 233.

Reference to Previous Count. — Where, in the first count of a declaration in slander, it was alleged in the introductory part of it that the plaintiff was a merchant, which was omitted in the second and third counts, but the words were alleged to have been spoken in another discourse of and concerning the plaintiff "in his business of a merchant, and of and concerning his said books of account which he kept with his customers and others, as such merchant as aforesaid," it was held that the reference to the first count was sufficient to cure the defect. *Loomis v. Swick*, 3 Wend. (N. Y.) 205.

Colloquium. — That the alleged slanderous words were spoken of and concerning the plaintiff, and of and

concerning his trade, office or profession, must be alleged. *Orr v. Skofield*, 56 Me. 483; *Barnes v. Trundy*, 31 Me. 321; *Blumhardt v. Rohr*, 70 Md. 328; *Carroll v. White*, 33 Barb. (N. Y.) 615.

In *Titus v. Follet*, 2 Hill (N. Y.) 318, a declaration in slander by John Titus and another averred that, in a discourse of and concerning the plaintiffs and their business as partners, the defendant said: "*John Titus & Co.* (meaning the plaintiffs) are down." It was held on special demurrer that the declaration was bad for want of a direct allegation that the words charged were spoken of and concerning the plaintiffs, etc., and that the defect could not be supplied by an innuendo. But it was also held that had the declaration averred that the colloquium was with the plaintiffs and that the words were spoken in the first person as "you," etc., it would have been held good on special demurrer and without an innuendo.

In *Burtch v. Nickerson*, 17 Johns. (N. Y.) 217, the declaration alleged that the plaintiff, at the time of publishing the alleged slanderous words, was, and long before had been, a blacksmith, and carried on the business of a blacksmith, honestly, and found and provided all such iron as was necessary and required of him in his business; and made correct charges, and had always kept honest, true and faithful accounts with all persons relating to his trade, etc.; yet the defendant, in order to injure the plaintiff in his business and to cause to be believed, etc., in a certain discourse of and concerning the plaintiff in his said business, spoke and published the following words, etc. This declaration was held sufficient without a more special averment that there was a discourse of and concerning the plain-

tiff's trade, and that the words were spoken of his trade.

Special Damages — *Generally.* — Where the alleged slanderous words are actionable because affecting the plaintiff in his trade, office or profession, special damages need not be alleged. *Butler v. Howes*, 7 Cal. 87; *Franklin v. Browne*, 67 Ga. 272; *Morasse v. Brochu*, 151 Mass. 567; *Henkel v. Schaub*, 94 Mich. 542.

But see *contra* *Curry v. Collins*, 37 Mo. 324.

Loss of Customers. — Where special damages are sought upon the ground that the plaintiff lost customers by reason of the speaking of the alleged slanderous words, the names of such customers must be stated, in order that the defendant may be enabled to meet the charge if it be false; and a general allegation of loss of customers is insufficient. *Morasse v. Brochu*, 151 Mass. 567; *Havemeyer v. Fuller*, (N. Y. Super. Ct. Tr. T.) 60 How. Pr. (N. Y.) 316; *Hallock v. Miller*, 2 Barb. (N. Y.) 630.

Precedent. — In *Phillips v. Hæfer*, 1 Pa. St. 62, the first count charged that, "Whereas the said *Daniel Hæfer* now is, and for divers years now last past hath been, a farmer, and hath for all the said time used and exercised the art, trade, and business of a farmer, without any falsity, trick, or deceit, and always well and faithfully observing and keeping up his credit and days of payment of all sums of money contracted by him in his said business with all his contracts, and hath thereby, for all the time aforesaid, quietly and honestly sought and got his livelihood and faculty of living, by means whereby, etc. Yet the said *Peter Phillips*, well knowing all and singular the premises aforesaid, but greatly envying the happy state and condition of the said *Daniel Hæfer*, and contriving and maliciously intending to hurt, injure, degrade and damnify the said *Daniel Hæfer* in his good name, fame, reputation, and credit in his business aforesaid; and to cause him, the said *Daniel*, to be reputed to be a person of no credit, and unable to pay his just and true debts, on the — day of *October*, in the year of our Lord one thousand eight hundred and *forty-three*, at —, in the county aforesaid, in a certain discourse which he, *Peter Phillips*, then and there had with divers worthy citizens of this

commonwealth, of and concerning the said *Daniel Hæfer*, in his business aforesaid, as well as credit; he, the said *Peter Phillips*, then and there falsely and maliciously said and proclaimed openly, and loudly published these false, feigned, scandalous, and opprobrious German words following, of the said *Daniel Hæfer*, in his business and credit aforesaid, in the presence and hearing of those citizens, to wit: 'Der Schrieff komt anes vanden tag ruff, und verkauft dem *Daniel Hæfer* si säch — er het de letzte woche schon komme solle, oder yezt komft er;' those German words meaning, when translated into the English language, 'The sheriff is coming up one of these days, and will sell *Daniel Hæfer's* goods or things — he was to have come last week already, but now he will come;' — meaning that the sheriff would sell out *Daniel Hæfer*; that he was to have done so the week before, but that he would certainly now come for the purpose of selling the said *Daniel Hæfer* out."

The second count charged that "The said *Peter Phillips* then and there falsely and maliciously said and proclaimed openly, and loudly published these other false, feigned, scandalous, and opprobrious German words following, of the said *Daniel Hæfer* to the said *Rebecca Borky*, in the presence and hearing of those citizens, they, the said citizens, well understanding, to wit: 'Hat ier noch etwas an den *Daniel Hæfer* zu fottern-wen dier hat, so misset ihr anpacken schonst grieg dir nix-der Schrieff ferkaufte ihne aus' — they, the said citizens, well understanding the false and scandalous German words, etc. Those German words, being translated into the English language, meaning and purporting as follows — 'Have you any claims against *Daniel Hæfer* yet (at this time)? if you have you must attack him, or you will get nothing; the sheriff will sell him out;' — meaning that if they had any claim against *Daniel Hæfer* they must sue him, the said *Daniel Hæfer*, or they would get nothing; that the said *Daniel Hæfer* would be sold out by the sheriff."

The third count charged that "The said *Phillips* then and there falsely and maliciously said, proclaimed openly and loudly, and published these other false, feigned, scandalous, and opprobrious German words following, of the said *Daniel Hæfer* to the said *Henry*

Weber, in the presence and hearing of divers good citizens of this commonwealth, to wit: 'Wan du den *Daniel Hæfer* nicht pushe dуст fur dem *Stephen* und *Heinrich Kauffman* ihr geld den verluhrest duest, dem *Schrieff* kom't eins von dieser tage heude oder morgen, und verkauft dem *Daniel Hæfer* sein sach.' These false, feigned, and scandalous German words, being translated into the English language, have the same meaning and purport as follows, to wit:— 'If you don't proceed against *Daniel Hæfer* for *Stephen* and *Henry Kauffman's* money, you will lose the same. The sheriff will come one of these days—to-day or to-morrow—and sell *Daniel Hæfer's* property;'—meaning that if he, the said *Henry Weber*, did not sue him, the said *Daniel Hæfer*, meaning for the moneys due *Stephen* and *Henry Kauffman*, which the said *Henry Weber* was appointed to collect, he (*Henry Weber* meaning) would lose the same. That the sheriff would come one of these days—to-day or to-morrow—for the purpose of selling him (the said *Daniel Hæfer* meaning) out:—by means of speaking and publishing of which said several false, feigned, scandalous and opprobrious words, he, the said *Daniel Hæfer*, is not only much hurt and prejudiced in his good name, fame, credit, etc.; that they, the said *Henry Weber* and *Jacob Yoder*, *Israel Miller*, *Jacob Haas*, and *Elizabeth Stout*, for the recovery of the said several sums due to them, impealed the said *Daniel Hæfer* and sued and prosecuted him, and put him to great expenses, to wit, at the county aforesaid; and also divers other persons to whom the said *Daniel Hæfer* was indebted in divers and sundry great sums of money at the time of the speaking of the said words, have on that occasion, on a sudden and in an untimely manner, prosecuted and sued the said *Daniel Hæfer*, at law, for the recovery and obtaining of their respective debts then due to them respectively as aforesaid; insomuch," etc.

It was held that the words laid in this declaration were slanderous and actionable. There was a verdict for the plaintiff, which was affirmed.

In *Morasse v. Brochu*, 151 Mass. 567, the declaration was as follows:

"The plaintiff says that, before the speaking of the words herein alleged, he was, hitherto had been, and still is, a physician in regular practice in *South-*

bridge, having the reasonable skill and qualification proper and necessary for the practice of that calling, business, and profession, and had always conducted himself therein with great diligence, industry, and propriety, and had acquired and was acquiring thereby great gain and profit from the practice of his calling, business, and profession. He further says, he then was, and still is, living in lawful wedlock, having been lawfully married, that he then was, and still is, a person of culture and education, and a person of good moral character and a Christian man, and had always behaved himself with propriety, as a good citizen and Christian, and was then, and still is, a person fit for social intercourse and association, professional relations, and practice among the members of the *Notre Dame Roman Catholic Church* in that place, and among all Christian people, and with defendant himself. Nevertheless, the plaintiff says the defendant, well knowing the premises aforesaid, but intending to bring the plaintiff into public contempt, infamy, and disgrace with and among all his neighbors and all the members of the church aforesaid, and to cause it to be believed by them and the said members of the said church that the plaintiff was a person of bad character, and unfit to be employed in his calling, business, and profession, and an improper person for social intercourse and association among persons of good moral and religious character, and to cause the plaintiff to be deprived of and to lose his said practice in his calling, business, and profession, and employment therein, and of the gains and profits thereof, and of his social rank and standing aforesaid, and to degrade, vex, harass, and annoy the plaintiff by influencing and preventing the members of said church from employing the plaintiff in his said calling, business, and profession, did heretofore, on a certain day, to wit, on or about the 27th day of *February* last past, in a certain discourse which the defendant then uttered in the said *Notre Dame Roman Catholic Church*, and before and in the presence and hearing of the members of said church then and there assembled and congregated, publicly, falsely and maliciously spoke and published of the plaintiff, in the French language, to said members of the said church and congregation then

Form No. 18718.

(Precedent in *Blumhardt v. Rohr*, 70 Md. 333.)¹[[*(Title of court and cause as in Form No. 6941.)*]]²

For that on or about the *twenty-third* day of *July* last past, the plaintiff then being, as he still is, engaged in the lucrative and profitable business of butchering cattle for sale, the defendant well know-

and there assembled understanding said language, the words following: (*Here followed the words in the French language*); that said words being translated into the English language have, and were understood by the persons to whom they were so published to have, the meaning and effect following, that is to say: 'During my absence there was a scandal of a marriage by law in this parish, and you know who this person is. On my return from Europe, when I first heard of it, I thought I would say nothing about it, because I supposed he would not have the sympathies of the people. But I see it is not so, and, on the contrary, this person is gaining the sympathies and favor of the people, and that they are running after this person, and they give him the first places. Why do you run after him so? Not long ago I was invited to a party where that person was, and I refused to go, because I would not meet an excommunicated person. If any of you are sick and want my assistance, you need not send for me if this person is there, because I will not be under the same roof with him.'

The plaintiff further says, that the defendant then and there, and by the words then there spoken, as above alleged, publicly and maliciously accused the plaintiff, in his said calling, business, and profession, of being a person who was unfit to associate with persons of good moral and religious character, and to be received and employed by such persons, and unworthy of their favors, thereby meaning the plaintiff, and then and there understood to be the plaintiff, by the audience and congregation then and there present.

And the plaintiff says, that by means of the said grievances so committed by the said defendant, the plaintiff is greatly injured in his good name, fame, and credit, and in his said trade, calling, and profession, and brought into public scandal, infamy, and disgrace with and among the members of said Catholic Church, and other good and

worthy persons, and that such members of said church, and other good and worthy persons have hitherto, by reason thereof, wholly refused and still do refuse to have any transactions, or discourse, or acquaintance with the plaintiff, as they were before accustomed to have, or to employ the said plaintiff in his said trade, calling, and profession, and would otherwise have had and done, whereby the said plaintiff has been deprived of the society of such members of the said church, and other good and worthy persons, and of the profits, income, and emoluments of his said trade, profession, and employment as aforesaid."

An objection to this declaration, on the ground that the averment of special damages was insufficient for failure to name the persons who would not employ the plaintiff as a physician, was held to have been raised too late. But the court said that, "even if the averment of special damages is to be regarded as insufficient for want of naming the persons who would not employ the plaintiff as a physician, the question remains, whether the words are actionable *per se*, as containing a defamatory imputation upon the plaintiff; or, rather, whether there was enough in them to warrant the judge in submitting them to the jury;" and, after a discussion of the question, decided that, "in the opinion of a majority of the court, the words might, therefore, properly be found by the jury to have been spoken of the plaintiff in respect to his profession as a physician, and they might properly be found to be defamatory and actionable without an averment of special damages. See, as supporting this result, *Sanderson v. Caldwell*, 45 N. Y. 398, where the court formulates a rule which would include this case.

1. These were the third and fourth counts in the case. It was held that a good cause of action was shown.

See, generally, *supra*, note 2, p. 261.

2. The matter to be supplied within [] will not be found in the reported case.

ing the premises, and contriving to injure the plaintiff in his said business, at *Lexington Market*, in the City of *Baltimore*, in the presence and hearing of *George Long*, *Abraham Frank*, and many other persons, spoke and uttered of and concerning the plaintiff and his said business, the false, malicious and slanderous words following, to wit: "It is better to buy Western beef, than to buy beef from a slaughter-house where condemned or diseased cattle are slaughtered;" meaning thereby that the plaintiff kept such a slaughter-house, and that the plaintiff was slaughtering and selling the carcasses of diseased cattle for meat and human food; whereby the plaintiff suffered great loss and damage to his said business, and to his character and reputation, and whereby the plaintiff in his business lost the trade and custom of the said *Abraham Frank*, and also a certain *Ormond Hammond, Jr.*, and also divers other persons.

2. And for that on or about the *tenth* day of *March* last past, the plaintiff then being, as he still is, engaged in the lucrative and profitable business of butchering cattle for sale, the defendant well knowing the premises, and contriving to injure the plaintiff in his said business, in the restaurant of *Frederick Zimmer*, in the City of *Baltimore*, in the presence of *Charles Reeder*, and many other persons, spoke and uttered of and concerning the plaintiff, and of and concerning his said business, the false, malicious and slanderous language following, to wit: "Did you hear of those diseased 'stillery bulls *Rohr* (meaning *Charles Rohr*, the plaintiff) was getting and selling the meat at *four* and *four* and a *half* cents, and bulls are selling for that; it is cheaper to buy the meat than bulls;" meaning thereby that the plaintiff was slaughtering and selling the carcasses of diseased cattle for meat and human food; whereby the plaintiff suffered great loss and damage to his said business, and to his character and reputation; and whereby also the plaintiff, in his said business, lost the trade and custom of divers persons, to wit, of a certain *Abraham Frank* and *Ormond Hammond, Jr.*, and many others.

[And the plaintiff claims (*concluding as in Form No. 6941*).]¹

(2) CHARGING MASTER OF SHIP WITH CONVERTING CARGO.

Form No. 18719.

(Precedent in *Orr v. Skofield*, 56 Me. 483.)²

[[*Commencing as in Form No. 6940*]]³ for that whereas the plaintiff is, and from his youth has been, of good reputation among his neighbors and fellow-citizens, for honesty and propriety of conduct, and hath been wholly free from the atrocious crime of stealing, and hath never been convicted or suspected to have been guilty of that crime, and for more than *ten* years last past hath been master of a vessel,

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. A demurrer to this declaration was overruled. The court said: "Applying to the words spoken their ordinary meaning, we cannot doubt that they

are slanderous of the plaintiff in relation to his business, if untrue."

See, generally, *supra*, note 2, p. 261.

3. The matter to be supplied within [] will not be found in the reported case.

and entrusted by the owners thereof with the command, care and control of the same, and was, during the year 1867, master of a ship called *Rising Sun*, and had the care, command and control of said ship, and hath always honestly and faithfully discharged his duties as master of said vessels of which he has had command, and especially of said ship *Rising Sun*, and hath always justly and faithfully accounted for all sums of money received by him, in his capacity of master of said vessel, to the owners thereof: — Nevertheless, the said defendant, not being ignorant of the premises, but fraudulently, maliciously and wickedly contriving to injure, blacken and defame the plaintiff in his good fame and reputation, and to injure him in his calling and business as a shipmaster, and to impose him to the pains and penalties prescribed by law for stealing and embezzlement, did, on divers days and times during the year eighteen hundred and sixty-seven, at *Brunswick*, aforesaid, in presence of divers good citizens of this state, and in conversation with the same, with a loud voice did speak, utter, publish and declare in the following false, scandalous and malicious words, of and concerning the plaintiff, [and of and concerning the plaintiff in his capacity of shipmaster, and of and concerning the business and occupation of the plaintiff in his capacity as a shipmaster,]¹ to wit, "He (meaning the plaintiff) sold the consignment of the ship *Rising Sun* (meaning the consignment of the vessel of which the plaintiff was then master) in *St. Thomas*, for seven hundred dollars, and pocketed the money;" meaning that the plaintiff was thereby guilty of larceny by embezzling and fraudulently converting to his own use the property of another, and under his care by virtue of his employment as master of said vessel, by means of which false and scandalous words, the plaintiff has been much injured in his good name and reputation, and is now and has been exposed to a prosecution for stealing, and has been much injured in his business as shipmaster, and has been thrown out of employment, suffered great anxiety of mind, and has lost situations and employment in the command of divers vessels which he would otherwise have received, and by which he would have earned and received large sums of money, to his damage, as he says, in the sum of *ten thousand* dollars, [(concluding as in Form No. 6940).]²

(3) CHARGING MINISTER.

(a) *With Embezzlement of Money.*

Form No. 18720.³

(Precedent in *Franklin v. Browne*, 67 Ga. 273.)⁴

1. The matter enclosed by [] was added by amendment.

2. The matter to be supplied within [] will not be found in the reported case.

3. *Georgia*. — 2 Code (1895), § 3837.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 2, p. 261.

4. A general demurrer to this petition was overruled. It was held that the case fell clearly within the provisions of the code as charging the plaintiff with "being guilty of a debasing act, which may exclude him from society," and as making charges against him "in relation to his office and profession calculated to injure him therein."

[Georgia — Bibb County.

To the Superior Court of said County:]¹

The petition of *Edward B. M. Browne* sheweth that *Max Franklin*, of said county, has injured and damaged your petitioner in the sum of *twenty thousand* dollars, by falsely and maliciously saying of and concerning your petitioner, on the *third* day of *January*, eighteen hundred and *eighty-one*, the following false and malicious words, to wit: "That on the excursion to *Europe*, aboard the *Silesia*, in *June* last, *Browne* (meaning your petitioner) collected *seventy-five* dollars from the passengers, in order to print a paper — which was edited on the boat by *Browne* and others (and meaning by said *Browne* your petitioner) — in memory of the excursion; but *Browne* (meaning your petitioner) used and embezzled the money (meaning the said *seventy-five* dollars) for his own wrongful uses, without printing the paper at all, and I will prove it; and that he (meaning your petitioner) is unfit to be the minister in our pulpit."

Wherefore your petitioner [(concluding as in Form No. 5913).]²

(b) *With Running After Women.*

Form No. 18721.

(Precedent in *Amos v. Stockert*, 47 W. Va. 110.)³

[(Title of court and cause as in Form No. 6952).]²

H. B. B. Amos complains of *G. F. Stockert* of a plea of trespass on the case for this, to wit: That, whereas, the plaintiff is now, and has been continually for a great number of years, a minister of the gospel, depending wholly upon his work as such minister for the support of himself and his family, is a good, true, just and honest citizen of this state, and as such hath always behaved and demeaned himself, and until the committing of the grievances by said defendant, as hereinafter mentioned, was always reputed, esteemed and accepted by and amongst all of his neighbors, and other good and worthy citizens of this state to whom he was known, to be a person of good name, fame, and credit, whereby the plaintiff, before the committing of the several grievances by the said defendant, as hereinafter mentioned, was recognized and esteemed as being a minister of good moral character, as a person who was virtuous, upright, honest, and faithful in the discharge of his duties as a citizen and as a minister of the gospel as aforesaid, and has deservedly obtained the confidence and good opinion of all his neighbors, and of other good and worthy citizens of this state to whom he was known, both as a minister of the gospel, as aforesaid, and as a citizen of this state. And the plaintiff says that the said defendant, well knowing the premises, but contriving and wickedly and maliciously intending to insult the plaintiff, did, on the ——— day of ———, 1895, in the

1. The matter enclosed by [] will not be found in the reported case.

2. The matter to be supplied within [] will not be found in the reported case.

3. No objection was made to the

sufficiency of this declaration. The defendant filed pleas of justification and upon trial a verdict was rendered for defendant.

See, generally, *supra*, note 2, p. 261.

presence of *L. A. Simons* and other good and worthy citizens of this state, then and there, in the presence and hearing of the said last-mentioned citizens, falsely and maliciously, and with intention to insult the plaintiff, speak and publish of and concerning the plaintiff the false, scandalous, malicious, defamatory, and insulting words following, which the plaintiff avers to be, from their usual construction and common acceptation, construed as insults, and tend to violence and breach of the piece; that is to say: "The *Reverend Amos* (meaning the plaintiff) has been twice egged out of his own county. I know this is a fact, and can prove it." "He (meaning the plaintiff) parted a man and his wife, and ran off with the man's wife, leaving his own wife and children." "Parties (naming them) told me that he (meaning the plaintiff) would have better clothes, and would appear more decent, if he (meaning the plaintiff) would not spend his time running after so many dirty bitches, and spending his money riding on the train with them." Also, on the ——— day of ———, 1895, in the presence of *Frederick Cutright* and other good and worthy citizens of this state, the said defendant, with a like intent upon his part, uttered and published the following false statements of and concerning the plaintiff, that is to say: "I have been in *Lewis* county, near the work of *Reverend H. B. B. Amos* (meaning the plaintiff), and people told me there that he was a man of very bad character; that he spent his money running after women of bad character, and paying their fare on the train." "*Amos* (meaning the plaintiff) can stand in the pulpit and preach a lie with more grace than any man I ever heard preach." Also, on the ——— day of ———, 1895, in the presence of *J. W. Simons*, and other good and worthy citizens of this state, the said defendant, with like malicious intent upon his part to slander and injure the plaintiff, did utter and publish the following false and scandalous, malicious, defamatory, and insulting words of and concerning the plaintiff, that is to say: "If the *Camp* boys catch *H. B. B. Amos* (meaning the plaintiff) out, it will be worse for him than the egging he got in *Braxton* county." "He (meaning the plaintiff) has been running over his circuit with other women, spending his money, leaving his family to make a living for themselves." "He (meaning the plaintiff) treats his family worse than a dog when he is at home." The plaintiff avers that all the foregoing words, statements, and utterances made and published by the defendant of and concerning the plaintiff in the presence and hearing of the various parties herein mentioned, together with many other words, statements, and utterances of like meaning, character, and import, uttered and published of and concerning the plaintiff in the presence and hearing of many other good and worthy citizens of this state, were so uttered and published by the defendant falsely and maliciously, and with intent to insult the plaintiff; which said words, statements, and utterances the plaintiff avers are false, scandalous, malicious, defamatory, and insulting, and, from their usual construction and common acceptation, are construed as insults, and tend to violence and breach of the peace. By means of which said premises the plaintiff has been greatly injured in his good name.

fame, and credit, and has been, especially in his profession as a minister of the gospel, as aforesaid, and otherwise, greatly injured and damnified, to the damage of the plaintiff *five thousand* dollars (\$5,000). And therefore he sues.

[*Jeremiah Mason*, p. q.]¹

(4) CHARGING TRADER.

(a) *With Being a Bankrupt, Villain and Scoundrel.*

Form No. 18722.³

(Conn. Prac. Act, p. 159, No. 282.)

(*Commencement as in Form No. 5912.*)

1. The plaintiff is, and for more than *twelve* years last past has been, a merchant engaged in the retail dry-goods business at *New London*.

2. The defendant, on *August 5th*, 1878, at *New London*, in the hearing of divers persons, said, concerning the plaintiff as such merchant: "*John Doe* is a great villain and a scoundrel, a bankrupt, not worth a cent, not able to pay his debts, and thousands worse than nothing."

3. Said words were false and malicious.

4. The plaintiff, in consequence of said words, has suffered in his reputation and has lost the good will and trade of many persons with whom he otherwise would have had profitable business.

The plaintiff claims \$5,000 damages.

(*Conclusion as in Form No. 5912.*)

(b) *With Having Cheated by Means of False Weights and Measures and with Preparing to Fail.*

Form No. 18723.³

(Bullitt's Civ. Code Ky. (1895), p. 565.)

(*Title of court and cause as in Form No. 5918.*)

The plaintiff, *John Doe*, says that, on the *tenth* day of *May*, 1900, he was, as he had been for *three* previous years, engaged in business as a retail grocer, selling sugar, coffee, dried fruits, molasses, wine, whiskey, and all other such articles as are generally sold by retail grocers; and that, on the day aforesaid, the defendant, *Richard Roe*, who resides in *Lee* county (or in *Lee* county) falsely and maliciously spoke and published in the presence and within the hearing of *Samuel Short* (or of *Samuel Short and William West*, or of *divers persons*), of and concerning the plaintiff and his said business, these words: "*John Doe* uses false weights and measures;" meaning thereby that the plaintiff was in the habit of cheating his customers by delivering to them smaller quantities of goods than they contracted and paid for. (Or these words: "*John Doe* has turned over a new leaf: he used

1. The matter enclosed by [] will See also list of statutes cited *supra*, not be found in the reported case. note 1, p. 220; and, generally, *supra*,

2. See, generally, *supra*, note 2, p. 261. note 2, p. 261.

3. *Kentucky*. — Bullitt's Civ. Code (1895), § 123.

to buy for cash and sell on credit, but now he buys on credit and sells for cash;" meaning thereby that the plaintiff was secretly preparing to make a fraudulent failure and cheat his creditors.)

2. (A paragraph may be added asserting the plaintiff's right to special damages resulting from loss of custom or of credit.)

Wherefore, (concluding as in Form No. 5918.)

(c) *With Keeping a Disorderly House.*

Form No. 18724.

(Precedent in *Fitzgerald v. Robinson*, 112 Mass. 375.)¹

[[*Title of court and cause as in Form No. 6942.*)]²

1. A demurrer to this fourth count of the declaration was overruled. The court said, "we have * * * a false charge, maliciously uttered for the purpose of injuring the plaintiff in his business, having a natural tendency to produce that effect, and resulting in special damage to him in that business. We think that this count in the declaration comes within the rule that words, even though not in themselves actionable, may become so by being spoken of the special profession, office or occupation of the person to whom they are applied. For this reason, this count in the declaration is sufficient in law and the demurrer to it must be overruled."

See, generally, *supra*, note 2, p. 261.

Sixth Count. — The sixth count of the declaration was as follows: "And the plaintiff further says, that he was a trader as aforesaid, and accustomed to furnish meals and entertainments for parties, as aforesaid, and that heretofore, to wit, on the *fifth* day of *January* last past, he was applied to by one *Patrick McKenney*, of *Orange*, in said county, to provide for himself, and divers others of his friends from said *Orange*, food and entertainment at his said place of business, and the defendant, wickedly, maliciously, intending to injure the said plaintiff, and to deprive him of his custom, trade and business, and the profits to be derived therefrom, did speak and publish concerning the plaintiff the false, malicious, scandalous and defamatory words following, that is to say: 'My *Orange* friends, let not any of you go to *Patrick Fitzgerald's* (meaning the plaintiff's) house, to bring disgrace on yourselves and on me (meaning the defendant); do not go that way at all (meaning not to go to the plaintiff's place of business); he (meaning the

plaintiff) is a bad man' (meaning thereby that the plaintiff was a disreputable and dishonest man); — by means whereof the said *McKenney* and the said other persons from said *Orange* were induced to obtain their meals and refreshments elsewhere, and not of said plaintiff, as they intended and otherwise would have done, and said plaintiff was thereby deprived of the custom of said parties, and the profits arising therefrom, and was brought into disgrace and scandal with said parties, and divers other persons."

A demurrer to this count was overruled. The court said, "it charges that the plaintiff, being a trader and accustomed to furnish meals and entertainments for parties, had been applied to by certain persons to provide entertainment for them; and the defendant, maliciously intending to injure him in business, used these false, etc., words to those persons, 'Do not go to his house to bring disgrace on yourselves and on me; do not go that way at all; he is a bad man,' — whereby they were prevented from going there, and he lost their custom, etc. It is true that the charge is somewhat indefinite, but it is sufficiently averred that it was spoken of the plaintiff in his business. It is equivalent to charging that he was a person of so bad a reputation that it would be disgraceful to go to his house at all. It was advice to all who heard it not to go to his place of business, and it had the effect of injuring him in his business. We think that this count comes within the rule that we have already held to be applicable to the fourth count."

2. The matter to be supplied within [] will not be found in the reported case.

(*First, second and third counts.*)

Fourth count. And the plaintiff further says, that before and at the time of the committing of the grievances hereinafter stated, and from thence hitherto, he hath used and exercised the trade and business of a retailer of tobacco, tea, coffee, spices, fish and candies, and other articles, and was accustomed to let his hall in his, the plaintiff's, house for social parties, and occasionally prepare meals and refreshments for persons, and hath always conducted himself, and still continues to conduct himself, with honesty and integrity in his said business, to wit, at said *Greenfield*, and hath never been guilty, nor, until the committing of said grievances hereinafter stated, been suspected to have been guilty of any cheating, fraud or dishonesty, in his said business or otherwise.

By means whereof the said plaintiff, before the committing of said grievances, had not only deservedly obtained the good opinion, confidence and credit of all his neighbors, and other good and worthy people, to whom he was in any wise known, but had acquired, and was still continuing to acquire, in his said trade and business, divers great profits and emoluments for his support, to wit, at *Greenfield*, aforesaid; yet the defendant, well knowing the premises, contriving and wickedly and maliciously intending to injure the said plaintiff in his said good name, fame and credit, and in his trade and business, and to bring him into public scandal, infamy and disgrace, and to cause it to be suspected and believed that he, the said plaintiff, was guilty of fraud and dishonesty, and of cheating and imposing on his customers in his trade and business, and to oppress and ruin him, the said plaintiff, heretofore, to wit, on the *sixth* day of *November* last, at *Greenfield* aforesaid, in a certain public discourse which he, the said defendant, then delivered and published at *the Church of the Holy Trinity*, of and concerning the plaintiff in his trade and business, falsely and maliciously spoke and published of and concerning the plaintiff in his said trade and business the false, scandalous, malicious and defamatory words following, that is to say: "He (meaning the plaintiff) keeps a bad place of resort (meaning that the plaintiff's house was a bad place of resort); keep away from it" (meaning that the plaintiff was a bad man, and permitted bad and wicked persons to resort to his, the plaintiff's, house, for illegal and improper purposes, and that his, the plaintiff's, house was a disorderly house, and so kept by him, said plaintiff).

By means of said grievances, so committed by the defendant as aforesaid, said plaintiff, being a trader and dealer as aforesaid, has been deprived of the custom and trade of divers persons, to wit, (*naming sixteen persons*), and divers other good and worthy people, and whereby, also, the said plaintiff was deprived of the profits, income and emoluments of letting his said hall, and of furnishing refreshments as aforesaid, and of the profits of his trade and business as aforesaid.

[*Jeremiah Mason, Attorney for Plaintiff.*]¹

2. Answer or Plea.¹

a. General Denial.

Form No. 18725.²

(Mass. Pub. Stat. (1882), c. 167, § 94.)

John Doe }
against } *Middlesex Sup. Ct.*
Richard Roe. } Defendant's Answer.

And the plaintiff comes and upon his personal knowledge denies that he accused the plaintiff of the crime of perjury as set forth in the plaintiff's first count.

And as to the second count* (*Here set out the denial to the second count*).

Oliver Ellsworth, Attorney for Plaintiff.

b. Justification.

(1) OF TRUTH.³

1. **Statutes** relating to answers and pleas in actions for slander are set out *supra*, note 1, p. 220.

For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

2. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220.

3. **Requisites of Answer or Plea, Generally.** — For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Specially Plead. — That the alleged slanderous words were true must be specially pleaded. *Arrington v. Jones*, 9 Port. (Ala.) 139; *Kennedy v. Dear*, 6 Port. (Ala.) 90; *Swift v. Dickerman*, 31 Conn. 285; *Williams v. Miner*, 18 Conn. 464; *Bailey v. Hyde*, 3 Conn. 463; *Eastland v. Caldwell*, 2 Bibb (Ky.) 21; *Harper v. Harper*, 10 Bush (Ky.) 447; *Taylor v. Robinson*, 29 Me. 323; *Bodwell v. Swan*, 3 Pick. (Mass.) 376; *Alderman v. French*, 1 Pick. (Mass.) 1; *Thompson v. Bowers*, 1 Dougl. (Mich.) 321; *Jarnigan v. Fleming*, 43 Miss. 710; *Sayre v. Sayre*, 25 N. J. L. 235; *Fero v. Ruscoe*, 4 N. Y. 162; *Snyder v. Andrews*, 6 Barb. (N. Y.) 43; *Shepard v. Merrill*, 13 Johns. (N. Y.) 475; *Wormouth v. Cramer*, 3 Wend. (N. Y.) 395; *Porter v. Botkins*, 59 Pa. St. 484; *Stees v. Kemble*, 27 Pa. St. 112; *Updegrove v. Zimmerman*, 13 Pa. St. 619; *Petrie v.*

Rose, 5 W. & S. (Pa.) 364; *Shirley v. Keathy*, 4 Coldw. (Tenn.) 29; *McCampbell v. Thornburgh*, 3 Head (Tenn.) 109; *Hutchinson v. Wheeler*, 35 Vt. 330; *Grant v. Hover*, 6 Munf. (Va.) 13; *Amos v. Stockert*, 47 W. Va. 109. And evidence as to the truth of the charges cannot be admitted under a plea of not guilty. *Stees v. Kemble*, 27 Pa. St. 112.

Extent of Justification. — The justification of truth contained in the answer or plea must be as broad as the alleged slanderous charge. *Darling v. Banks*, 14 Ill. 46; *Sanford v. Gaddis*, 13 Ill. 329; *Rice v. Aleshire*, 72 Ill. App. 455; *Tull v. David*, 27 Ind. 377; *Peterson v. Murray*, 13 Ind. App. 420; *Eccles v. Shackelford*, 1 Litt. (Ky.) 36; *Fero v. Ruscoe*, 4 N. Y. 162; *Lanpher v. Clark*, 77 Hun (N. Y.) 506. But it must not be any broader than such charge. *Sanford v. Gaddis*, 13 Ill. 329; *Frederitze v. Odenwalder*, 2 Veates (Pa.) 243.

In *Lanpher v. Clark*, 149 N. Y. 472, the court says:

"The rule of pleading, that the justification shall be as broad as the charge, does not mean that an answer in justification must be broad enough to embrace every slanderous charge stated in the complaint. When several separate and distinct things are charged, the defendant may justify as to one, though he fail as to the others. (*Fero v. Ruscoe*, 4 N. Y. 162; *Holmes v. Jones*, 121 N. Y. 461.) In this case the plaintiff had alleged that the defendant falsely and maliciously spoke and published of and concerning her personally,

(a) *Of Charge of Keeping Disorderly House.*

and of and concerning her place of business, that she kept a disorderly house. It is true, according to the allegations of the complaint, that he also charged her with many other things, but the charge of keeping a disorderly house was distinct and separate from all the rest, and the defendant was entitled to justify that charge if he could, though he failed as to all the rest. When the defamatory charge imputes to the plaintiff two or more separate and distinct offenses, as larceny and perjury, the rule that the justification must be as broad as the charge means that it shall be full and complete as to at least one of the charges separately and distinctly made and alleged.

We think that the answer in this case was sufficient as a justification of the charge that the plaintiff kept a disorderly house. It contains all the material facts which it would be necessary to allege in an indictment for that offense under the present system of criminal pleading."

In *Illinois*, where it is made slanderous by statute to charge a person with false swearing, it is held that if the declaration for slander be general, charging the defendant with having said of the plaintiff "he swore falsely," without reference to any judicial or other proceeding in which an oath could have been lawfully administered, a plea of justification, pointing the plaintiff to the time, place and occasion of the false swearing, and alleging the truth of the words spoken, will be good. If the charge be of having sworn falsely in a judicial proceeding, without the necessary averments to make the slander amount to an imputation of perjury, then a plea of justification that the plaintiff did swear falsely in the particular proceeding would be sufficient; but if the declaration be so framed as to show that the defendant, by the slanderous words, intended to impute perjury to the plaintiff in a particular case, the defendant can only justify having made such a charge by showing that the plaintiff committed perjury in the case alluded to. The justification must, in all cases, be coextensive with the slander; and need not go farther. *Sanford v. Gaddis*, 13 Ill. 329.

Must Admit Speaking of Words. — The answer or plea justifying the speaking of the words on the ground that they

are true must distinctly admit such speaking. *Jarnigan v. Fleming*, 43 Miss. 710; *Atteberry v. Powell*, 29 Mo. 429; *Folsom v. Brawn*, 25 N. H. 114; *Anibal v. Hunter*, (Supreme Ct. Spec. T.) 6 How. Pr. (N. Y.) 255; *Davis v. Mathews*, 2 Ohio 257. And a plea in a hypothetical form, that "if he spoke the words," etc., then "they are true," is bad. *Williams v. McKee*, 98 Tenn. 139.

In *Alderman v. French*, 1 Pick. (Mass.) 1, the court says: "When the defendant in slander pleads the truth of the words in justification, he explicitly admits the fact alleged against him, but says that for the reason assigned in his plea the plaintiff cannot maintain the action."

Setting Out Offense — Identical Offense Justified. — The identical offense laid in the pleading of the plaintiff must be justified. *Andrews v. Vanduzer*, 11 Johns. (N. Y.) 38; *Wood v. Livingston*, 11 Johns. (N. Y.) 36; *Sharpe v. Stephenson*, 12 Ired. L. (34 N. Car.) 348; *Whitaker v. Carter*, 4 Ired. L. (26 N. Car.) 461. And the defendant cannot set up an offense of the same kind, but distinct, as the subject-matter. *Wood v. Livingston*, 11 Johns. (N. Y.) 36. When any circumstance is stated which is descriptive of and identifies the offense, it must be averred, for the purpose of showing that it is the same offense. *Sharpe v. Stephenson*, 12 Ired. L. (34 N. Car.) 348; *Whitaker v. Carter*, 4 Ired. L. (26 N. Car.) 461.

In *Skinner v. Grant*, 12 Vt. 456, the court says, "there is no better settled point in slander than this: the plea must justify the same words contained in the declaration, or at least so many of them as are actionable. It is not enough to justify the sentiment contained in the words."

Must State Facts. — The facts which go to constitute the crime or offense imputed by the alleged slanderous words must be specifically alleged. *Mull v. McKnight*, 67 Ind. 535; *Jarnigan v. Fleming*, 43 Miss. 710; *Atteberry v. Powell*, 29 Mo. 429; *Tilson v. Clark*, 45 Barb. (N. Y.) 178; *Billings v. Waller*, (Supreme Ct. Spec. T.) 28 How. Pr. (N. Y.) 97; *Bissell v. Cornell*, 24 Wend. (N. Y.) 354. And an answer stating that the words spoken are true is insufficient as a justification. *Atteberry v. Powell*, 29 Mo.

Form No. 18726.¹(Precedent in *Lanpher v. Clark*, 149 N. Y. 474.)²[[*Title of court and cause as in Form No. 18146.*]]³
(*First defense.*)

Said defendant, for a second and further answer and defense, alleges upon information and belief, and by way of mitigation, alleges herein, that the house known as the "*Lanpher House*" at *Delta* is and was kept and run as a disorderly house; that it was the place wherein immoral persons for immoral purposes congregated, and where conspiracies were formed to injure this defendant, and it was from said hotel that they started to carry out said conspiracies so formed; that said house, hotel and place, as defendant alleges upon information and belief to be, was a place where lewd and immoral people congregated, and that the plaintiff herself is a lewd, unchaste, boisterous, immoral woman, and has conducted and run the hotel in an improper and disorderly manner; that upon the trial of this cause the defendant will give evidence of the facts and circumstances, as alleged in the second count of this answer, by way of mitigation or justification of the things, allegations and charges made in said plaintiff's complaint.

[[*Signature and verification as in Form No. 18146.*]]³(b) *Of Charge of Fornication.*Form No. 18727.⁴(Precedent in *Nelson v. Wallace*, 48 Mo. App. 196.)⁵[[*Venue and title of court as in Form No. 1869.*]]³
(*First defense.*)

This defendant, further answering the petition of the plaintiffs

429; *Tilson v. Clark*, 45 Barb. (N. Y.) 178. And see *Billings v. Waller*, (Supreme Ct. Spec. T.) 28 How. Pr. (N. Y.) 97, where the court says: "The code has not changed the rule which requires certainty and particularity in stating the offense charged against the plaintiff in a plea of justification in an action of slander. The plea or answer must not deal in general charges nor in vague and indefinite language. It must state specifically the offense of which the plaintiff is alleged to have been guilty, giving time, place and circumstances."

In *Sunman v. Brewin*, 52 Ind. 140, it is held that while it is necessary, where the alleged slanderous words contain a general imputation upon the plaintiff's character, that the answer shall state specific facts showing in what particular instances and in what manner he has misconducted himself, it is not necessary, where the alleged

slanderous words are specific, to further particularize.

1. *New York*. — Code Civ. Proc., §§ 535, 536.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

2. It was held that this answer of justification "was sufficient as a justification of the charge that the plaintiff kept a disorderly house." It contains all the material facts which it would be necessary to allege in an indictment for that offense under the present system of criminal pleading.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Missouri*. — Rev. Stat. (1899), § 2262.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

5. No objection was made to the sufficiency of this plea.

and the several counts thereof, says: That, at the time of the alleged speaking of the alleged defamatory words set out in said petition and in the several counts thereof, the defendant had good reason to believe, and did believe, and now so charges the facts to be, that on, to-wit, the ——— day of ———, 18—, and divers other times before and after said date and prior to said *May 25*, 1890, the plaintiff, *Amanda, Susan*, then being unmarried, did have carnal communication with and did commit fornication with the said *James Schackelford* at the county and state aforesaid. Wherefore this defendant says that whatever words he may have spoken of or concerning said plaintiff were and are true.

[(*Signature of attorney as in Form No. 1369.*)]¹

(c) *Of Charge of Larceny.*

Form No. 18728.²

(2 Chit. Pl. (3d. Am. from 2d Lond. ed.) 551.)

(*Commencement as in Form No. 15206.*)

(*First plea.*)

And for a further plea in this behalf as to the speaking and publishing of the said several words of and concerning the said *John Doe*, as in the said several counts mentioned, the said *Samuel Short*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, saith that the said *John Doe* ought not to have or maintain his aforesaid action thereof against him,* because he says that the said *John Doe*, before the speaking and publishing of the said several words of and concerning him, the said *John Doe*, as in the said several counts mentioned, to wit, on (*stating time*), at (*stating place*), did feloniously steal, take and carry away certain goods and chattels, to wit, (*stating them*), of one *Samuel Short*, of great value, to wit, of the value of £100, wherefore he, the said *Richard Roe*, afterwards, to wit, at the said several times in the said several counts mentioned, at (*stating place*), aforesaid, did speak and publish the said words of and concerning the said *John Doe*, as in the said several counts mentioned, as he lawfully might for the cause aforesaid. And this (*concluding as in Form No. 15213*).

Form No. 18729.³

(Bullitt's Civ. Code Ky. (1895), p. 655.)

<i>John Doe</i> , plaintiff,	} <i>Lee Circuit Court.</i>
against	
<i>Richard Roe</i> , defendant.	} Answer of Defendant.

The defendant denies that he falsely (or maliciously) spoke and published the words complained of in the plaintiff's petition; and

1. The matter to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 3, p. 272.

3. *Kentucky*. — Bullitt's Civ. Code Ky. (1895), § 124.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

says that, before he spoke and published said words, to wit, on the *tenth* day of *May*, 1900, at (*stating place*), the plaintiff did feloniously steal, take and carry away (*describe the property*), which was the property of one *William West*, and of great value, to wit, of the value of *one hundred* dollars; wherefore the defendant afterwards spoke and published the words in the petition mentioned; and the defendant says that (*set forth any mitigating circumstances not amounting to a justification*).

(*Verification.*)

Oliver Ellsworth, Attorney.

Form No. 18730.¹

(Mass. Pub. Stat. (1882), c. 167, § 94.)

(*Commencing as in Form No. 18725, and continuing down to **) he says the plaintiff did feloniously steal, take and carry away *ten* dollars, the property of one *Samuel Short*, in the possession of said *Samuel Short* being found, and converted the same to his own use, and so the plaintiff was guilty of the crime of theft, and the defendant's accusation was true.

Oliver Ellsworth, Attorney for Defendant.

(2) THAT DEFENDANT MERELY REPEATED WORDS SPOKEN BY ANOTHER.²

Form No. 18731.³

(Bullitt's Civ. Code Ky. (1895), p. 656.)

(*Title of court and cause as in Form No. 18729.*)

The defendant denies that he ever published or spoke of and concerning the plaintiff that (*repeat the words complained of in the petition*); and says that, on (or *before*) the *tenth* day of *May*, 1900, the defendant heard one *William West* speak said words of and concerning the plaintiff, and, afterward, on said day, the defendant spoke and published in the presence and hearing of the persons in the petition mentioned that he, the defendant, had heard said *William West* speak said words of and concerning the plaintiff.

Oliver Ellsworth, Attorney.

c. Justification as to One Count in Plaintiff's Petition and General Denial as to Other Count.

1. *Massachusetts*. — Rev. Laws (1902), c. 173, § 130.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

2. **Repetition of Slanderous Words.** — It is held, in some states, that a person to whom a slanderous charge is communicated may communicate it to others and be justified in doing so, provided he gives his authority at the time. *Trabue v. Mays*, 3 Dana (Ky.) 138; *Haynes v. Leland*, 29 Me. 233;

Jarnigan v. Fleming, 43 Miss. 710; *Scott v. Peebles*, 2 Smed. & M. (Miss.) 546; *Church v. Bridgman*, 6 Mo. 190; *Miller v. Kerr*, 2 McCord L. (S. Car.) 285. While in other states such facts do not show a justification. *Kenney v. McLaughlin*, 5 Gray (Mass.) 3; *Stevens v. Hartwell*, 11 Met. (Mass.) 542; *Inman v. Foster*, 8 Wend. (N. Y.) 602; *Fowler v. Chichester*, 26 Ohio St. 9; *Haines v. Welling*, 7 Ohio 253.

3. *Kentucky*. — Bullitt's Civ. Code (1895), § 124.

Form No. 18732.¹

(1 Mo. Rev. Stat. (1899), p. viii, No. 41.)

(Venue and title of court as in Form No. 1369.)

The defendant answers and says he denies that he charged the plaintiff with the crime of perjury, as set forth in the plaintiff's first cause of action; admits he spoke the words mentioned in the second cause of action, but says that on (*stating time*), at (*stating place*), the plaintiff did feloniously steal and carry away (*one rifle gun*), the property of *Richard Roe*, of the value of *thirty* dollars; so the defendant's charge was true.

*(Signature of attorney as in Form No. 1369.)*d. Mitigation of Damages.²

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

1. *Missouri*. — Rev. Stat. (1899), § 2262.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 272.

2. *Statutes relating to pleas in mitigation of damages are set out supra*, note 1, p. 220.

Requisites of Answer or Plea, Generally.

— For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Specially Pled. — In a few states, it is held under the code that facts tending to mitigate damages must be specially pleaded in order to be proved. *Willover v. Hill*, 72 N. Y. 36; *Blanchard v. Tulip*, 32 Hun (N. Y.) 638; *Steffen v. Schaeffer*, (Supreme Ct. Gen. T.) 39 N. Y. St. Rep. 796; *Calkins v. Colburn*, (Supreme Ct. Gen. T.) 10 N. Y. St. Rep. 778; *Reiley v. Timme*, 53 Wis. 63.

In *Iowa*, it is provided that no mitigating circumstances shall be proved unless pleaded, except such as are shown by or grow out of the testimony introduced by the adverse party. *Iowa Code* (1897), § 3593.

Facts Shown Under General Denial. — It is generally held at common law, and in a few states by statute, that facts tending to mitigate damages may be shown under the general issue or a general denial. *Fuller v. Dean*, 31 Ala. 654; *Pope v. Welsh*, 18 Ala. 631; *Arington v. Jones*, 9 Port. (Ala.) 139; *Kennedy v. Dear*, 6 Port. (Ala.) 90; *Williams v. Miner*, 18 Conn. 464; *Treat v. Browning*, 4 Conn. 408; *Bailey v. Hyde*, 3 Conn. 463; *Yeates v. Reed*,

4 Blackf. (Ind.) 463; *Ross v. Lapham*, 14 Mass. 275; *Larned v. Buffinton*, 3 Mass. 546; *Parkhurst v. Ketchum*, 6 Allen (Mass.) 406; *Bodwell v. Swan*, 3 Pick. (Mass.) 376; *Thompson v. Bowers*, 1 Dougl. (Mich.) 321; *Miss. Anno. Code* (1892), § 685; *Jarnigan v. Fleming*, 43 Miss. 710; *Anthony v. Stephens*, 1 Mo. 254; *N. H. Pub. Stat. & Sess. L.* (1901), c. 223, § 6; *Lamos v. Snell*, 6 N. H. 413; *Cook v. Barkley*, 2 N. J. L. 156; *Bisbey v. Shaw*, 12 N. Y. 67; *Snyder v. Andrews*, 6 Barb. (N. Y.) 43; *Hamer v. McFarlin*, 4 Den. (N. Y.) 509; *Wormouth v. Cramer*, 3 Wend. (N. Y.) 395; *Smith v. Smith*, 8 Ired. L. (30 N. Car.) 29; *Haywood v. Foster*, 16 Ohio 88; *Reynolds v. Tucker*, 6 Ohio St. 516; *Blue v. Hoke*, 3 West. L. Month. 100, 2 Ohio Dec. (reprint) 440; *Drown v. Allen*, 91 Pa. St. 393; *Fitzgerald v. Stewart*, 53 Pa. St. 343; *Moyer v. Moyer*, 49 Pa. St. 210; *Conroe v. Conroe*, 47 Pa. St. 198; *Stees v. Kemble*, 27 Pa. St. 112; *Updegrave v. Zimmerman*, 13 Pa. St. 619; *Steinman v. McWilliams*, 6 Pa. St. 170; *Steever v. Beehler*, 1 Miles (Pa.) 146; *Beehler v. Steever*, 2 Whart. (Pa.) 313; *Easterwood v. Quin*, 2 Brev. (S. Car.) 64; *Sawyer v. Eifert*, 2 Nott & M. (S. Car.) 511; *Buford v. M'Luny*, 1 Nott & M. (S. Car.) 268; *Lambert v. Pharis*, 3 Head (Tenn.) 622; *Hackett v. Brown*, 2 Heisk. (Tenn.) 264; *Bowen v. Hall*, 20 Vt. 232; *Bourland v. Eidson*, 8 Gratt. (Va.) 27.

In *Indiana*, facts tending to mitigate damages may be specially pleaded or may be given in evidence under a general denial. *McCoy v. McCoy*, 106 Ind. 492; *O'Conner v. O'Conner*, 27 Ind. 69; *Swinney v. Nave*, 22 Ind. 178; *Smith v. Rodecap*, 5 Ind. App. 78.

Joinder. — Mitigating circumstances may be pleaded in connection with a

Form No. 18733.¹(Precedent in *Bisbey v. Shaw*, 12 N. Y. 67.)²[(Title of court and cause as in Form No. 18146.)]³
(First defense.)

Second. And the said defendant, for further answer to the complaint in this action, says, that heretofore, to wit, on or about the 10th day of March, 1847, at the city of Rochester, in said county, he, this defendant, made a certain agreement with the plaintiff that he, the plaintiff, should take a piece of land from him, the said defend-

general denial and with or without a plea of justification. *Dolevin v. Wilder*, (N. Y. Super. Ct. Spec. T.) 34 How. Pr. (N. Y.) 488.

Charge Unfounded.—An answer in mitigation impliedly admits that the charge was unfounded. *Gorton v. Keeler*, 51 Barb. (N. Y.) 475.

Belief of Truth.—Where the answer in mitigation undertakes to set up that the alleged slanderous charge was made in a belief of its truth, it must allege not only circumstances tending to produce such belief, but also the fact that such belief so produced existed in the mind of the defendant when he made the charge. *Gorton v. Keeler*, 51 Barb. (N. Y.) 475.

Precedent.—In *Spooner v. Keeler*, 51 N. Y. 527, the defendant's answer, after a general denial, contained the following:

"For a second and further answer, the defendant alleges that before the speaking of the words alleged in the complaint, and on the third day of November, A. D. 1866, upon the trial of an action then pending before *Thomas S. Crosby*, Esq., a justice of the peace of the town of Cohocton, in said county, between the said defendant *Keeler* as plaintiff and the said *James Gorton* as defendant, *James Gorton*, the plaintiff in this action, appeared as a witness for and on his own behalf, and was then and there duly sworn by the said justice, and took oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue.

II. That the plaintiff, being so sworn, falsely deposed and gave evidence, among other things, that he, the said *Gorton*, agreed to work for the said *Keeler*, and that said *Keeler* agreed to pay said *Gorton* for said work five dollars per day; that said *Keeler* agreed to pay him, said *Gorton*, five dollars per day for his work; that he agreed with the plaintiff at five dollars per day; that

he (the plaintiff in this action meaning) agreed with the plaintiff (the defendant in this action meaning) at five dollars per day; that the defendant, *Keeler*, agreed and promised to pay to him, the said *Gorton*, for his work and labor, five dollars per day.

III. That in truth and in fact he, said *Gorton*, never agreed to work for the said *Keeler*, when the said *Keeler* agreed to pay him five dollars per day for said work; the said *Keeler* never agreed to pay the said *Gorton* five dollars per day for his work; the said *Gorton* never agreed with the said *Keeler* at five dollars per day.

IV. That the truth of the matters hereinbefore stated were material and pertinent to the issue there tried.

V. That whatever the defendant said of and concerning the plaintiff at the time, and as alleged in the complaint in this action, had exclusive reference to the testimony given by the said plaintiff, on the trial of said action before the said justice, relating to the alleged agreement for five dollars per day for work, as above stated and set forth, and not other or different."

The facts set out in the answer were on the trial sought to be proved both in justification and in mitigation of damages. It was held that the evidence was not proper in justification because there was no averment in the answer of knowledge on the part of the plaintiff that his testimony was false, but that it was competent in mitigation.

1. *New York*.—Code Civ. Proc., §§ 535, 536.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 2, p. 277.

2. The court said of this branch of the answer, that "the facts stated * * * were clearly proper to be proved in mitigation of damages."

3. The matter to be supplied within [] will not be found in the reported case.

ant, situate in said city of *Rochester*, and plant the same with corn, on shares with him, said defendant — the plaintiff to be at all the labor and expense of planting said land with corn, and cutting, harvesting and securing the same, and to have as his recompense and remuneration therefor the *one-half* of whatever corn should be raised upon said land; the said corn was to be equally divided in the ear between the plaintiff and defendant; the said land was accordingly planted to corn by said plaintiff under said agreement, and was cut and harvested by said plaintiff; but the said plaintiff, while cutting, harvesting and securing said corn, or immediately after said corn was cut, harvested and secured, instead of fairly and honestly dividing said corn equally with said defendant, fraudulently, dishonestly and unfairly secreted, carried away and converted to his own use, without the knowledge or consent of said defendant, a considerable quantity of said corn, with intent to appropriate the same wholly to his own use, and to give no account thereof to the defendant; that the same being discovered by the defendant, he did thereupon charge the plaintiff with having stolen said corn, which the said plaintiff admitted and confessed, and pretended to express great penitence therefor; which above facts the defendant will give in evidence on the trial of this action, in mitigation of any damages the said plaintiff may, by law, be entitled to recover therein.

[(*Signature and verification as in Form No. 18146.*)]¹

e. Privilege.²

(1) IN GENERAL.

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Answer or Plea, Generally.** — For the formal parts of an answer or plea in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. I, p. 799; PLEAS, vol. 13, p. 918.

Privilege Specially Pleaded. — Under the codes and practice acts, it has been held that privilege must be pleaded. *Jones v. Forehand*, 89 Ga. 520; *Hess v. Sparks*, 44 Kan. 470; *Goodwin v. Daniels*, 7 Allen (Mass.) 61. But at common law, privilege was shown under the general issue. *Bradley v. Heath*, 12 Pick. (Mass.) 163; *Hackett v. Brown*, 2 Heisk. (Tenn.) 264.

Absence of Malice. — Where the words uttered are actionable *per se*, no allegation of malice in the complaint is necessary, because malice will be presumed; and in such a case, although malice is alleged in the complaint, an answer setting up by way of a defense that the communications were privileged need not allege that they were

made without malice. *Robinson v. Hatch*, (Supreme Ct. Spec. T.) 55 How. Pr. (N. Y.) 55.

Must Admit Speaking of Words. — It has been held that both at common law and under the code an answer of privilege must admit the speaking of the words; and that an allegation that if the defendant spoke any slanderous words of and concerning the plaintiff of the nature of those charged in the complaint they were confidential and privileged is insufficient. *Goodman v. Robb*, 41 Hun (N. Y.) 605.

In *Georgia*, it is held that the speaking of the words need not be expressly admitted, but may be put hypothetically. *Jones v. Forehand*, 89 Ga. 520.

See also *Perry v. Breed*, 117 Mass. 155, where the answer alleged that "if the defendant said anything of or concerning the plaintiff the same was true," etc., and the form of the answer was not objected to.

Joinder. — In *Jones v. Forehand*, 89 Ga. 520, it was held that a plea of privilege may be joined with the plea of general issue.

Form No. 18734.

(Precedent in *Rausch v. Anderson*, 75 Ill. App. 532.)¹[(*Venue and title of court and cause as in Form No. 15219.*)]²
(*First, second, third and fourth pleas.*)

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that the defendant, before and at the time of the committing of the supposed grievances in the said declaration mentioned, was the duly elected and qualified superintendent of schools in and for the county of *Grundy* in the state of *Illinois*; and was then and there in the discharge of his duties as such superintendent of schools; and the said plaintiff was then and there a teacher in district No. 7, of the township of *Mazon* in said *Grundy* county; and was then and there teaching as a teacher of public schools in said district, under a certificate issued to him by the defendant herein, as such county superintendent of schools. And the defendant further avers that before the time of the supposed grievances in said declaration mentioned, and while the defendant was such county superintendent of schools, and said plaintiff was teacher in district No. 7, the said plaintiff was accused of the embezzlement and larceny of *two* certain books, each of the value of *one* dollar, the personal property of the *Grundy County Teacher's Library Association*; and which said charge then and there affected the good moral character and qualification of said plaintiff as such teacher of the public schools; and the defendant avers that he then and there, in his official capacity as such county superintendent of schools, investigated said accusation, and interviewed said plaintiff in regard thereto; and then and there personally ascertained in the presence of the said plaintiff that said plaintiff had withheld said books from said *Grundy County Teacher's Library Association*, with unlawful intent then and there to convert the same to his own use, and with intent to steal the same; and he then and there found one of the said books concealed by said plaintiff, about the premises of him, the said plaintiff; and that thereupon, and by reason of such immoral conduct on the part of the said plaintiff, he had then and there revoked the certificate of said plaintiff, as by law he was authorized to do, and had exercised his authority in that regard conscientiously, with the sole desire to do his full duty, and promote the interests of the public, and the interest of the public schools of said *Grundy* county; that thereupon said plaintiff still persisted in his rights to fill the position of teacher in said district No. 7, notwithstanding such revocation of his certificate, and was then and there endeavoring, publicly and privately, to influence the board of directors and the public of said district No. 7, that the defendant had acted with selfish and improper motives regarding the revocation of such certificate; and was then and there endeavoring to obtain from this defendant a renewal of his said certificate, so

1. A demurrer to this plea was over-ruled.

See, generally, *supra*, note 2, p. 279.

2. The matter to be supplied within [] will not be found in the reported case.

that he might continue as such teacher of the public schools in said county of *Grundy*; and that thereupon the board of directors of said district No. 7 requested the defendant to then and there state his reasons for the revocation of such certificate; and said board of directors then and there met together for the purpose of hearing the statements of this defendant for his official action in so canceling the certificate of the plaintiff, at which meeting the plaintiff was present, and then and there took part in the investigations then and there held, touching the moral conduct of him, the said plaintiff; and the defendant was then and there, in his official capacity as such county superintendent of schools, to make known his reasons for the revocation of such certificate, and for his refusal to issue a new certificate to said plaintiff; wherefore the defendant, at same time and place mentioned in said declaration, then and there spoke and published of and concerning the plaintiff the said several words in the said declaration mentioned, as he was privileged and as it was lawful for him to do, for the cause aforesaid; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him.

[*Jeremiah Mason*, Attorney for Defendant.]¹

(2) AND GENERAL DENIAL.

Form No. 18735.²

(Conn. Prac. Act, p. 228, No. 431.)

(*Title of court and cause as in Form No. 1367.*)

1. The plaintiff had been a clerk to the defendant. Said *John Smith* was a friend of the defendant, engaged in the same business, and applied to the defendant for advice as to the character of the plaintiff, who was seeking employment of him. The defendant spoke the words complained of while giving to said *John Smith*, in confidence, his real opinion of the plaintiff, for the purpose aforesaid.

2. Paragraphs third and fourth are denied.

(*Signature as in Form No. 1367.*)

3. Reply.³

a. Denying that the Plaintiff Committed Larceny.

Form No. 18736.⁴

(Bullitt's Civ. Code Ky. (1895), p. 679.)

(*Title of court and cause as in Form No. 17877.*)

1. The matter enclosed by [] will not be found in the reported case.

2. See, generally, *supra*, note 2, p. 279.

3. Reply Necessary. — The plaintiff must reply to a plea of justification. *Nelson v. Wallace*, 48 Mo. App. 193.

Statutes relating to replies in actions of slander are set out *supra*, note 1, p. 220.

For the formal parts of a replication or reply in a particular jurisdiction see the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

4. *Kentucky*. — Bullitt's Civ. Code (1895), § 124.

See also, generally, *supra*, note 3, this page.

The plaintiff denies that, on the *tenth* day of *May*, 1900, or at any other time, he feloniously stole, took, or carried away the property in the answer mentioned or any part thereof.

(Signature and verification as in Form No. 17877.)

b. Denying that the Defendant Spoke the Alleged Slanderous Words as Words That He had Heard a Certain Third Person Speak of and Concerning the Plaintiff.

Form No. 18737.¹

(Bullitt's Civ. Code Ky. (1895), p. 679.)

(Title of court and cause as in Form No. 17877.)

The plaintiff denies that the defendant spoke and published the words in the plaintiff's petition complained of as words that he had heard *William West* speak of and concerning the plaintiff.

(Signature and verification as in Form No. 17877.)

c. Denying that the Defendant Heard a Certain Third Person Speak the Alleged Slanderous Words of and Concerning the Plaintiff.

Form No. 18738.²

(Bullitt's Civ. Code Ky. (1895), p. 679.)

(Title of court and cause as in Form No. 17877.)

The plaintiff denies that the defendant, before he spoke and published the words in the plaintiff's petition complained of, heard *William West* speak said words of and concerning the plaintiff.

(Signature and verification as in Form No. 17877.)

II. CRIMINAL PROSECUTION.

1. In General.³

Form No. 18739.⁴

(Ala. Crim. Code (1896), § 4923, No. 34.)

(Commencing as in Form No. 10680, and continuing down to *)
John Doe did falsely and maliciously speak of and concerning *Richard Roe* in the presence of *Samuel Short* charging him (or *her*, as the case may be) with a want of chastity (or *with having committed larceny or perjury*, as the case may be), in substance as follows, to wit:
(Here set out the substance of the words spoken), against (concluding as in Form No. 10680).

1. *Kentucky*. — Bullitt's Civ. Code (1895), § 124.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 281.

2. *Kentucky*. — Bullitt's Civ. Code (1895), § 124.

See also list of statutes cited *supra*, note 1, p. 220; and, generally, *supra*, note 3, p. 281.

3. For the formal parts of an indictment, information or criminal complaint in a particular jurisdiction see the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS, vol. 9, p. 615; INFORMATIONS IN CRIMINAL CASES, vol. 9, p. 768.

4. *Alabama*. — Crim. Code (1896), § 5065.

2. For Charging Female with Unchastity.¹

1. Requisites of Indictment or Information, Generally. — For the formal parts of an indictment or information in a particular jurisdiction see the titles INDICTMENTS, vol. 9, p. 615; INFORMATION IN CRIMINAL CASES, vol. 9, p. 768.

Following Words of Statute. — In *North Carolina*, it is sufficient if the indictment follows the words of the statute. *State v. Haddock*, 109 N. Car. 873. But in *Missouri*, it is held that the exact words of the statute need not be followed: it is sufficient to use words equivalent in meaning. *State v. Matheis*, 44 Mo. App. 294.

Publication. — That the words constituting the alleged slander were uttered or spoken in the presence of someone must be alleged; and it is the better practice to set out the names, or some of them, of the persons before whom they were spoken. *Burnham v. State*, 37 Fla. 327; *McMahan v. State*, 13 Tex. App. 220.

A designation of the person before whom the words were spoken, as "*J. McLendon*," is sufficient. *Haley v. State*, 63 Ala. 83.

Setting Out Words — Generally. — The words constituting the alleged slander must be set forth substantially. *Burnham v. State*, 37 Fla. 327; *Frisby v. State*, 26 Tex. App. 180; *Rogers v. State*, 30 Tex. App. 462; *Berry v. State*, 27 Tex. App. 483; *Humbard v. State*, 21 Tex. App. 200; *Conlee v. State*, 14 Tex. App. 222; *Wiseman v. State*, 14 Tex. App. 74; *Hammers v. State*, 13 Tex. App. 344; *McMahan v. State*, 13 Tex. App. 220. But see *contra* *State v. Haddock*, 109 N. Car. 873, which holds that under the statute in that state the words spoken need not be set forth.

Foreign Words. — If the alleged slanderous words were spoken in a foreign language, they must be set forth in such language, together with a translation into English. *State v. Marlier*, 46 Mo. App. 233; *Sticht v. State*, 25 Tex. App. 420. And it must be alleged that they were spoken in the presence of a person, or of persons, who understood such foreign language. *State v. Matheis*, 44 Mo. App. 294.

Innuendo. — Where the meaning of the alleged slanderous words is obscure, there should be an allegation of their meaning by way of innuendo;

otherwise proof of such meaning is not admissible. *Rogers v. State*, 30 Tex. App. 462.

Unlawfully Pregnant. — In *Clark v. State*, 32 Tex. Crim. 412, the slander consisted in stating that Fannie Magingo was pregnant and would give birth to a child within a few days. The indictment was held insufficient for failing to exclude the fact that she was lawfully or legitimately pregnant.

Precedents — Sufficient. — In *Whitehead v. State*, 30 Tex. Crim. 89, the charging part of the information was "that *Mug Whitehead*, on or about the 10th day of July, A. D. 1897, did, * * * in the presence and hearing of *Burney Quinn* and divers other persons, falsely, maliciously and wantonly say of and concerning the said Miss *S. A. Walker*, that he, the said *Mug Whitehead*, saw Miss *Alice Walker* (meaning Miss *S. A. Walker*, a female) and *Lorenzo Bounds* (meaning *Lorenzo Bounds*, a male person) getting there (meaning that the said Miss *S. A. Walker* and the said *Lorenzo Bounds* were having carnal intercourse with each other); contrary," etc.

There was a motion made to quash this information because "the language or terms alleged, to wit, 'getting there,' could not be contorted into a charge that the prosecutrix was unchaste; and the deduction that the prosecutrix and the said *Bounds* were having carnal intercourse was an unfair one and not born out of said language; and the State could not show, by innuendo, a more extended and enlarged meaning of said words." The motion was overruled.

In *Dickson v. State*, 34 Tex. Crim. 1, the information alleged that the accused "did falsely and maliciously impute a want of chastity to *July Chambliss*, by saying that one *Ed. Henry* was monkeying with said *July Chambliss* and doing what he pleased with her, meaning that said *Henry* was having carnal knowledge of her, the said *July Chambliss*." This information was held unquestionably good.

In *Shaw v. State*, 28 Tex. App. 236, the indictment was as follows:

"That *Jess Shaw*, on the 15th day of October, 1887, in the county and State aforesaid, did orally, falsely, maliciously and wantonly impute to a female in this State, to wit, *Ellen Goodman*, a

Form No. 18740.¹(Precedent in *Haley v. State*, 63 Ala. 83.)²

[(Commencing as in Form No. 10680, and continuing down to *)]³
Zack, alias *Zachariah Haley*, did falsely and maliciously speak of and concerning *Mollie Goins*, in the presence of *J. McLendon*, charging her with a want of chastity, in substance as follows: "that the said *Mollie Goins* was whoring about through the country;" against the peace [(concluding as in Form No. 10680).]³

Form No. 18741.⁴(Precedent in *State v. Buck*, 43 Mo. App. 445.)⁵[(Venue as in Form No. 10829).]³

State of Missouri } Before *Walter McQuie*, Justice of the Peace, *Upper*
v. } *Loutre township, Montgomery county, Missouri.*
Charles Buck.

want of chastity, to wit, the said *Jess Shaw*, did then and there, in the presence of *George Love* and other persons, falsely, maliciously, and wantonly say of and concerning the said *Ellen Goodman*, that she, the said *Ellen Goodman*, was unchaste, and that he, the said *Jess Shaw*, had had carnal intercourse and carnal knowledge of her, the said *Ellen Goodman*; and of and concerning the said *Ellen Goodman*, did falsely speak these words, to wit: 'I (meaning himself, the said *Jess Shaw*) have been cramming her' (meaning the said *Ellen Goodman*, and then and there by the word 'cramming' as so used meaning carnal intercourse and carnal knowledge); the said *Ellen Goodman* being then and there an unmarried female," etc.

This indictment was held sufficient.

Insufficient.—In *Neely v. State*, 32 Tex. Crim. 370, the information charged "that *Jim Neely*, in the county of *Henderson, Texas*, did orally, falsely, maliciously and wantonly impute to a female in this State, to wit, the said *Jim Neely* did then and there, in the presence and hearing of *Zack Worf* and *Hence Manning*, and divers other persons, falsely, maliciously, and wantonly say of and concerning the said *Rosetta Thomas*, that *Tom Cleveland* was keeping her, the said *Rosetta Thomas*, and that *Tom Cleveland* was caught on *Rosetta Thomas*, against, etc." The court said: "We believe that the motion in arrest of judgment should have been sustained. The offense which the law punishes is falsely imputing a want of chastity when done wantonly or maliciously. The infor-

mation here fails to state, except inferentially, what was imputed to a female in this state, or who the female was. It is carelessly drawn, and insufficient to sustain the prosecution, though we may concede the slanderous words need no innuendo or explanatory averment, which is doubtful."

1. *Alabama*.—Crim. Code (1896), § 5065.

See also, generally, *supra*, note 1, p. 283.

2. Two pleas in abatement were filed to this indictment. The first averred "that his [defendant's] true name is, and always has been since his birth, *Zacary Haley*, and he has never been known or called either *Zack* or *Zachariah Haley*." The second averred "that the name of the party mentioned in said indictment, to whom, or in whose presence, the defendant is alleged to have made use of the said slanderous language, is *James McLendon*, and not *J. McLendon*, as charged in said indictment, and that he has never been known or called by any other name." A demurrer was sustained to the second plea and issue was joined on the first, which issue was decided in favor of the plaintiff. The defendant then pleaded not guilty.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Missouri*.—Rev. Stat. (1899), § 2258.

See also, generally, *supra*, note 1, p. 283.

5. Certain objections made to this information were overruled and a judgment of conviction was sustained.

Sol. Hughlett, prosecuting attorney for and within the county of *Montgomery*, in the state of *Missouri*, of his own knowledge,¹ informs the court that one *Charles Buck*, on or about the *twenty-ninth* day of *May*, A. D. 1889, at the said county of *Montgomery*, did then and there falsely and maliciously charge and accuse Miss *Linnie Evans*, [an unmarried]² female, of incest, fornication, adultery and whoredom,³ by falsely speaking of and concerning such female, Miss *Linnie Evans*, in the presence of *Edward Morris*, *John Morris* and *Nathaniel Richards*, and divers other good citizens and persons, the false and slanderous words, to wit: "She is in the family way, it shows itself; there will be an increase in Mr. *Evans*' family. *Linnie* is in the family way; I can and could see she was sticking out;" meaning all the time to convey the impression and idea that Miss *Linnie Evans* was pregnant. They were spoken of and concerning Miss *Linnie Evans*, [an unmarried]² female, [contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state].⁴

Sol. Hughlett [Prosecuting Attorney].⁴

Form No. 18742.⁵

(Precedent in *State v. Haddock*, 109 N. Car. 874.)⁶

[(*Venue and title of court as in Form No. 10711.*)]⁷

The jurors for the State upon their oaths present, that *Spencer Haddock*, late of the county of *Pitt*, on the *26th* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-one*, at and in the county of *Pitt*, attempting, wantonly and maliciously, to injure and destroy the reputation of one *Lany Booth*, being an innocent and virtuous woman, did, by words spoken, declare in substance that the said *Lany Booth* was an incontinent woman, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

[(*Signature and indorsements as in Form No. 10711.*)]⁷

1. Personal Knowledge.—It was held that this information was upon the personal knowledge of the prosecuting attorney and, in consequence, that an affidavit attached to it, and which was in conflict with it, was surplusage, because of the rule of law that "where an information is made by the prosecuting attorney of his own knowledge it is not necessary for him to add his affidavit to it."

2. Unmarried.—The words within [] have been supplied to make the form more specific. The court said of this omission, "the information would undoubtedly have been clearer and better if it had charged in direct language that Miss *Linnie Evans* was a single woman; but the employment of the word 'Miss,' which is commonly used to designate a woman who has never been married, does state that fact, at least inferentially. Besides, the infor-

mation charges that they were spoken with the intent to charge her with incest, fornication, adultery and whoredom; and such an intention could not be imputed to the mere use of the words in their application to a married woman living with her husband."

3. Four Offenses.—It was held that "the words charged in this information [were] capable of being used in all of the four senses there charged; and it [seemed] sufficient to make the charge collectively instead of drawing up the information in four different counts."

4. The matter enclosed by [] will not be found in the reported case.

5. North Carolina.—Code (1883), § 1113.

See also, generally, *supra*, note 1, p. 283.

6. This indictment was held sufficient on a motion to quash.

7. The matter to be supplied within

Form No. 18743.¹(Precedent in *Patterson v. State*, 12 Tex. App. 473.)²

[(Commencing as in Form No. 10721)]³ did wilfully, wantonly, maliciously and falsely impute, orally, to one *Catherine Eugenie Smith*, then and there an unmarried female in this State, a want of chastity, in this, namely, he, the said *Zene Patterson*, then and there stated to one *Milton Vandegriff* and one *Scott Perkins*, that he knew she, the said *Catherine Eugenie Smith*, was pregnant, and that he, the said *Zene Patterson*, and one *Joseph Perkins* had been having carnal intercourse with her, the said *Catherine Eugenie Smith*, for the space of about *two* years [against the peace (*concluding as in Form No. 10721*).]⁴

[] will not be found in the reported case.

1. *Texas*. — Pen. Code (1895), § 750.

See also, generally, *supra*, note 1, p. 283.

2. The indictment in this case was held to be good.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [] will not be found in the reported case.

SLANDER OF TITLE.

BY HAROLD N. ELDRIDGE.

- I. ATTENDING AUCTION AND SLANDERING PLAINTIFF'S TITLE TO THE ESTATE HE WAS ABOUT TO SELL THERE, 287.
- II. PROCURING A THIRD PERSON TO ATTEND AN AUCTION AND SLANDER PLAINTIFF'S TITLE TO THE ESTATE HE WAS ABOUT TO SELL THERE, 288.
- III. SAYING TO A PERSON, WHO WAS ABOUT TO HIRE PLAINTIFF'S SHIP, THAT SHE WAS BROKEN AND UNFIT TO PROCEED TO SEA, WHEREBY HE REFUSED TO HIRE THE SHIP, 290.

I. ATTENDING AUCTION AND SLANDERING PLAINTIFF'S TITLE TO THE ESTATE¹ HE WAS ABOUT TO SELL THERE.

Form No. 18744.¹

(Title of court and cause as in Form No. 5915.)

John Doe, plaintiff, complains of *Richard Roe*, defendant, and says, that on the *tenth* day of *June*, 1899, the plaintiff was the owner in fee

1. Slander of Title.—Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by use become a recognized phrase of the law, and an action therefor is permitted against one who falsely and maliciously disparages the title of another to property, whether real or personal, and thereby causes him some special pecuniary loss or damage. *Burkett v. Griffith*, 90 Cal. 532.

Requisites of Complaint, Declaration or Petition, Generally.—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

Interest in Property.—That plaintiff has some title or interest in the property slandered must be alleged. *Edwards v. Burris*, 60 Cal. 157; *Germ Proof Filter Co. v. Pasteur Chamberland Filter Co.*, 81 Hun (N. Y.) 49; *Harriss v. Sneed*, 101 N. Car. 273.

Falsity of Words.—That the words spoken were false must be alleged.

Burkett v. Griffith, 90 Cal. 532; *Edwards v. Burris*, 60 Cal. 157; *Harriss v. Sneed*, 101 N. Car. 273.

Malice.—That the words were maliciously spoken by the defendant must be alleged. *Burkett v. Griffith*, 90 Cal. 532; *Edwards v. Burris*, 60 Cal. 157; *Stark v. Chitwood*, 5 Kan. 141; *Harriss v. Sneed*, 101 N. Car. 273.

Want of Probable Cause.—That the words were spoken without probable cause must be alleged. *Stark v. Chitwood*, 5 Kan. 141.

Setting Out Words.—The slanderous words must be set out. *Hill v. Ward*, 13 Ala. 310.

Special Damages.—That the plaintiff has sustained some special pecuniary damage as the direct and natural result of the speaking of the words must be alleged, and such damage must be distinctly and particularly set out. *Burkett v. Griffith*, 90 Cal. 532; *Edwards v. Burris*, 60 Cal. 157; *Stark v. Chitwood*, 5 Kan. 141; *Harriss v. Sneed*, 101 N. Car. 273.

2. See, generally, *supra*, note 1, this page.

(or other estate) of the following described real estate situated in the city of *Mt. Vernon*, county of *Posey* and state of *Indiana*, to wit, (*describing the property*); that on the *tenth* day of *June*, 1899, the plaintiff caused said property to be offered for sale (or to be put up and exposed for sale at public auction).

That the defendant, well knowing the premises and maliciously and without probable cause contriving to cause it to be suspected that the plaintiff did not own said property and could not sell the same, and to prevent plaintiff from effecting a sale thereof, did attend said sale and did maliciously then and there, at said sale, publicly state in the presence and hearing of *William West* (or of many persons), who was (or were) then and there present for the purpose of bidding on said property and of buying the same, concerning this plaintiff and his title to the said property, the following false and defamatory matter, to wit, (*set out the words complained of with suitable innuendoes*).

That by reason thereof the said *William West* was (or various persons, and in particular (*naming the persons referred to*), who were present at said sale for the purpose of buying the said property, were) dissuaded and prevented from bidding therefor and refused, and still do refuse, to purchase the said property in consequence thereof, and thereby the said plaintiff has been unable to sell said property and has been obliged to expend, and has expended, the sum of *fifty* dollars in and about the attendance upon said auction, and has been otherwise greatly injured, to his damage *two thousand* dollars, for which he asks judgment.

(*Signature and verification as in Form No. 5915.*)

II. PROCURING A THIRD PERSON TO ATTEND AN AUCTION AND SLANDER PLAINTIFF'S TITLE TO THE ESTATE HE WAS ABOUT TO SELL THERE.

Form No. 18745.¹

(3 Chit. Pl. (3d Am. from 2d Lond. ed.) 361.)

(*Commencement as in Form No. 6934.*) For that whereas the said *John Doe* before and at the time of the committing of the grievances by the said *Richard Roe* hereinafter mentioned, was seised as of fee of and in the reversion of and in certain land with the appurtenances, situate, lying and being in the parish of (*stating parish*), in the county of (*stating county*), immediately expectant upon the death of one *Sarah Short*, who was then seised of the same premises in her demesne as of freehold for the term of her natural life, to wit, at (*stating place*). And whereas the said *John Doe* before and at the time of the committing of the grievances hereinafter mentioned was desirous of selling his said estate and interest by public auction, and for that purpose he, the said *John Doe*, before and at the time of the committing of the said grievances, to wit, on (*stating time*), at (*stating place*), caused the said estate and interest to be, and the same then and there were, put up and exposed to sale by public auction

1. See, generally, *supra*, note 1, p. 237.

by one *George Hall*, as the said auctioneer and agent of the said *John Doe*, in order that the same might be then and there sold for the said *John Doe*, yet the said *Richard Roe*, well knowing the premises, but contriving and falsely, and fraudulently intending to injure him, the said *John Doe*, and to cause it to be suspected and believed that he, the said *John Doe*, had no title, estate or interest of, in or to the said land with the appurtenances, and to hinder and prevent the said *John Doe* from selling or disposing of his said estate or interest in the same, and to cause and procure the said *John Doe* to sustain and be put to divers great expenses attending the said exposure to sale, and to vex, harass, oppress, impoverish, and wholly ruin him, and the said *John Doe*, heretofore, to wit, on (*stating time*), aforesaid, at (*stating place*), aforesaid, wrongfully and injuriously, falsely and maliciously caused and procured a certain person, to wit, one *William Matthews*, to attend and be present at and upon such exposure to sale of his, the said *John Doe's*, estate and interest as aforesaid, and then and there upon such exposure to sale, and before the said estate and interest had been sold and disposed of, falsely and maliciously caused and procured the said *William Matthews* to assert and represent, and the said *William Matthews* did accordingly, in the presence and hearing of divers liege subjects of our said lord the king, then and there present, at and upon such exposure to sale as aforesaid, of and concerning the said *John Doe* and of and concerning the said *George Hall*, so being such auctioneer as aforesaid, and of and concerning the said land with the appurtenances, and the said *John Doe's* estate and interest therein, that (*Here set out the words*). And whereas also the said *Richard Roe* afterwards, to wit, on (*stating time*), aforesaid, at (*stating place*), aforesaid, further intending and contriving as aforesaid, then and there falsely and maliciously caused and procured a certain person, to wit, the said *William Matthews*, to attend and be present at and upon the said exposure to sale of his, the said *John Doe's*, estate and interest, and then and there at and upon such exposure to sale, and before the said estate and interest had been sold or disposed of, falsely and maliciously caused and procured the said *William Matthews* to assert and represent, and the said *William Matthews* did assert and represent, then and there in the presence and hearing of divers other subjects of the said lord the king then and there present upon and at such exposure to sale as aforesaid, of and concerning the said *John Doe* and the said *George Hall*, and of and concerning the said land and the estate and interest of the said *John Doe* therein, that (*stating the words with appropriate innuendoes*). By means of the committing of which said several grievances by the said *Richard Roe* as aforesaid, divers of the said liege subjects of our said lord the king, who were so present at and upon the said exposure to sale as aforesaid, and who were then and there about to be and become purchasers of the said estate and interest of the said *John Doe*, and who might, and would otherwise have bid for and purchased the same, and especially *Samuel White*, who was then and there about to bid for, and who would otherwise have purchased the same, were then and there deterred and pre-

vented from bidding for, and becoming the purchasers of the said estate and interest of the said *John Doe*, and then and there, and from thence hitherto have respectively wholly declined to purchase the same, and thereby he, the said *John Doe*, was then and there hindered and prevented from selling and disposing of his said estate and interest, and hath thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but hath been forced and obliged to pay, lay out, and expend divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of £100, in and about the said exposure to sale, and expenses incidental thereto, to wit, at (*stating place*), aforesaid. (*Concluding as in Form No. 6934.*)

III. SAYING TO A PERSON, WHO WAS ABOUT TO HIRE PLAINTIFF'S SHIP, THAT SHE WAS BROKEN AND UNFIT TO PROCEED TO SEA, WHEREBY HE REFUSED TO HIRE THE SHIP.

Form No. 18746.¹

(3 Chit. Pl. (3d. Am. from 2d. Lond. ed.) 363.)

(*Commencement as in Form No. 6934.*) For that whereas the said *John Doe*, before and at the time of the said *Richard Roe's* committing the grievances hereinafter mentioned, at (*stating place*), was possessed, as of his own property, of a certain ship or vessel called (*stating name*), and which said ship or vessel one *William West* before, and at the time of the committing of the grievances hereinafter mentioned, was about to hire, and would, had not such grievances been committed, have hired of the said *John Doe* to go and proceed on a certain voyage for a certain freight and reward to be therefor paid to the said *John Doe*, nevertheless the said *Richard Roe*, well knowing the premises, but contriving, and wrongfully, and maliciously intending to injure the said *John Doe*, and to induce the said *William West* not to hire the said ship or vessel as aforesaid, and thereby to deprive the said *Richard Roe* of all the profits, emoluments, rewards, and advantages he would have derived and acquired from the said ship or vessel being so hired as aforesaid, heretofore, to wit, on (*stating time*), at (*stating place*), in a certain discourse which the said *Richard Roe* then and there had with the said *William West*, of and concerning the said ship or vessel in the presence and hearing of the said *William West*, falsely and maliciously spoke and published of and concerning the said ship or vessel, the false, scandalous, and malicious words following, that is to say, (*Here set out the words*), thereby then and there meaning that the keel and floors of the said ship or vessel were broken at the time when the said *Richard Roe* had seen the same, whereas in truth and in fact at no time when he, the said *Richard Roe*, saw the said ship or vessel, nor when he spoke and published the said slander as aforesaid, her keel was in any place hove up *eighteen* inches in a straight line, nor the splice or scaff of

1. See, generally, *supra*, note 1, p. 287.

the said keelson as aforesaid, nor was the said ship or vessel in any manner so imperfect as the said *Richard Roe* so asserted and alleged as aforesaid. By means of the speaking and publishing of which said several false, scandalous and malicious words as aforesaid, the said *Richard Roe* giving credit to, and believing that the said representations and assertions were true, afterwards, to wit, on (*stating time*), aforesaid, at (*stating place*), aforesaid, wholly refused to hire the said ship or vessel as aforesaid, and thereby the said *John Doe* lost and was deprived of all profits, emoluments, rewards, and advantages he would have derived, of and from the said ship or vessel having been so hired as aforesaid; and the said *Richard Roe* hath been also by means of the speaking and publishing of the said several words as aforesaid, otherwise greatly injured and damnified, to wit, at (*stating place*), aforesaid. (*Concluding as in Form No. 6934.*)

SLAUGHTER-HOUSES.

See the title NUISANCES, vol. 13, p. 226.

SLEEPING-CAR COMPANIES.

See the title CARRIERS, vol. 4, p. 192.

SMUGGLING.

See the title REVENUE LAWS AND OFFICERS, vol. 16, p. 535.

SOCIETIES AND CLUBS.

See the title UNINCORPORATED SOCIETIES.

SODOMY.

See the title CRIME AGAINST NATURE, vol. 5, p. 921.

SOLE TRADERS.

- I. NOTICE BY A MARRIED WOMAN OF INTENTION TO MAKE APPLICATION TO BECOME A SOLE TRADER, 292.
- II. PETITION BY A MARRIED WOMAN TO BECOME A SOLE TRADER, 293.
- III. AFFIDAVIT OF PETITIONER, 294.
- IV. JUDGMENT AUTHORIZING A MARRIED WOMAN TO BECOME A SOLE TRADER, 295.

CROSS-REFERENCES.

For Forms in Actions Against Married Women, see the title HUSBAND AND WIFE, vol. 9, p. 538.

For Forms in Proceedings relating to Separate Estate of Married Women, see the title HUSBAND AND WIFE, vol. 9, p. 538. See also the GENERAL INDEX to this work.

I. NOTICE BY A MARRIED WOMAN OF INTENTION TO MAKE APPLICATION TO BECOME A SOLE TRADER.¹

Form No. 18747.²

(Title of court and proceeding as in Form No. 18751.)

Notice is hereby given that the undersigned, *June Doe*, wife of *John Doe*, who is a resident of the city of *Missoula*, in the county of *Missoula* and state of *Montana*, intends to make an application to the District Court within and for said county of *Missoula*, on *Tuesday*, the *tenth* day of *February*, 1903, at the opening of the court on said day, or as soon thereafter as said application may be heard, for a judgment and order of said court authorizing her to transact business in her own name and upon her own account, as a sole trader,

1. Statutes relating to sole traders exist in the following jurisdictions, viz:

California. — Code Civ. Proc. (1897), § 1811 *et seq.*

Idaho. — Code Civ. Proc. (1901), § 3886 *et seq.*

Montana. — Code Civ. Proc. (1895), § 2290 *et seq.*

Nevada. — Comp. Laws (1900), § 545 *et seq.*

Requisites of Notice. — That the applicant intends to carry on some certain business, describing it; that she intends to carry it on in her own name, and on her own account, must be stated. These three facts are essential

and the omission of either is fatal. *Adams v. Knowlton*, 22 Cal. 283; *Manton v. Tyler*, 4 Mont. 364. And the omission of the words "on her own account" is fatal. *Manton v. Tyler*, 4 Mont. 364.

That the business which the applicant intends to carry on will be "the business of buying and selling goods, wares and merchandise," sufficiently specifies the kind of business. *Abrams v. Howard*, 23 Cal. 388.

2. *Montana*. — Code Civ. Proc. (1895), §§ 2290, 2291.

See also, generally, *supra*, note 1, this page.

under the provisions of title XI of part III of the Code of Civil Procedure of the state of *Montana*; that the nature of the business to be conducted by the undersigned is that of (*specifying nature of the business*), and that the place at which it is proposed to conduct said business is the city of *Missoula*, in the county of *Missoula* and state of *Montana*.

Dated this *fifth* day of *January*, A. D. 1903.

Jane Doe.

II. PETITION BY A MARRIED WOMAN TO BECOME A SOLE TRADER.

Form No. 18748.¹

In the *District* Court of the *First* Judicial District of the State of *Idaho* in and for the County of *Shoshone*.

In the matter of the application of *Jane Doe* } Petition.

To become a Sole Trader.

The petition of *Jane Doe* respectfully shows to this court:

1. (*As in Form No. 18749.*)
2. (*As in Form No. 18749.*)
3. (*As in Form No. 18749.*)
4. (*As in Form No. 18749.*)
5. (*As in Form No. 18749.*)
6. (*As in Form No. 18749.*)
7. (*As in Form No. 18749.*)
8. (*As in Form No. 18749.*)

9. That of the moneys so to be used by your petitioner in her said business not more than *five hundred* dollars have come either directly or indirectly from the community property or from the separate property of the husband of your petitioner; that this application is made in good faith and for the purpose of enabling your petitioner to support herself and (*specifying persons dependent upon petitioner as aforesaid*), and not with any view to defraud, delay or hinder any creditor or creditors of your petitioner's husband.

Your petitioner therefore prays (*continuing as in Form No. 18749.*)

Form No. 18749.²

(*Venue and title of court as in Form No. 18751.*)

In the matter of the application of *Jane Doe* } Petition.

To become a Sole Trader.

The petition of *Jane Doe*, of the city of *Missoula*, in the county of *Missoula* and state of *Montana*, respectfully represents to this court:

I. That your petitioner is a married woman, and is the wife of *John Doe*, and now is and for *six* months and upward immediately preceding the date of the filing of this petition has been residing with her said husband in said city of *Missoula*, in said county of *Missoula* and state of *Montana*.

1. *Idaho*.—Code Civ. Proc. (1901), § 3888.

See also list of statutes cited *supra*, note 1, p. 292.

2. *Montana*.—Code Civ. Proc. (1895), § 2292.

See also list of statutes cited *supra*, note 1, p. 292.

II. That your petitioner is desirous of becoming a sole trader under the provisions of title XI, part III, of the Code of Civil Procedure of the state of *Montana*, and of obtaining a judgment and order of the *District Court* of said county of *Missoula*, authorizing her to engage in business in her own name and on her own account, in the city of *Missoula*, in said county of *Missoula*.

III. That this application of your petitioner is made in good faith to enable her to support herself and others dependent upon her for support and maintenance, to wit: (*Here state the names of the persons dependent upon and their relationship to the petitioner*).

IV. That your petitioner receives insufficient support from her husband and that the cause of such insufficient support is as follows, to wit: (*Here state the cause of the insufficient support from the husband*).

V. That the reason why a divorce is not sought by your petitioner is (*Here state reason why divorce is not sought*).

VI. That the nature of the business, which your petitioner purposes to conduct, is as follows: (*specify nature of the business*), and the place where your petitioner purposes to conduct such business is the city of *Missoula*, in said county of *Missoula* and state of *Montana*.

VII. That the capital to be invested in said business by your petitioner is *five hundred* dollars.

VIII. That the sources from which said capital is derived are as follows: (*specifying the sources from which the capital to be invested is derived*).

Your petitioner therefore prays that this honorable court, upon the hearing of this petition, will render judgment authorizing your petitioner to carry on said business in her own name and on her own account as a sole trader.

Jeremiah Mason, Attorney for Petitioner.

(*Verification.*)

III. AFFIDAVIT OF PETITIONER.

Form No. 18750.¹

(Cal. Code Civ. Proc. (1897), § 1818.)

In the *Superior Court* of the County of *Madera*, State of *California*.
In the matter of the application of

Jane Doe

} Affidavit.

To become a Sole Trader.

State of *California*, }
County of *Madera*. } ss.

I, *Jane Doe*, do, in the presence of Almighty God, solemnly swear that this application is made in good faith for the purpose of enabling me to support myself (*and any dependent, such as husband, parent, sister, child, or the like, naming them, if any*), and not with any view to defraud, delay or hinder any creditor or creditors of my husband, and that of the money so to be used by me in business not more than *five hun-*

1. *California*. — Code Civ. Proc. See also list of statutes cited *supra*, (1897). § 1811 *et seq.* note I, p. 292.

dred dollars have come either directly or indirectly from my husband. So help me God.

Jane Doe.

Subscribed and sworn to before me this *tenth* day of *September*,
A. D. 1899.

Calvin Clark, Clerk, *Madera* County.

Form No. 18751.¹

(Mont. Code Civ. Proc. (1895), § 2295.)

State of *Montana*, } ss. In the *District* Court within and for
County of *Missoula*. } said County.
In the matter of the application of }
Jane Doe } Affidavit.
To become a Sole Trader.

State of *Montana*, } ss.
County of *Missoula*. }

I, *Jane Doe*, do, solemnly swear that this application is made in good faith for the purpose of enabling me to support myself (and any dependent, such as husband, parent, sister, child, or the like, naming them, if any), and not with any view to defraud, delay or hinder any creditor or creditors of my husband.

Jane Doe.

Subscribed and sworn to before me this *tenth* day of *September*,
A. D. 1899.

Calvin Clark, Clerk, *Missoula* County.

**IV. JUDGMENT AUTHORIZING A MARRIED WOMAN TO BECOME A
SOLE TRADER.**

Form No. 18752.²

In the *District* Court of the *Fourth* Judicial District of the State
of *Montana*, in and for the County of *Missoula*.

In the matter of the application of }
Jane Doe } Judgment.
To become a Sole Trader.

The application in the above entitled proceeding came on regularly to be heard on this *tenth* day of *June*, A. D. 1903, and it satisfactorily appearing to the court that the notice of the intention of the petitioner to make said application has been duly published in the "*Missoula Democrat*," a newspaper printed and published in the city of *Missoula*, in said county of *Missoula* and state of *Montana*, for four consecutive weeks immediately preceding the date upon which said application was made, and no creditor of the husband of the said petitioner having filed in this court written opposition to the application of said petitioner or appearing to oppose said application.

The said applicant appeared in person in open court, and the court

1. *Montana*. — Code Civ. Proc. (1895), § 2295.

See also list of statutes cited *supra*, note 1, p. 292.

2. *Montana*. — Code Civ. Proc. (1895), § 2294.

See also list of statutes cited *supra*, note 1, p. 292.

having heard the allegations of the petition of said applicant, duly filed and verified, and having examined the said applicant under oath, as required by law, and having heard the proofs of the applicant, and it satisfactorily appearing to the court that the said applicant has been for *six* months and upward next preceding the time of her said application a *bona fide* resident of said county of *Missoula*; and it further satisfactorily appearing to the court that a proper case exists for the granting of the order prayed for, and the said applicant having filed with the clerk of this court the affidavit required by law; and the court now here finds the following facts from the proofs and in accordance therewith, to wit:

1. That the application of said petitioner is made in good faith and to enable her to support herself and the following persons dependent upon her for support and maintenance, (*Here state the names of the persons dependent upon and their relationship to the petitioner*);

2. That the said applicant receives insufficient support from her husband and that the cause of such insufficient support is, to wit, (*specify the cause of the insufficient support*);

3. That the said applicant has no sufficient grounds upon which to obtain a divorce;

4. That the capital to be invested by the applicant in the proposed business is derived from the following sources, to wit: (*specify sources from which the money is derived*).

Therefore it is considered, adjudged and decreed by the court that the said applicant, *Jane Doe*, be and she hereby is authorized to carry on in her own name and on her own account, as a sole trader, at the city of *Missoula*, in the county of *Missoula* and state of *Montana*, the business specified in the said notice and petition, to wit, (*Here specify the business*).

Judgment entered (*concluding as in Form No. 11862*).

SOLICITING TO CRIME.

See the title *ACCESSORIES, AIDERS AND ABBETTORS*,
vol. 1, p. 158.

SOLICITORS.

See the title *ATTORNEYS*, vol. 2, p. 969.

SOLVIT POST DIEM.

See the title *PAYMENT*, vol. 13, p. 723.

SON ASSAULT DEMESNE.

See the title *ASSAULT*, vol. 2, p. 228.

SPECIAL AND STRUCK JURIES.

BY HAROLD N. ELDRIDGE.

- I. DEMAND UPON CLERK FOR STRUCK JURY, 297.
- II. NOTICE OF MOTION FOR STRUCK JURY, 298.
- III. AFFIDAVIT SUPPORTING MOTION FOR STRUCK JURY, 298.
- IV. ORDER FOR STRUCK JURY, 298.
- V. NOTICE OF TIME OF STRIKING JURY, 300.
 1. *By Clerk*, 300.
 2. *By Party to Action*, 301.
- VI. VENIRE FOR STRUCK JURY, 301.

CROSS-REFERENCES.

For Forms relating to Common Juries, see the title JURIES, vol. 10, p. 954.

I. DEMAND UPON CLERK FOR STRUCK JURY.¹

1. **Definition.** — Special juries were originally introduced in the trials at bar, when the causes were of too great nicety for the discussion of ordinary freeholders; or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book; and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides; who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. By the statute 3 Geo. II, c. 25, either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assizes as at bar; he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II, c. 18) that the cause required such special jury, 3 Black. Com. 357.

At Common Law. — Special and struck juries were well known to the common law, their origin being so ancient that its date cannot be ascertained. *Lommen v. Minneapolis Gaslight Co.*, 65 Minn. 196.

Statutes relating to special and struck juries exist in the following states:

Alabama. — Civ. Code (1896), § 2656.
Delaware. — Rev. Stat. (1893), p. 806, c. 109, § 16.

Georgia. — 3 Code (1895), § 848.

Indiana. — Horner's Stat. (1901), § 522 *et seq.*

Iowa. — Code (1897), § 3699.

Maryland. — Pub. Gen. Laws (1888), art. 51, § 13.

Michigan. — Comp. Laws (1897), § 356 *et seq.*

Minnesota. — Laws (1895), c. 328, § 1 *et seq.*

Missouri. — Rev. Stat. (1899), § 3791.

Nevada. — Comp. Laws (1900), § 3256.

New Jersey. — Gen. Stat. (1895), p. 1849, § 18 *et seq.*

New York. — Code Civ. Proc., § 1063 *et seq.*

Pennsylvania. — Bright. Pur. Dig. (1894), p. 1115, §§ 79, 80.

Vermont. — Stat. (1894), § 1134 *et seq.*

Virginia. — Code (1887), § 3158.

West Virginia. — Code (1899), c. 116, § 21; c. 159, § 3.

Wisconsin. — Stat. (1898), § 2544a *et seq.*

In *Ohio*, special or struck juries have been abolished by statute. *Bates' Anno. Stat. Ohio* (1897), §§ 5183, 5184.

Form No. 18753.¹

(Venue and title of court and cause as in Form No. 5915.)

To Calvin Clark, Clerk of said County:

Take notice that I, *Richard Roe*, defendant in the above entitled cause now pending in said court, demand a struck jury for the trial of said cause.

Dated this *tenth* day of *May*, A. D. 1902.*Richard Roe.*II. NOTICE OF MOTION FOR STRUCK JURY.²Form No. 18754.³

(Commencing as in Form No. 14254, and continuing down to †) an order that a special jury be struck for the trial of this action, (concluding as in Form No. 14254).

III. AFFIDAVIT SUPPORTING MOTION FOR STRUCK JURY.⁴Form No. 18755.⁵*New Jersey Supreme Court.*

John Doe }
 against } In Contract.
Richard Roe. }
 State of *New Jersey*, } ss.
 County of *Mercer*. }

John Doe, the above named plaintiff, being duly sworn according to law, on his oath says, that (*Here state the facts deponent relies on as entitling him to a struck jury*).

And deponent says that, in consequence of the above enumerated facts, the nature and importance of the matter and matters in controversy in this action render it reasonable and proper that a jury be struck for the trial thereof, and that the court grant an order to that effect.

(Signature and jurat as in Form No. 8846.)

IV. ORDER FOR STRUCK JURY.⁶

1. *Indiana*. — Horner's Stat. (1901), § 524 *et seq.*

See also list of statutes cited *supra*, note 1, p. 297.

2. For the formal parts of a notice of motion in a particular jurisdiction see the title *MOTIONS*, vol. 12, p. 938.

3. *New York*. — Code Civ. Proc., § 1063.

See also list of statutes cited *supra*, note 1, p. 297.

4. *Affidavit Necessary*. — In several cases it has been held that an affidavit in support of a motion for a struck jury is necessary. *Livingston v. Columbian Ins. Co.*, 2 Cal. (N. Y.) 28; *Manhattan Co. v. Lydig*, 2 Cal. (N. Y.) 380; *Thomas v. Rumsey*, 4 Johns. (N. Y.) 482; *Livingston v. Cheetham*, 1 Johns. (N. Y.) 61; *Livingston v. Smith*, 1 Johns. (N. Y.) 141.

And see list of statutes cited *supra*, note 1, p. 297.

Requisites of Affidavit, Generally. — For the formal parts of an affidavit in a particular jurisdiction see the title *AFFIDAVITS*, vol. 1, p. 548.

Specifying Intricacy. — Where a struck jury is sought on the ground that the case is intricate and important, the affidavit must specify wherein such case is intricate and important, and a mere allegation of such fact is not enough. *Manhattan Co. v. Lydig*, 2 Cal. (N. Y.) 380.

5. *New Jersey*. — Gen. Stat. (1895), p. 1849, § 18.

See also list of statutes cited *supra*, note 1, p. 297.

6. For the formal parts of an order in a particular jurisdiction see the title *ORDERS*, vol. 13, p. 356.

Form No. 18756.¹

(Title of court and cause as in Form No. 5522.)

It appearing to this court that a fair and impartial trial will be more likely to be obtained in this cause by having a struck jury for the trial thereof, on motion of Mr. *Jeremiah Mason*, of counsel for the defendant, ordered, that a special jury be struck for the trial of said cause.

(Signature as in Form No. 10280.)

Form No. 18757.²

(Title of court and cause as in Form No. 11785.)

Upon reading and filing in this court the affidavit of the plaintiff (or the defendant) in the above entitled action, and it satisfactorily appearing to the court that the facts therein set forth are true and that a proper case exists, it is on this *tenth* day of *May*, 1902, ordered, at the instance of the said plaintiff (or the defendant), that the sheriff of the county of *Hudson* do, according to the form of the statute in such case made and provided, attend one of the justices of this court with the book or list of persons qualified to serve on juries in the county of *Hudson*, and that such justice do, in the presence of the attorneys or agents of the respective parties, name *forty-eight* of those persons out of which each party may strike *twelve*, and the sheriff of the said county of *Hudson* shall impanel the remaining *twenty-four* to try the issue between the said parties.

By the court (or *Joseph Story, Justice*).

Dated this *tenth* day of *May*, 1902.

On motion of

Jeremiah Mason, Attorney for the Plaintiff
(or the Defendant).

Form No. 18758.³

(Title of court and cause as in Form No. 6957.)

Upon reading and filing (*Here enumerate the motion papers*), and

Precedent.—In *Houghton v. Huron Copper Min. Co.*, 57 Mich. 547, is set out the following order: "It is further ordered, pursuant to the prayer of said petitioner, no sufficient cause to the contrary being shown, that the sheriff of this county make a list of *twenty-four* freeholders, residing in the vicinity of the property in the petition described, from which to strike a jury for the hearing of said petition as against said respondents, and that the attorneys of said petitioners and said respondents respectively attend at the office of the clerk of this court on the *first* day of *July*, 1884, at *ten* o'clock in the *forenoon* of that day, for the purpose of striking such jury, and that the sheriff, under-sheriff, or deputy-sheriff have then and there such list of freeholders, and that when such jury shall have been struck, the clerk of this court issue, under the

seal of this court, a venire summoning such jury to attend this court on the *fifth* day of *July*, A. D. 1884, at *nine* o'clock in the *forenoon* of that day, which venire shall be served by said sheriff."

No objection was made to the sufficiency of this order.

1. *Michigan*.—Comp. Laws (1897), § 356.

2. *New Jersey*.—Gen. Stat. (1895), p. 1849, § 18 *et seq.*

See also list of statutes cited *supra*, note 1, p. 297.

This is substantially the form of rule for a special or struck jury set out in *Besson's Prec.* 365.

3. *New York*.—Code Civ. Proc., § 1063 *et seq.*

See also list of statutes cited *supra*, note 1, p. 297.

upon reading and filing (*Here specify papers, if any*) filed in opposition to the said motion, and upon hearing *Oliver Ellsworth*, attorney for the above named defendant, in argument in support of said motion, and *Jeremiah Mason*, attorney for the plaintiff, in opposition (or and upon satisfactory proof of service of said notice of motion and papers upon *Jeremiah Mason*, attorney for plaintiff above named, and upon hearing *Oliver Ellsworth*, attorney for the defendant above named, in argument in support of said motion, and no one appearing in opposition), and it appearing to the court that a fair and impartial trial of the issues of fact, joined in this action, cannot be had without a struck jury (or that the importance or intricacy of this case requires a struck jury); now, on motion of *Oliver Ellsworth*, attorney for said defendant,

Ordered, that a special jury be struck for the trial of said issues to be had at the next trial term of the Supreme Court,¹ to be held within and for the county of *Suffolk*, at the court-house in the village of *Riverhead*, in said county of *Suffolk*, on the second Tuesday, being the tenth day, of *March*, 1903.²

And it is further ordered that the said jurors attend at the said term of said court on the twelfth day of *March*, 1903.

And it is further ordered that the parties to this action attend before *Calvin Clark*, clerk of said county of *Suffolk*, at the county clerk's office in the village of *Riverhead*, in said county of *Suffolk*, on the second day of *March*, 1903, at ten o'clock in the forenoon (or that the clerk of the county of *Suffolk* fix a time for the parties to this action to attend before him), for the purpose of having said jury struck.

(Where clerk or other officer is interested, say, "And it appearing to the court that the clerk of said county of *Suffolk* (or other officer) is interested in this action (or is related to the plaintiff (or the defendant) in this action, or is not indifferent between the parties to this action), the court hereby appoints *Samuel Short*, of *Riverhead*, in said county of *Suffolk*, and *William West*, of *Riverhead*, in said county of *Suffolk*, two disinterested persons, to strike said jury.")³

(Signature as in Form No. 6957.)

V. NOTICE OF TIME OF STRIKING JURY.⁴

1. By Clerk.

Form No. 18759.⁵

(Venue and title of court and cause as in Form No. 5915.)

To *John Doe*, Plaintiff:

Take notice that in pursuance of the demand made by *Richard*

1. **Specifying Day in Term.** — The order must specify a particular day in the term when the jurors must attend. N. Y. Code Civ. Proc., § 1063.

2. **Specifying Term.** — The order must specify the term when the jurors must attend. N. Y. Code Civ. Proc., § 1063.

3. **Disinterested Persons may Strike.** — If it appears to the court that the clerk is interested in the action, or is related

to either of the parties, or is not indifferent between them, the court must appoint two disinterested persons to strike the jury. N. Y. Code Civ. Proc., § 1068.

4. **For the formal parts** of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

5. *Indiana*. — Horner's Stat. (1901), § 524 et seq.

Roe, the defendant in the above entitled cause, for a struck jury, the jury commissioners of said county will attend at the clerk's office in said county, in the city of *Mount Vernon*, on *Monday*, the *fifteenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, to select from the number of persons qualified to serve as jurors within said county, *forty* persons from which a jury will be struck to try the said cause, now pending in said court.

Dated this *tenth* day of *May*, A. D. 1902.

Calvin Clark, Clerk.

2. By Party to Action.

Form No. 18760.¹

(*Venue and title of court and cause as in Form No. 13166.*)

To *John Doe*, plaintiff above named:

Sir: Please to take notice that on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, I shall attend on behalf of the above named defendant, before *Calvin Clark*, clerk of the county of *Montcalm*, at his office in *Stanton*, for the purpose of having a jury struck, which has been ordered in this cause.

(*Date and signature as in Form No. 13166.*)

VI. VENIRE FOR STRUCK JURY.²

Form No. 18761.³

State of *Indiana*,)
Posey County.) ss.

The State of *Indiana* to the Sheriff of *Posey* County, Greeting:

You are hereby commanded to summon (*naming the sixteen persons to be summoned*), if they shall be found in your county, to appear before the judge of the *Posey Circuit* Court now in session at the court-house in *Mount Vernon*, on the *eleventh* day of *September*, A. D. 1899, then and there to serve as petit jurors in the trial of the action now pending in said court between *John Doe*, plaintiff, and *Richard Roe*, defendant. And this they shall in nowise omit. And have you then and there this writ, with your doings thereon.

See also list of statutes cited *supra*, note 1, p. 297.

1. *Michigan*. — Comp. Laws (1897), § 357.

See also list of statutes cited *supra*, note 1, p. 297.

2. *Another Form*. — In Graydon's F. (Pa. 1845), p. 583, is set out the following venire for a struck jury:

"*Lackawanna* County, ss. The Commonwealth, etc.

We command you that you cause to come before our judges at *Scranton*, at our County Court of *Common Pleas*, there to be held for the said county of *Lackawanna*, the *tenth* day of *May*, at *ten* o'clock in the *forenoon* of that day,

William West, *Samuel Short*, etc., good and lawful men of your county, by whom the truth of the matter may be better known, to make a jury between *John Doe*, the plaintiff, and *Richard Roe*, the defendant, in an action of (*stating action*), because as well the said *Richard Roe*, the defendant, as the said *John Doe*, the plaintiff, between whom the contention is, have put themselves on that jury. And have you then and there this writ. Witness, etc."

3. *Indiana*. — Horner's Stat. (1901), § 524 *et seq.*

See also list of statutes cited *supra*, note 1, p. 297.

In witness whereof, I, *Calvin Clark*, clerk of said court, hereunto affix the seal thereof and subscribe my name at *Mount Vernon*, this fourth day of *September*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 18762.¹

New Jersey, ss.

The State of *New Jersey* to our Sheriff of our County of *Mercer*, greeting:

(SEAL) We command you that you cause to come before such justice of our *Supreme Court* as shall hold our *Circuit Court* to be holden at *Trenton*, in and for the county of *Mercer*, on the tenth day of *May next*, the persons named in the annexed list or panel, subscribed by the Honorable *Joseph Story*, one of the justices of our *Supreme Court*, to make a certain jury of the country, between *John Doe*, plaintiff, and *Richard Roe*, defendant, in a plea of (*stating action*), because as well the said *John Doe* as the said *Richard Roe*, between whom the contention is, have put themselves upon the said jury. And in what manner you shall have executed this our writ make appear at *Trenton* aforesaid, before our said justice of our said court, on the day aforesaid. And have you then there the names of those persons and this writ.

Witness, *John Marshall*, Esq., chief justice, at *Trenton* aforesaid, this 15th day of *April*, A. D. 1902.

Calvin Clark, Clerk.

1. *New Jersey*.—Gen. Stat. (1895), p. 1849, § 18 *et seq.*

See also list of statutes cited *supra*, note 1, p. 297.

This is substantially the form of venire for a special or struck jury set out in Besson's Prec. 365.

SPECIAL APPEARANCES.

See the title APPEARANCES, vol. 1, p. 1110.

SPECIAL BAIL.

See the title BAIL AND RECOGNIZANCE, vol. 3, p. 1.

SPECIAL CASE.

See the title SUBMITTED CASE.

SPECIAL FINDINGS.

See the titles JUDGMENTS AND DECREES, vol. 10, p. 645;
SPECIAL INTERROGATORIES TO JURIES, *post*;
VERDICTS.

SPECIAL INJUNCTIONS.

See the title INJUNCTIONS, vol. 9, p. 822.

SPECIAL INTERROGATORIES TO JURIES.¹

BY HAROLD N. ELDRIDGE.

- I. REQUEST FOR SUBMISSION OF SPECIAL INTERROGATORIES WITH INTERROGATORIES ANNEXED, 304.
- II. GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND ANSWERS ANNEXED, 308.
- III. JUDGMENT ON ANSWERS TO SPECIAL INTERROGATORIES, 313.

I. REQUEST FOR SUBMISSION OF SPECIAL INTERROGATORIES WITH INTERROGATORIES ANNEXED.²

1. Statutes relating to special interrogatories to juries exist in the following states:

Arkansas.—Sand. & Dig. (1894), §§ 5831, 5832.

California.—Code Civ. Proc. (1897), § 625.

Colorado.—Mills' Anno. Code (1896), § 199.

Idaho.—Code Civ. Proc. (1901), § 3478.

Illinois.—Starr & C. Anno. Stat. (1896), c. 110, pars. 102, 103.

Indiana.—Horner's Stat. (1901), § 546.

Iowa.—Code (1897), §§ 3725, 3728.

Kansas.—Gen. Stat. (1897), c. 95, §§ 296, 297.

Michigan.—Comp. Laws (1897), § 10237.

Minnesota.—Stat. (1894), §§ 5380, 5381.

Montana.—Code Civ. Proc. (1895), § 1101.

Nebraska.—Comp. Stat. (1899), § 5865.

Nevada.—Comp. Laws (1900), § 3272.

New York.—Code Civ. Proc., §§ 1187, 1188.

North Carolina.—Clark's Code Civ. Proc. (1900), §§ 409, 410.

North Dakota.—Rev. Codes (1895), § 5445.

Ohio.—Bates' Anno. Stat. (1897), §§ 5200, 5201.

Oklahoma.—Stat. (1893), § 4301.

Oregon.—Bellinger & C. Codes & Stat. (1901), §§ 154, 155.

South Carolina.—Code Civ. Proc. (1902), §§ 283, 284.

South Dakota.—Stat. (1901), § 6270.

Utah.—Rev. Stat. (1898), § 3163.

Washington.—Ballinger's Anno. Codes & Stat. (1897), §§ 5021, 5022.

West Virginia.—Code (1899), c. 131, § 5.

Wisconsin.—Stat. (1898), § 2860.

Wyoming.—Rev. Stat. (1887), §§ 2564, 2565.

2. **Conditional Request.**—The request to the court for the submission of the interrogatories must be conditioned upon the jury's finding a general verdict, and a request which is absolute and unconditional is insufficient. *Louisville, etc., R. Co. v. Worley*, 107 Ind. 320; *Taylor v. Burk*, 91 Ind. 252; *McIlvain v. State*, 80 Ind. 69; *Ogle v. Dill*, 61 Ind. 438; *Killian v. Eigenmann*, 57 Ind. 480; *Hodgson v. Jeffries*, 52 Ind. 334; *Adams v. Holmes*, 48 Ind. 299; *Otter Creek Block Coal Co. v. Raney*, 34 Ind. 329; *Schenck v. Butsch*, 32 Ind. 338; *Morse v. Morse*, 25 Ind. 156; *Crassen v. Swoveland*, 22 Ind. 427; *La Grange County v. Kromer*, 8 Ind. 446; *Bird v. Lanius*, 7 Ind. 615.

Requisites of Interrogatories — Must be in Writing.—The interrogatories must be in writing. *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533; *Miller v. White River School Tp.*, 101 Ind. 503; *Allen v. Davison*, 16 Ind. 416; *Eberhardt v. Sanger*, 51 Wis. 72.

Number of Interrogatories.—It is not the object of the statute to permit

many interrogatories to go to the jury. Louisville, etc., R. Co. v. Kane, 120 Ind. 140. And the tendency of the court is to limit rather than to extend the practice which has grown up of propounding a great many interrogatories to the jury. Indianapolis v. Lawyer, 38 Ind. 348. The interrogatories should be as few in number as will attain the ends of justice, so as to avoid confusing the jury and leading them into unprofitable wrangling over nonessentials. Flannery v. Kansas City, etc., R. Co., 23 Mo. App. 120; Jackson v. German Ins. Co., 27 Mo. App. 62. And a profusion of questions which only creates distraction and increases perplexity will be ruled out by the court. Peninsular Land Transp., etc., Co. v. Franklin Ins. Co., 35 W. Va. 666.

Particular Questions of Fact. — The interrogatories must embrace particular questions of fact. Ohio, etc., R. Co., v. Stansberry, 132 Ind. 533; Chicago, etc., R. Co. v. Ostrander, 116 Ind. 259; Blacker v. Slown, 114 Ind. 322; Miller v. White River School Tp., 101 Ind. 503; Otter Creek Block Coal Co. v. Raney, 34 Ind. 329; Manning v. Gasharie, 27 Ind. 399; Allen v. Davison, 16 Ind. 416; Rosser v. Barnes, 16 Ind. 502; Whalen v. Chicago, etc., R. Co., 75 Iowa 563; McPheeters v. Birk, 48 Kan. 784; Southern Kansas R. Co. v. Walsh, 45 Kan. 653; Elliott v. Reynolds, 38 Kan. 274; Foster v. Turner, 31 Kan. 58; Wyandotte v. White, 13 Kan. 191; Dubois v. Campau, 28 Mich. 304; Porter v. Western North Carolina R. Co., 97 N. Car. 66; Andrews v. Mundy, 36 W. Va. 22. And must not relate to matters of law. Ohio, etc., R. Co. v. Stansberry, 132 Ind. 533; Chicago, etc., R. Co. v. Ostrander, 116 Ind. 259; Louisville, etc., R. Co. v. Pedigo, 103 Ind. 481; Louisville, etc., R. Co. v. Worley, 107 Ind. 320; Albion v. Hetrick, 90 Ind. 545; Trentman v. Wiley, 85 Ind. 33; Toledo, etc., R. Co. v. Goddard, 25 Ind. 185; Toledo Sav. Bank v. Rathmann, 78 Iowa 288; Hatfield v. Lockwood, 18 Iowa 296.

Single Fact. — Each interrogatory must relate to a single fact. Albion v. Hetrick, 90 Ind. 545; Todd v. Fenton, 66 Ind. 25; Rosser v. Barnes, 16 Ind. 502; O'Leary v. German-American Ins. Co., 100 Iowa 390; Whalen v. Chicago, etc., R. Co., 75 Iowa 563; McCoy v. Milwaukee St. R. Co., 88 Wis. 56; Jewell v. Chicago, etc., R. Co., 54 Wis. 610.

And an interrogatory which embraces an issue is insufficient. Ohio, etc., R. Co. v. Stansberry, 132 Ind. 533; Todd v. Fenton, 66 Ind. 25; Morse v. Morse, 25 Ind. 156.

Material Facts. — The interrogatories must relate to material facts. Ohio, etc., R. Co. v. Ramey, 139 Ill. 9; Jacksonville Southeastern R. Co. v. Southworth, 135 Ill. 250; Consolidated Coal Co. v. Maehl, 130 Ill. 551; Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Louisville, etc., R. Co. v. Kane, 120 Ind. 140; Louisville, etc., R. Co. v. Hubbard, 116 Ind. 193; Grosco v. Rainier, 111 Ind. 361; North Western Mut. L. Ins. Co. v. Heimann, 93 Ind. 24; Albion v. Hetrick, 90 Ind. 545; Clegg v. Waterbury, 88 Ind. 21; Manning v. Gasharie, 27 Ind. 399; Allen v. Davison, 16 Ind. 416; Ohio, etc., R. Co. v. Wrape, 4 Ind. App. 100; Heiney v. Garretson, 1 Ind. App. 548; Scagel v. Chicago, etc., R. Co., 83 Iowa 380; Monroe Bank v. Gifford, 79 Iowa 300; O'Leary v. German-American Ins. Co., 100 Iowa 390; Patterson v. Omaha, etc., R., etc., Co., 90 Iowa 247; Capital City Bank v. Wakefield, 83 Iowa 46; Sage v. Haines, 76 Iowa 581; Whalen v. Chicago, etc., R. Co., 75 Iowa 563; Hawley v. Chicago, etc., R. Co., 71 Iowa 717; Liston v. Central Iowa R. Co., 70 Iowa 714; Dreher v. Iowa Southwestern R. Co., 59 Iowa 599; Lawson v. Chicago, etc., R. Co., 57 Iowa 672; Mickey v. Burlington Ins. Co., 35 Iowa 174; Bonham v. Iowa Cent. Ins. Co., 25 Iowa 328; Hatfield v. Lockwood, 18 Iowa 296; Mays v. Foster, 26 Kan. 518; Atchison, etc., R. Co. v. Plunkett, 25 Kan. 188; Wyandotte v. Gibson, 25 Kan. 236; Bent v. Philbrick, 16 Kan. 190; Kansas Pac. R. Co. v. Reynolds, 8 Kan. 623; Miner v. Vedder, 66 Mich. 101; Henry C. Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564; Pigott v. Engle, 60 Mich. 221; Daniels v. Aldrich, 42 Mich. 58; Johnson v. Continental Ins. Co., 39 Mich. 33; Harbaugh v. Cicott, 33 Mich. 241; Fowler v. Hoffman, 31 Mich. 215; Crane v. Reeder, 25 Mich. 303; Iltis v. Chicago, etc., R. Co., 40 Minn. 273; Jaspers v. Lano, 17 Minn. 296; Jackson v. German Ins. Co., 27 Mo. App. 62; Horne v. Peoples Bank, 108 N. Car. 109; Bean v. Western North Carolina R. Co., 107 N. Car. 731; Cole v. Laws, 104 N. Car. 651; Porter v. Western North Carolina R. Co., 97 N. Car. 66; Andrews v. Mundy, 36 W. Va. 22; Peninsular Land Transp., etc., Co. v.

Franklin Ins. Co., 35 W. Va. 666; Eberhardt v. Sanger, 51 Wis. 72.

Controverted Facts.—The interrogatories must relate to controverted facts. McCoy v. Milwaukee St. R. Co., 88 Wis. 56; Jewell v. Chicago, etc., R. Co., 54 Wis. 610. And not to facts which are admitted. Pigott v. Engle, 60 Mich. 221.

Ultimate and Not Evidentiary Facts.—The interrogatories must relate to ultimate facts, and not to mere evidentiary or probative facts. Elgin, etc., R. Co. v. Raymond, 148 Ill. 241; Ingalls v. Allen, 144 Ill. 535; Chicago, etc., R. Co. v. Clough, 134 Ill. 586; Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Ohio, etc., R. Co. v. Ramey, 39 Ill. App. 409; Lake Erie, etc., R. Co. v. Morin, 36 Ill. App. 632; Treffert v. Ohio, etc., R. Co., 36 Ill. App. 93; Gates v. Scott, 123 Ind. 459; Louisville, etc., R. Co. v. Kane, 120 Ind. 140; Louisville, etc., R. Co. v. Hubbard, 116 Ind. 193; North Western Mut. L. Ins. Co. v. Heilmann, 93 Ind. 24; Chapin v. Clapp, 29 Ind. 614; Manning v. Gasharie, 27 Ind. 399; Seiberling Co. v. Tatlock, 13 Ind. App. 345; Heiney v. Garretson, 1 Ind. App. 548; O'Leary v. German-American Ins. Co., 100 Iowa 390; Aultman, etc., Co. v. Shelton, 90 Iowa 288; Patterson v. Omaha, etc., R., etc., Co., 90 Iowa 247; Clifton v. Granger, 86 Iowa 573; Thomas v. Schee, 80 Iowa 237; Phoenix v. Lamb, 29 Iowa 352; Hatfield v. Lockwood, 18 Iowa 296; Cousins v. Lake Shore, etc., R. Co., 96 Mich. 386; Balch v. Grand Rapids, etc., R. Co., 78 Mich. 654; People v. White, 53 Mich. 537.

Relevant to Issue.—The interrogatories must relate to matter involved in the issues in the case. Blacker v. Slown, 114 Ind. 322; Miller v. White River School Tp., 101 Ind. 503; Albion v. Hetrick, 90 Ind. 545; Trentman v. Wiley, 85 Ind. 33; Indianapolis v. Kollman, 79 Ind. 504; Todd v. Fenton, 66 Ind. 25; Campbell v. Frankem, 65 Ind. 591; Mutual Ben. L. Ins. Co. v. Cannon, 48 Ind. 264; Skillen v. Jones, 44 Ind. 136; Otter Creek Block Coal Co. v. Raney, 34 Ind. 329; Manning v. Gasharie, 27 Ind. 399; Morse v. Morse, 25 Ind. 156; Noble v. Enos, 19 Ind. 72; Allen v. Davison, 16 Ind. 416; Rosser v. Barnes, 16 Ind. 502; Cormac v. Western White Bronze Co., 77 Iowa 32; McPheeters v. Birk, 48 Kan. 784; American Cent. Ins. Co. v. Hathaway,

43 Kan. 399; Leroy, etc., R. Co. v. Anderson, 41 Kan. 528; Wichita, etc., R. Co. v. Fechheimer, 36 Kan. 45; Elliott v. Reynolds, 38 Kan. 274; Mays v. Foster, 26 Kan. 518; Bent v. Philbrick, 16 Kan. 190; Wyandotte v. White, 13 Kan. 191; Sherwood v. Chicago, etc., R. Co., 82 Mich. 374; Toulman v. Swain, 47 Mich. 82; Harbaugh v. Cicott, 33 Mich. 241; Fowler v. Hoffman, 31 Mich. 215; Flannery v. Kansas City, etc., R. Co., 23 Mo. App. 120; Jackson v. German Ins. Co., 27 Mo. App. 62; Eberhardt v. Sanger, 51 Wis. 72.

Based on the Evidence.—The interrogatories must be based on the evidence in the case. Noble v. Enos, 19 Ind. 72; Cormac v. Western White Bronze Co., 77 Iowa 32; McPheeters v. Birk, 48 Kan. 784; Fort Scott, etc., R. Co. v. Karracker, 46 Kan. 511; American Cent. Ins. Co. v. Hathaway, 43 Kan. 399; Elliott v. Reynolds, 38 Kan. 274; Atchison, etc., R. Co. v. Plunkett, 25 Kan. 188; Fowler v. Hoffman, 31 Mich. 215; Missouri Pac. R. Co. v. Vandeventer, 26 Neb. 222.

Must Affect General Verdict.—The interrogatories must be capable of affecting the general verdict; otherwise they are not material and may be ruled out. Fortune v. Jones, 30 Ill. App. 116; Louisville, etc., R. Co. v. Pedigo, 108 Ind. 481; Hamilton v. Shoaff, 99 Ind. 63; West v. Cavins, 74 Ind. 265; Campbell v. Frankem, 65 Ind. 591; Mutual Ben. L. Ins. Co. v. Cannon, 48 Ind. 264; Chapin v. Clapp, 29 Ind. 614; Manning v. Gasharie, 27 Ind. 399; Ohio, etc., R. Co. v. Trapp, 4 Ind. App. 69; Scagel v. Chicago, etc., R. Co., 83 Iowa 380; Cormac v. Western White Bronze Co., 77 Iowa 32; Dreher v. Iowa Southwestern R. Co., 59 Iowa 599; Wyandotte v. White, 13 Kan. 191; Hemenway v. Burnham, 90 Mich. 227; Dickerson v. Dickerson, 50 Mich. 37; Swift v. Plessner, 39 Mich. 178; Michigan Pannelling Mach., etc., Co. v. Parsell, 38 Mich. 475; John Hancock Mut. L. Ins. Co. v. Moore, 34 Mich. 41; Sheahan v. Barry, 27 Mich. 217; Schneider v. Chicago, etc., R. Co., 42 Minn. 68; North Bend First Nat. Bank v. Miltonberger, 33 Neb. 847; Andrews v. Mundy, 36 W. Va. 22; Peninsular Land Transp., etc., Co. v. Franklin Ins. Co., 35 W. Va. 666; Wheeling Bridge Co. v. Wheeling, etc., Bridge Co., 34 W. Va. 155.

Must be Positive, Direct, Intelligible

Form No. 18763.¹

(Venue and title of court and cause as in Form No. 5915.)

The defendant in the above entitled action respectfully submits to the court the following special interrogatories, and requests that the court instruct the jury in said action to answer in writing each of said interrogatories in the event that they return a general verdict.

1. (*Here set out the first interrogatory.*)

and Brief. — The interrogatories must admit of positive, direct and intelligible answers. *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56; *Jewell v. Chicago, etc., R. Co.*, 54 Wis. 610. And must be intelligible to the apprehension of the average juror. *Flannery v. Kansas City, etc., R. Co.*, 23 Mo. App. 120; *Jackson v. German Ins. Co.*, 27 Mo. App. 62. And see *Scagel v. Chicago, etc., R. Co.*, 83 Iowa 380, where it is held that special interrogatories should be clear and distinct and capable of being answered briefly.

The interrogatories should be capable of being answered by "Yes" or "No," or in some brief and pertinent way. *O'Leary v. German-American Ins. Co.*, 100 Iowa 390; *Marshall v. Blackshire*, 44 Iowa 475.

Must Not be in the Alternative or Disjunctive. — The interrogatories must not, as a general rule, be framed in the alternative or disjunctive. *Geisinger v. Beyl*, 80 Wis. 443.

Must Not be Ambiguous. — The interrogatories must not be ambiguous. *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374; *Wilkie v. Chandon*, 1 Wash. 355; *Peninsular Land Transp., etc., Co. v. Franklin Ins. Co.*, 35 W. Va. 666.

Must Not Admit of Categorical Answer. — The interrogatories must be in such form as to admit of a categorical answer. *Jaspers v. Lano*, 17 Minn. 296; *Flannery v. Kansas City, etc., R. Co.*, 23 Mo. App. 120; *Jackson v. German Ins. Co.*, 27 Mo. App. 62; *Wilkie v. Chandon*, 1 Wash. 355.

Leading Interrogatories. — The interrogatories must not be put in a leading form suggesting the answer expected. *Benton v. St. Louis, etc., R. Co.*, 25 Mo. App. 155; *Anderson v. McPike*, 41 Mo. App. 328.

Repetition. — The interrogatories must not substantially repeat what is contained in other interrogatories. *Lake Shore, etc., R. Co. v. Johnsen*, 135 Ill. 641; *Louisville, etc., R. Co. v. Kane*, 120 Ind. 140; *Monroe Bank v. Gifford*, 79 Iowa 300; *Russell v. Gregg*, 49 Kan. 89; *Elliott v. Reynolds*, 38 Kan. 274.

Precedents — Sufficient. — In *Sherwood v. Chicago, etc., R. Co.*, 82 Mich. 374, the following interrogatories were submitted:

"1. Did the witnesses Dr. *Stratton* and Mr. *Lyon* alight from the front end of the chair-car of the train in question?

2. Had they walked in the direction of the train a distance of about 25 or 30 feet when their attention was attracted by the fall of the plaintiff?

3. When the attention of the witnesses *Stratton* and *Lyon* was attracted by the fall of the plaintiff, did they return to where she had fallen, and reach the plaintiff in walking a distance of about 10 or 15 feet?"

A refusal by the court to submit the interrogatories to the jury was held error.

Insufficient. — In *Lake Erie, etc., R. Co. v. Morain*, 36 Ill. App. 632, the interrogatories were as follows:

"3d. How long did defendant's train stop at *Ellsworth*?

4th. Did plaintiff alight from the platform of the car to the station platform, and then endeavor to regain the car platform, or run along the station platform with the train?

7th. Did plaintiff, with his brother and the witness *Vandervoort*, stand on the platform of the car or elsewhere on the train after it had stopped at *Ellsworth*, without attempting to get off until it had started again?

8th. Did the plaintiff receive his injury in attempting to get off the train while it was in motion?

9th. Did any of the trainmen consent to or encourage plaintiff's attempt to leave the train while it was in motion?"

These interrogatories were held properly refused, because they called for a finding upon mere evidentiary or probative facts, and not upon ultimate facts.

1. *Indiana*. — *Horne's Stat.* (1901), § 546.

See also list of statutes cited *supra*, note 1, p. 304; and, generally, *supra*, note 2, p. 304.

Answer. (*Here leave a space for the answer to the first interrogatory.*)
2. (*Continue with interrogatories and answers as above.*)

Oliver Ellsworth, Attorney for Defendant.

II. GENERAL VERDICT WITH SPECIAL INTERROGATORIES AND ANSWERS ANNEXED.¹

1. Requisites of Answers—Must be in Writing.—The answers to the interrogatories must be in writing. *Moss v. Priest*, (N. Y. Super. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 314.

Must State Facts.—The answers must state facts, and not conclusions of law merely. *Norwich Union F. Ins. Soc. v. Girtton*, 124 Ind. 217; *Sohn v. Cambern*, 106 Ind. 302; *Pittsburgh, etc., R. Co. v. Adams*, 105 Ind. 151; *Indianapolis v. Kingsbury*, 101 Ind. 200; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186.

Responsive to Interrogatories.—The answers must be responsive to the interrogatories submitted. *Elgin, etc., R. Co. v. Raymond*, 148 Ill. 241; *Ingalls v. Allen*, 144 Ill. 535; *Bradley v. Bradley*, 45 Ind. 67; *Noakes v. Morey*, 30 Ind. 103; *Noble v. Enos*, 19 Ind. 72; *McPheeters v. Birk*, 48 Kan. 784; *Johnson v. Husband*, 22 Kan. 277; *Hazard Powder Co. v. Viergutz*, 6 Kan. 471; *Barkow v. Sanger*, 47 Wis. 500.

Certain, Direct and Positive.—The answers to the interrogatories must be certain. *Cincinnati, etc., R. Co. v. Smock*, 133 Ind. 411; *Louisville, etc., R. Co. v. Kane*, 120 Ind. 140; *Hereth v. Hereth*, 100 Ind. 35; *Bedford, etc., R. Co. v. Rainbolt*, 99 Ind. 551; *North Western Mut. L. Ins. Co. v. Heimann*, 93 Ind. 24; *Keesling v. Ryan*, 84 Ind. 89; *Peters v. Lane*, 55 Ind. 391; *Hopkins v. Stanley*, 43 Ind. 553; *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424; *Dodson v. Cooper*, 37 Kan. 346; *Baehler v. Consolidated Ranch Co.*, 31 Kan. 502. And direct and positive. *Morrow v. Saline County*, 21 Kan. 484.

Must Not be Evasive.—The answers to the interrogatories must not be evasive. *Elgin, etc., R. Co. v. Raymond*, 148 Ill. 241; *Cleveland, etc., R. Co. v. Asbury*, 120 Ind. 289; *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424; *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472; *Atchison, etc., R. Co. v. Brown*, 33 Kan. 757; *Urbanek v. Chicago, etc., R. Co.*, 47 Wis. 59.

In *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472, the following answers were held evasive and unsatisfactory:

"Q. 27. Did not the plaintiff of his own will occupy a position which prevented him from ascertaining the speed of the car which injured him? A. We think he occupied the usual place for making the coupling.

Q. 28. Could he not have taken such a position as would have enabled him to determine the speed of the car before he attempted to couple? A. To make the coupling he could not."

Must Not be Equivocal.—The answers must not be equivocal. *Noakes v. Morey*, 30 Ind. 103.

Must Not be Contradictory.—The answers must not be contradictory. *Matchett v. Cincinnati, etc., R. Co.*, 132 Ind. 334; *Dodson v. Cooper*, 37 Kan. 346.

Negative Answers.—Where the evidence is insufficient to enable the jury to answer special interrogatories in the affirmative, negative answers should be given in clear and decided language. *Fisk v. Chicago, etc., R. Co.*, 74 Iowa 424.

"In Our Judgment"—Where the answer to an interrogatory is in other respects certain and direct, the prefacing or adding thereto, by the jury, of the phrase "in our judgment," does not render it uncertain. *Peters v. Lane*, 55 Ind. 391.

"We Think" and "Have Reason to Believe."—In *Martin v. Central Iowa R. Co.*, 59 Iowa 411, the court instructed the jury that "if they could not answer the questions by 'Yes' or 'No,' they might answer them in some other manner." It was held that these answers by the jury, "we think" and "have reason to believe," presented in positive language the conclusions reached by the jury and sufficiently expressed the findings of fact sought by the questions.

"We Do Not Believe."—In *Evans, etc., Fire Brick Co. v. St. Louis, etc., R. Co.*, 21 Mo. App. 648, one of the interrogatories and answers was as follows: "Was plaintiff's mule struck or injured by the car of the defendant? Answer. We do not believe it was." It was held that this answer was sufficiently positive and certain.

"We Think Not."—In *Hopkins v. Stanley*, 43 Ind. 553, it was held that an answer of "We think not" was uncertain and insufficient.

"Weight of Evidence."—In *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264, the answer of the jury to the interrogatory as to the existence of certain supposed facts was, "The weight of the evidence justifies the jury in answering No." It was held that the answer was sufficient.

"Don't Know."—"Don't know" is generally held to be an insufficient answer to an interrogatory. *Elgin, etc., R. Co. v. Raymond*, 148 Ill. 241; *Cleveland, etc., R. Co. v. Doerr*, 41 Ill. App. 530; *Hawley v. Atlantic*, 92 Iowa 172; *Darling v. West*, 51 Iowa 259; *Atchison, etc., R. Co. v. Cone*, 37 Kan. 567; *Union Pac. R. Co. v. Fray*, 35 Kan. 700; *Baehler v. Consolidated Ranch Co.*, 31 Kan. 502. But it has been held to be "proper in some instances, where the jury have made an honest effort to answer the questions properly and have honestly failed, for the court to relieve them from giving proper answers and to permit them to give answers by merely saying they 'don't know.' But the court should not permit the jury to make such answers until the court is satisfied that the jury have faithfully endeavored to answer the questions properly and failed to do so, and until after the court is satisfied that the jury cannot answer the questions in any other manner." *Kansas Pac. R. Co. v. Peavey*, 34 Kan. 472. And see *Terre Haute, etc., R. Co. v. Barr*, 31 Ill. App. 57, where the court held that "the jury may answer that they do not know, in reply to special interrogatories touching matters to which the evidence does not warrant any other."

In *McMarshall v. Chicago, etc., R. Co.*, 80 Iowa 757, the jury, in answer to one special interrogatory, said, "We cannot say," and to another, "We do not know," and it was held that this was in effect a finding that there was no evidence on the subject.

In *Flannery v. Kansas City, etc., R. Co.*, 23 Mo. App. 120, it was held that the expression "we don't know" was equivalent to a finding that the facts were not satisfactorily proved by the party having the burden of proof, and entitled the other party to a judgment on the findings.

In *Morrow v. Saline County*, 21 Kan.

484, the answer "We don't know," was held to be tantamount to a simple denial.

Signature—*Generally*.—The answers to the interrogatories must be signed either by the jury as a whole or by their foreman; otherwise they are not part of the verdict. *Greenberg v. Hoff*, 80 Cal. 81; *Norwich Union F. Ins. Soc. v. Girton*, 124 Ind. 217; *Pennsylvania Co. v. Meyers*, 136 Ind. 242; *Vater v. Lewis*, 36 Ind. 288; *Sage v. Brown*, 34 Ind. 464; *Byers v. Davis*, 3 Ind. App. 387.

Signing as "Foreman."—In *Norwich Union F. Ins. Soc. v. Girton*, 124 Ind. 217, the general verdict was signed by the foreman and the word "foreman" was affixed to his signature, but the interrogatories and answers, while signed by him, did not have after the signature the word "foreman," and it was held on objection that the interrogatories and answers were part of the verdict.

Precedents.—In *Ohio, etc., R. Co. v. Stansberry*, 132 Ind. 533, the court allowed the following interrogatories and no objection was made to the answers:

"1. Q. Was it day-time or night-time when plaintiff stepped off defendant's train at *Mitchell*? A. Day-time.

2. Q. Did plaintiff look to see the condition of the platform before she stepped upon it? A. She did not.

3. Q. Was the condition of the platform at *Mitchell*, upon which plaintiff stepped, open to view? A. Yes.

4. Q. What was there to have prevented plaintiff from seeing the condition of the platform before she stepped upon it? A. Nothing."

In *Norwich Union F. Ins. Soc. v. Girton*, 124 Ind. 217, the interrogatories and answers were as follows:

"1. Did not the defendant, by its agent, pay, on *April 20th*, 1885, to the wife of the plaintiff, and in his presence and with his knowledge and consent, the sum of *seven* dollars? Answer.—Yes.

2. Did not the plaintiff's wife, at the request of the plaintiff, sign the settlement receipt, or release, which is copied in the *fifth* paragraph of the defendant's answer? Answer.—Yes.

3. Did not the plaintiff, before the release was written on the policy of insurance, and the money paid therefor, state to defendant's agent that he was able to attend to the business? Answer.—Yes.

4. Were any threats used by the defendant or its agents to induce the plaintiff to accept the *seven* dollars and execute the release written on the policy? Answer.—Yes.

5. If you say any threats were used by defendant or its agents, state just what the threats were in full. Answer.—By threatening to sue for the recovery of the policy on the ground of burning his own goods.

6. Was the plaintiff induced or procured to execute the release written on the policy of insurance, and to accept the *seven* dollars, by any false representations or fraud on the part of the defendant or its agents? Answer.—Yes.

7. If you say in answer to the last question there were false representations or fraud, state every such representation or fraud. Answer.—By stating to plaintiff that he heard people say that he had burned his own stock of goods, and that he was of the same opinion.

8. Has the plaintiff, at any time before he brought this suit, offered back said *seven* dollars paid to his wife for him? Answer.—No.

9. Has not the defendant been in the possession of said policy of insurance from the time it was released until the bringing of this suit? Answer.—Yes.

10. Did the plaintiff, at any time before this suit was brought, ever notify the defendant, or any agent of defendant, that he repudiated said settlement and release, and that he rescinded said release and settlement? Answer.—No.

11. Was not the *seven* dollars paid for said release and settlement used for household expenses of the plaintiff? Answer.—Yes."

The overruling of a motion for judgment on the answers to these interrogatories, notwithstanding a general verdict for the plaintiff, was held error.

In *Campbell v. Frankem*, 65 Ind. 591, the interrogatories and answers were as follows:

"1. Did not the defendant tell the plaintiff, in the office of the plaintiff's attorney, *Voss*, after the plaintiff and defendant had returned from a visit to the *South-East Addition*, that he could not locate the lots, and was not the trade agreed upon at that interview? and did not *Frankem* make the trade with the knowledge that *Campbell* did not know the location of the lot in the *South Addition*?

Ans. We, the jury, answer the interrogatory as follows:

1st. The defendant said he could not locate the lot exactly, but said that the lot was on the high ground, and was not in the creek. The trade was agreed upon at the interview. The plaintiff made the trade with the knowledge that the defendant could not locate the lot exactly, but defendant said it was not in the creek, but on the high ground.

2. If there was any statement made by the defendant to the plaintiff at the office of the witness, *Voss*, in regard to the location of the lot in the *South Addition*, was it not in the nature of a guarantee made with the knowledge of both plaintiff and defendant, that the defendant had no knowledge of the exact location of the lot?

Ans. The statement was made by the defendant to the plaintiff, that the lot was in the high ground and not in the creek; and the plaintiff knew that the defendant did not locate the lot exactly, but the defendant stated that it was not in the creek, but on the high ground.

3. What was the difference, if any, between the value of the lots at *Maywood*, conveyed to the plaintiff, and lots situated *one and a half* or *two* squares from the *Maywood* depot, in *February*, 1874?

Ans. The difference in the value of the *Maywood* lots is *two hundred* dollars (\$200).

A. H. Richardson, Foreman."

A motion by the defendant to require the jury to make their answers to the interrogatories more specific was overruled.

In *Allen v. Davison*, 16 Ind. 416, the interrogatories and answers were as follows:

"Question 1.—Is the plaintiff the illegitimate son of *John J. Davison*, as charged in the complaint?

Answer.—Yes.

Question 2.—Did the said *John J. Davison* acknowledge himself to be the father of complainant, as charged in the complaint?

Answer.—Yes.

Question 3.—Did the said *John J. Davison*, in his life-time, make, execute, and deliver to the said *Simon Phillips*, the grandfather of the complainant, a bond containing provisions or stipulations for the benefit of the complainant?

Answer.—Yes.

Question 4.—Did, or did not, the said bond obligate the said *John J. Davison* to convey real estate to the complainant, as charged in the complaint?

Answer.—Yes.

Question 5.—What quantity of real estate was so to be conveyed? When was the conveyance to be executed, and how was the land described?

Answer 1.—All the *Birmingham* place, as claimed by the plaintiff. 2. When the plaintiff came of age. 3. As the *Birmingham* place.

Question 6.—What was the consideration of such bond?

Answer.—To buy his peace, and satisfy the demands of justice.

Question 7.—What was the character of the conveyance which the said *John J. Davison* was to execute to said complainant?

Answer.—A deed in fee simple.

Question 8.—Did the bond contain a provision that the said *John J. Davison* should convey by lawful deed the lands specified therein?

Answer.—Yes."

These interrogatories were prepared by the court and contained substantially the matter included in questions proposed by counsel for defendant and which the court refused to submit to the jury. No objection was made to the answers, but there was a judgment for the plaintiff on the general verdict, which was affirmed.

In *Darling v. West*, 51 Iowa 259, interrogatories and answers were as follows:

"1. Did the defendant *George West*, with his family, prior to the purchase and occupancy of the homestead in dispute, own and occupy a homestead in *Harrison* county, this state?

Answer. Yes.

2. When did defendant sell his homestead in *Harrison* county?

Ans. In *September, 1868*.

3. Did he sell the homestead in *Harrison* county with the intention of investing the proceeds or a part thereof in a new homestead?

Ans. Yes.

4. Did the defendant actually purchase the new homestead and the one now in dispute with the proceeds of the sale of the former one in *Harrison* county?

Ans. Yes, with a part thereof.

5. Did the defendant *West* pay for the premises in controversy, together

with other lands, out of the proceeds of a sale of about *six hundred* acres of land sold by him at a gross sale in *1868*, for about *fifteen thousand* dollars?

Ans. Yes.

6. Did the defendant *George West*, after the sale of said land referred to in the last question, use the proceeds derived therefrom, or a part thereof, for purposes of speculation?

Ans. Yes, a part thereof.

7. Was any portion of the *fifteen thousand* dollars derived by *West* from the sale of lands in *September, 1868*, set and kept apart as a separate fund for the purchase of a new homestead?

Ans. Yes.

8. Did the defendants own or occupy any homestead at the date when the indebtedness, for the satisfaction of which the premises in controversy were sold, was contracted by the defendant *George West*?

Ans. No.

9. When did defendants begin to occupy the real estate in controversy as a homestead?

Ans. *July, 1869*.

10. When did the defendant contract the debt upon which judgment was obtained, and upon which execution issued and his homestead was sold to the plaintiff?

Ans. In *April, 1869*.

11. Did the defendant acquire credit from the plaintiffs in execution on any representation made by him that he had abandoned his homestead, or that he did not intend to claim any homestead?

Ans. No.

12. Did *H. E. Harper* and *T. A. Darling & Co.* have any knowledge, when the indebtedness to them was contracted, that it was the intention of the defendant *George West* to invest any portion of his means in a homestead?

Ans. We do not know.

13. Did the defendant, by means of the homestead selection which has been introduced in evidence, executed by the defendant *George West*, under date of *August 1, 1876*, and recorded in the records of this county, and by means of other representations made to plaintiff, or his agents or attorneys, cause plaintiff to believe that their homestead right accrued in *August, 1869*?

Ans. We do not know.

14. Did the plaintiff make his bid of *one thousand* dollars, at the sheriff's sale, relying upon the belief that de-

Form No. 18764.¹(Precedent in *Davis v. Guarnieri*, 45 Ohio St. 474.)²

[*Nicola Guarnieri*, as Administrator
of the Estate of *Angelo Guarnieri*,
deceased, plaintiff,
against
William P. Davis, defendant.]³ Petition.]³

We, the jury, impaneled and sworn to try this action, do find the issues with the said plaintiff, and do assess his damages at \$1,000.

J. W. Hudson, Foreman.

And in response to the several questions propounded to them by the plaintiff, and at his request, now return the same with their special findings thereon as follows, to-wit:

1. Did *Guarnieri* know at the time he purchased the poison that the same was a poison? No.

2. Did *Foster* know at the time he sold the drug that the same was a deadly poison? We are of the opinion from the evidence that he did not know.

J. W. Hudson, Foreman.

And in response to the several questions propounded to them by the said defendant, and at his request, now return them with their special findings thereon as follows, to-wit:

1. If *Guarnieri* purchased the drug from *Foster*, then was he, *Guarnieri*, acting for himself or as the agent of his wife? For himself.

2. Did *Guarnieri* make known to *Foster*, when he got the drug, what he wanted it for, and that it was to be taken as a medicine? Not intelligently.

3. Did *Guarnieri* make known to *Foster*, when he got the drug, to whom he intended to administer it? Not intelligently.

4. Was the large bottle, containing the oil of bitter almonds, handed to *Guarnieri* by *Foster*? Yes.

5. If so, did *Guarnieri* look at and smell of it? Yes.

[*J. W. Hudson*, Foreman.]³

Form No. 18765.⁴(Precedent in *Green v. Tower*, 49 Kan. 309.)⁵

defendant's homestead right accrued in August, 1869?

Ans. We do not know."

The plaintiff's motion for a new trial was overruled and judgment was rendered for the defendant on the verdict. The plaintiff appealed.

For a failure of the jury to answer interrogatories 13 and 14 by either "Yes" or "No," a general verdict for the defendant was reversed, the court holding that "these questions were pertinent and material, [and] in order to reach a general verdict the jury should have been able to answer them either in the affirmative or negative."

No objection was made to the other interrogatories and answers.

1. *Ohio*. — Bates' Anno. Stat. (1897), § 5200.

See also list of statutes cited *supra*, note 1, p. 304; and, generally, *supra*, note 1, p. 308.

2. No objection was made to the interrogatories and answers set out in the text.

3. The matter enclosed by [] will not be found in the reported case.

4. *Kansas*. — Gen. Stat. (1895), c. 95, §§ 296, 297.

5. The special interrogatories and answers are set out in the case, but

[(*Venue and title of court as in Form No. 5917.*)
Henry Tower, plaintiff, }
 against } Verdict.]¹
S. B. Green, defendant. }

Verdict: We, the jury in the above-entitled cause, do upon our oaths find for the plaintiff, and assess the amount of his recovery at \$95.60.

Special findings.

I. (*Here was set out the first interrogatory with its answer.*)
 II., III., IV., etc. (*Other interrogatories with their answers followed in regular order.*)

[*John Smith*, Foreman.]²

III. JUDGMENT ON ANSWERS TO SPECIAL INTERROGATORIES.³

Form No. 18766.⁴

(*Title of court and cause as in Form No. 11851.*)

This sixth day of May, A. D. 1902, come the parties by their attorneys, and the jury having returned a general verdict for the defendant and having answered the special interrogatories which they were instructed by the court to answer in case a general verdict was rendered, and judgment having been ordered by the court in favor of the plaintiff on account of said answers and notwithstanding said general verdict (*or* and a motion having been made to the court by the plaintiff that he have judgment on said answer notwithstanding the general verdict, which motion is sustained, to which exceptions are taken by the defendant, and judgment is rendered by the court in accordance therewith):

It is therefore considered and adjudged by the court that the plaintiff (*Here enter the proper judgment authorized by the answers to the special interrogatories*).

are not set out here because they do not seem to be well formed.

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. The matter enclosed by [] will not be found in the reported case.

3. For the formal parts of a judgment

in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

4. *Indiana*. — Horner's Stat. (1901), § 546.

See also list of statutes cited *supra*, note 1, p. 304.

SPECIAL ORDERS.

See the title ORDERS, vol. 13, p. 356.

SPECIAL PLEAS.

See the title PLEAS, vol. 13, p. 918.

SPECIAL RELIEF.

See the title BILLS IN EQUITY, vol. 3, p. 417; *COMPLAINTS*, vol. 4, p. 1019.

SPECIAL REPLICATIONS.

See the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

SPECIAL TRAVERSE.

See the title PLEAS, vol. 13, p. 918.

SPECIAL VERDICT.

See the title VERDICT.

SPECIFICATIONS

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SPECIFIC PERFORMANCE.

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For Forms in Proceedings relating to Vendor and Purchaser, see the title VENDOR AND PURCHASER.

See also the GENERAL INDEX to this work.

I. BILL, COMPLAINT OR PETITION.¹

1. By Vendor of Real Estate, to Compel Specific Performance of an Agreement to Purchase.

a. In General.

1. Requisites of Bill, Complaint or Petition — Generally. — For the formal parts of a bill, complaint or petition in a particular jurisdiction see the titles *BILLS IN EQUITY*, vol. 3, p. 417; *COMPLAINTS*, vol. 4, p. 1019.

Where specific performance is sought, the bill must be framed with that in view. *Pitts v. Cable*, 44 Ill. 103; *Lockwood v. House*, 101 N. Y. 647.

That Plaintiff is Entitled to Relief. — The plaintiff must show affirmatively that he is entitled to the relief demanded. *Morey v. Farmers' L. & T. Co.*, 14 N. Y. 302. As against the

defendant from whom specific performance is sought. *Bolles v. Carli*, 12 Minn. 113; *Seager v. Burns*, 4 Minn. 141.

Facts must be Stated. — Facts must be distinctly stated, and not mere conclusions. *Gentry v. Rogers*, 40 Ala. 442; *Cameron v. Abbott*, 30 Ala. 416; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370.

Definiteness and Certainty. — Every allegation in the plaintiff's pleading must be direct and certain, and allegations in general terms are not sufficient. *Iron Age Pub. Co. v. Western Union*

Tel. Co., 83 Ala. 498; *Gentry v. Rogers*, 40 Ala. 442; *Duff v. Fisher*, 15 Cal. 375; *Starkey v. Starkey*, 136 Ind. 349; *Light Street Bridge Co. v. Bannon*, 47 Md. 129; *Semmes v. Worthington*, 38 Md. 298; *Wright v. Wright*, 31 Mich. 380; *Despain v. Carter*, 21 Mo. 331; *New York, etc., R. Co. v. Lawton*, 35 N. J. Eq. 386; *Crow v. Blythe*, 3 Hayw. (Tenn.) 236.

Parol Contract.—Where it is sought to enforce a parol contract within the statute of frauds, a clear case must be established by the pleading. *Ellerbe v. Ellerbe*, 42 Ala. 643; *Magruder v. Campbell*, 40 Ala. 611; *Fox v. Pierce*, 50 Mich. 500; *Phillips v. Thompson*, 1 Johns. Ch. (N. Y.) 131; *Anthony v. Leftwich*, 3 Rand. (Va.) 238.

Capacity in Which Plaintiff Sues.—The capacity in which the plaintiff brings his action must be shown, thus: a bill to enforce a claim after the death of the proposed vendee should be filed by the executor of the vendee's will or by his legatee, and if filed by the latter the assent of the executor should be shown. *McCormick v. Stephany*, 57 N. J. Eq. 257.

Citizenship of plaintiff need not be alleged. *Moritz v. Lavelle*, 77 Cal. 10.

In *Montana*, it has been held that in an action to compel the specific performance of an agreement concerning a mine, the plaintiff must aver that he was a citizen of the United States, or had declared his intention to become one. *Ducie v. Ford*, 8 Mont. 233.

No Adequate Remedy at Law.—The plaintiff must show by proper averments in his pleading that compensation by way of damages is not sufficient. *Powell v. Central Plank Road Co.*, 24 Ala. 441; *Senter v. Davis*, 38 Cal. 450; *Gove v. Biddeford*, 85 Me. 393; *Porter v. Frenchman's Bay, etc., Land, etc., Co.*, 84 Me. 195; *McClane v. White*, 5 Minn. 178; *Kauffman's Appeal*, 55 Pa. St. 383; *Manton v. Ray*, 18 R. I. 672; *Angus v. Robinson*, 62 Vt. 60; *Avery v. Ryan*, 74 Wis. 591.

In *Montana*, it has been held that in an action for the specific performance of a contract for the sale of land the plaintiff need not allege that he has no complete or adequate remedy at law. *Ide v. Leiser*, 10 Mont. 5.

Execution of Contract.—*Generally.*—The execution of the contract must be averred. *Magruder v. Campbell*, 40 Ala. 611; *Aday v. Echols*, 18 Ala. 353; *Carswell v. Walsh*, 70 Md. 504; *Light*

Street Bridge Co. v. Bannon, 47 Md. 129; *Ellicott v. White*, 43 Md. 145; *Semmes v. Worthington*, 38 Md. 298; *Benton v. Schultz*, 31 Minn. 312; *Despain v. Carter*, 21 Mo. 331; *Lockwood v. House*, 101 N. Y. 647; *Capehart v. Hale*, 6 W. Va. 547.

Manner of execution of the contract need not be set forth. *Hanchett v. McQueen*, 32 Mich. 22. To set forth the fact of the execution is all that is required. *Hanchett v. McQueen*, 32 Mich. 22.

"Executed."—Where the complaint states that the contract was executed, instead of subscribed, it is sufficient. *Cheney v. Cook*, 7 Wis. 413.

Execution by Agent.—Where the bill is for the specific performance of a contract, which was executed by an agent, it is not necessary to aver the manner of its execution in that regard. *Harding v. Parshall*, 56 Ill. 219; *Hanchett v. McQueen*, 32 Mich. 22. But it must be shown, either by direct averment or by the contract so far as set out, that the agent was duly authorized to execute the contract. *Roby v. Cossitt*, 78 Ill. 638.

Ratification of Contract.—In averring that the principal ratified the agreement made by his agent, it is not necessary to allege that he did so by the receipt of a portion of the purchase money under the agreement: to say that he ratified it is sufficient. *Harding v. Parshall*, 56 Ill. 219.

Terms of Contract.—The terms of the contract must be alleged. *Peck v. Ashurst*, 108 Ala. 429; *Iron Age Pub. Co. v. Western Union Tel. Co.*, 83 Ala. 498; *Magruder v. Campbell*, 40 Ala. 611; *Aday v. Echols*, 18 Ala. 353; *Stephens v. Soule*, 83 Cal. 438; *Hull v. Peer*, 27 Ill. 312; *Waymire v. Waymire*, 141 Ind. 164; *Starkey v. Starkey*, 136 Ind. 349; *Carswell v. Walsh*, 70 Md. 504; *Ellicott v. White*, 43 Md. 145; *Light Street Bridge Co. v. Bannon*, 47 Md. 129; *Semmes v. Worthington*, 38 Md. 298; *Wright v. Wright*, 31 Mich. 380; *Mayger v. Cruse*, 5 Mont. 485; *Price v. McKay*, 53 N. J. Eq. 588; *Lokerson v. Stillwell*, 13 N. J. Eq. 357; *Parker's Estate*, 19 Pa. Co. Ct. 347; *Byars v. Thompson*, 80 Tex. 468; *Ward v. Stuart*, 62 Tex. 333; *Jones v. Jones*, 49 Tex. 683; *Gaskins v. Peebles*, 44 Tex. 399; *Sturm v. McGuffin*, 48 W. Va. 595. And the terms of the contract must be stated with certainty and definiteness. *Iron Age Pub. Co. v.*

Western Union Tel. Co., 83 Ala. 498; Magruder v. Campbell, 40 Ala. 611; Waymire v. Waymire, 141 Ind. 164; Starkey v. Starkey, 136 Ind. 349; Carswell v. Walsh, 70 Md. 504; Light Street Bridge Co. v. Bannon, 47 Md. 129; Semmes v. Worthington, 38 Md. 298; Wright v. Wright, 31 Mich. 380; Despain v. Carter, 21 Mo. 331.

Where the bill states that the plaintiff is informed that certain facts exist, it is not sufficient. Cameron v. Abbott, 30 Ala. 416; New York, etc., R. Co. v. Lawton, 35 N. J. Eq. 386. But where the complainants are strangers to the contract and have no full and particular knowledge of its terms, and especially where the defects in the averments will be supplied by proof, the same strictness is not required. Light Street Bridge Co. v. Bannon, 47 Md. 129.

Setting Out Contract.—The contract sought to be enforced may be set out *in hac verba*, but in such case, if the contract is uncertain, the pleader must put some definite construction on it by averment. Durkee v. Cota, 74 Cal. 313. And it is better to set the contract out *in hac verba*, although it may be declared on according to its legal effect. Joseph v. Holt, 37 Cal. 250.

Consideration of Contract.—An adequate consideration for the contract must be stated in the complaint. Stiles v. Cain, 134 Cal. 170; Chadbourne v. Stockton Sav., etc., Soc., 88 Cal. 636; Iron Age Pub. Co. v. Western Union Tel. Co., 83 Ala. 498; Nicholson v. Tarpey, 70 Cal. 608; Agard v. Valencia, 39 Cal. 292; Waymire v. Waymire, 141 Ind. 164; Mayger v. Cruse, 5 Mont. 485; Byars v. Thompson, 80 Tex. 468; Jones v. Jones, 49 Tex. 683; Gaskins v. Peebles, 44 Tex. 390. And the character of the consideration must be alleged; an allegation that the consideration was fair and reasonable is not sufficient. Mayger v. Cruse, 5 Mont. 485. But where the petition stated that the contract was executed for a valuable consideration, and the instrument was made a part of the petition, the petition was held sufficient. Byars v. Thompson, 80 Tex. 468.

Description of Property.—The property, a conveyance of which is sought, must be described in the complaint or bill. Homan v. Stewart, 103 Ala. 644; Price v. Bell, 91 Ala. 180. Meyer v. Mitchell, 77 Ala. 312; Northrop v. Boone, 66 Ill. 368; Mason v. Bair, 33

Ill. 194; Baker v. Hathaway, 5 Allen (Mass.) 103; New York, etc., R. Co. v. Lawton, 35 N. J. Eq. 386; Allen v. Chambers, 4 Ired. Eq. (39 N. Car.) 125; Sundback v. Gilbert, 8 S. Dak. 359; Vail v. Tillman, 2 Wash. 476. And the land must be described with such certainty that it can be identified beyond the possibility of future controversy. Hecke v. Meyer, 68 Ill. App. 65.

Where the bill points out the property by a name which seems to have been well known and which distinguishes the premises from other property, it is sufficient. Goodenow v. Curtis, 18 Mich. 298.

Value of Subject-matter.—The plaintiff's pleading should show that the value of the subject-matter is sufficient to permit the court to take jurisdiction. Raymond v. Shawboose, 34 Mich. 142; Church v. Ide, Clarke (N. Y.) 494. But where the complaint shows that the plaintiff paid more than the sum necessary to give the court jurisdiction it is sufficient, although the value of the property is not averred. Raymond v. Shawboose, 34 Mich. 142. And in Brainard v. Jordan, (Tex. Civ. App. 1901) 60 S. W. Rep. 784, it was held that, in a petition to enforce the specific performance of a contract to convey land, the value of the land need not be stated.

Exchange of Property.—A bill to compel the performance of an agreement by a corporation for exchange of stock for property need not aver that the property was of the value of the stock for which it was to be exchanged. Davenport v. Plano Implement Co., 70 Ill. App. 161.

Title of Plaintiff.—The bill by a vendor need not show that the plaintiff had a valid legal title to the land sold. Vaught v. Cain, 31 W. Va. 424; Tavenner v. Barrett, 21 W. Va. 656.

Where the bill shows on its face that the complainant is not the owner of the title to the lands contracted to be sold, it is not a ground for a general demurrer. Day v. Cole, 56 Mich. 294; Vaught v. Cain, 31 W. Va. 424; Tavenner v. Barrett, 21 W. Va. 656.

That complainants are owners in fee simple of the lands to be exchanged by them is a sufficient statement of title. Daily v. Litchfield, 10 Mich. 29.

Equitable Title.—Where a bill seeking the specific performance of a contract for the sale of land shows on its face

that one of the defendants, through whom the plaintiff does not deduce his title, holds a legal title to the land by patent from the United States, the bill must show that the legal title is subordinate to the equitable title under which the plaintiff claims; otherwise the bill is without equity as against the holder of the legal title. *Cameron v. Abbott*, 30 Ala. 416.

Waiver of Objection to Title. — Where a waiver of objection to the title is relied on as a ground for specific performance of the contract of sale, the vendor's bill should be so framed as to put that question in issue. *Page v. Greeley*, 75 Ill. 400.

Title of Defendant — Generally. — Where the action is to compel a conveyance by the defendant, the ownership by the defendant of the property at the time the contract was made must be alleged. *Rice v. Bush*, 16 Colo. 484; *Williams v. Mansell*, 19 Fla. 546; *Northrop v. Boone*, 66 Ill. 368; *Ide v. Leiser*, 10 Mont. 5; *Manton v. Ray*, 18 R. I. 672, 19 R. I. 423.

That the defendant was the owner of the property at the time of the filing of the complaint need not be alleged. *Ide v. Leiser*, 10 Mont. 5.

Heirs of Deceased Vendor. — A complaint against the heirs of a deceased vendor need not allege that the ancestor had any title in the property. *Cottrell v. Cottrell*, 81 Ind. 87; *Moore v. Burrows*, 34 Barb. (N. Y.) 173.

Mutuality of Obligations must be shown by the complaint. *Light Street Bridge Co. v. Bannon*, 47 Md. 129; *Ducie v. Ford*, 8 Mont. 233; *Stanton v. Singleton*, (Cal. 1898) 54 Pac. Rep. 587.

Where an action for specific performance is instituted by a party who has not signed the agreement, the act is sufficient to make the remedy mutual. *Vassault v. Edwards*, 43 Cal. 458; *Peevey v. Haughton*, 72 Miss. 918; *Ivory v. Murphy*, 36 Mo. 534; *Ives v. Hazard*, 4 R. I. 14.

Statute of Frauds — Generally. — Where the contract to be enforced is within the statute of frauds, the complaint need not aver that such contract was in writing. *Nunez v. Morgan*, 77 Cal. 427; *McDonald v. Mission View Homestead Assoc.*, 51 Cal. 210; *Brennan v. Ford*, 46 Cal. 7; *Vassault v. Edwards*, 43 Cal. 458; *Hunt v. Hayt*, 10 Colo. 278; *Slingerland v. Slingerland*, 46 Minn. 100; *Benton v. Schulte*, 31

Minn. 312; *Mayger v. Cruse*, 5 Mont. 485; *Coles v. Bowne*, 10 Paige (N. Y.) 526; *Sundback v. Gilbert*, 8 S. Dak. 359. But see *Waymire v. Waymire*, 141 Ind. 164, holding that where there is no allegation that the contract was in writing the presumption is that it was in parol, and some fact must be alleged which takes the contract out of the statute. And see also *Drum v. Stevens*, 94 Ind. 181.

Where a vendor sues a purchaser for specific execution of a contract for the sale of land, he need not allege that the contract to pay the consideration was in writing and signed by the defendant. *Capehart v. Hale*, 6 W. Va. 547.

Where it appears upon the face of the pleading that the agreement to convey is oral and no facts are stated to take the contract out of the statute, the pleading is subject to demurrer. *Hudson v. Johnson*, 45 Cal. 21; *Cloud v. Greasley*, 125 Ill. 313; *Clough v. Hart*, 8 Kan. 487; *Farnham v. Clements*, 51 Me. 426; *Ahrend v. Odiorne*, 118 Mass. 261; *Slack v. Black*, 109 Mass. 496; *Chambers v. Lecompte*, 9 Mo. 575; *VanDyne v. Vreeland*, 11 N. J. Eq. 370; *Coles v. Bowne*, 10 Paige (N. Y.) 526. But where the complaint states that the parties have entered into a contract it will be taken on demurrer to mean a legal contract and one in writing, where that is essential to its validity. *Sundback v. Gilbert*, 8 S. Dak. 359.

Part Performance. — Where the pleading shows a contract within the statute of frauds and avers acts of part performance, taking the contract out of the operation of the statute, the pleading is not subject to demurrer. *Arguello v. Edinger*, 10 Cal. 150; *Cloud v. Greasley*, 125 Ill. 313; *Weaver v. Shipley*, 127 Ind. 526; *Slingerland v. Slingerland*, 46 Minn. 100; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638. But part performance under the contract must be clearly shown by the pleading. *Danforth v. Laney*, 28 Ala. 274; *Underhill v. Allen*, 18 Ark. 466; *Dorris v. Sullivan*, 90 Cal. 279; *Fowler v. Sutherland*, 68 Cal. 414; *Frixen v. Castro*, 58 Cal. 442; *Hull v. Peer*, 27 Ill. 312; *Drum v. Stevens*, 94 Ind. 181; *Moore v. Higbee*, 45 Ind. 487; *Pearson v. East*, 36 Ind. 27; *Whelan v. Sullivan*, 102 Mass. 204; *Bigbee v. Bigbee*, 50 Mich. 467; *Peckham v. Balch*, 49 Mich. 179; *Bomier v. Caldwell*, 8 Mich. 463;

Slingerland v. Slingerland, 46 Minn. 100; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638.

Possession.—Where the taking of possession is relied on to take the contract out of the statute of frauds, it must be alleged that the possession was taken under the contract and with the consent of the vendor. *Waymire v. Waymire*, 141 Ind. 164; *Swales v. Jackson*, 126 Ind. 282; *Judy v. Gilbert*, 77 Ind. 96.

Laches.—Where the defense of laches is apparent on the face of the pleading, facts to avoid such defense must be alleged. *Walker v. Ray*, 111 Ill. 315; *McCabe v. Matthews*, 155 U. S. 550.

Performance by Plaintiff—Generally.—Complainant must show that he has performed, or offered to perform, the act which forms the consideration of the contract on his part. *Bell v. Thompson*, 34 Ala. 633; *McKleroy v. Tulane*, 34 Ala. 78; *Underhill v. Allen*, 18 Ark. 466; *Chadbourne v. Stockton Sav., etc., Soc.*, 88 Cal. 636; *King v. Gildersleeve*, 79 Cal. 504; *Meylette v. Brennan*, 20 Colo. 242; *Hunt v. Hayt*, 10 Colo. 278; *Doyle v. Teas*, 5 Ill. 202; *Bates v. Wheeler*, 2 Ill. 54; *Harshman v. Mitchell*, 117 Ind. 312; *Martin v. Merritt*, 57 Ind. 34; *Hauser v. Roth*, 37 Ind. 89; *Slaughter v. Harris*, 1 Ind. 238; *Deglow v. Meyer*, (Ky. 1891) 15 S. W. Rep. 875; *Daily v. Litchfield*, 10 Mich. 29; *New York, etc., R. Co. v. Lawton*, 35 N. J. Eq. 386; *Roy v. Willink*, 4 Sandf. Ch. (N. Y.) 525; *Wilson v. Lineberger*, 92 N. Car. 547; *Chess's Appeal*, 4 Pa. St. 52; *Parker's Estate*, 19 Pa. Co. Ct. 347; *Sundback v. Gilbert*, 8 S. Dak. 359.

Facts Showing Performance.—A purchaser asking the specific performance of a parol contract for the sale of land must aver in his pleadings the facts showing a full compliance on his part with all the stipulations of the contract, and a general allegation of performance is not sufficient. *Hart v. McClellan*, 41 Ala. 251; *Gentry v. Rogers*, 40 Ala. 442; *Duff v. Fisher*, 15 Cal. 375; *Ramsey v. Liston*, 25 Ill. 114; *Roy v. Willink*, 4 Sandf. Ch. (N. Y.) 525. But see, to the effect that a general allegation of performance is sufficient, *Moritz v. Lavelle*, 77 Cal. 10; *Daily v. Litchfield*, 10 Mich. 29; *Pomeroy v. Fullerton*, 113 Mo. 440; *De Ford v. Hyde*, 10 S. Dak. 386.

In *Missouri*, under a statute which provides that it shall not be necessary

to state the facts showing performance, but that they may be stated generally, the petition need not allege payment, where it alleges that the plaintiff has performed all the conditions of the contract on his part and payment was one of the conditions. *Pomeroy v. Fullerton*, 113 Mo. 440.

Covenant to Renew Lease.—In an action for specific performance of a covenant of renewal, the plaintiff need not show performance of a simple covenant to pay rent and taxes or tender of any sums due thereunder: if the complaint contain an offer to perform, it is sufficient. *Crosby v. Moses*, 48 N. Y. Super. Ct. 146.

"That plaintiff has performed all and singular his agreements and covenants with the defendant" is sufficient as an averment of performance of the conditions on plaintiff's part to be performed. *Moritz v. Lavelle*, 77 Cal. 10.

Conditions Precedent—Generally.—A performance by the plaintiff of all conditions precedent must be shown. *Chadbourne v. Stockton Sav., etc., Soc.*, 88 Cal. 636; *Smith v. Taylor*, 82 Cal. 533; *Moritz v. Lavelle*, 77 Cal. 10; *Scott v. Shepherd*, 8 Ill. 483; *Doyle v. Teas*, 5 Ill. 202; *Deglow v. Meyer*, (Ky. 1891) 15 S. W. Rep. 875; *Ducie v. Ford*, 8 Mont. 233; *Low v. Heck*, 3 W. Va. 680.

Excuse for Nonperformance.—Where performance of conditions precedent is not alleged, an excuse for the nonperformance must be averred. *Chadbourne v. Stockton Sav., etc., Soc.*, 88 Cal. 636; *Martin v. Merritt*, 57 Ind. 34.

Payment.—Where payment is a condition precedent, the plaintiff must allege payment. *Chadbourne v. Stockton Sav., etc., Soc.*, 88 Cal. 636; *Mix v. Beach*, 46 Ill. 311; *Ramsey v. Liston*, 25 Ill. 114; *Bigbee v. Bigbee*, 50 Mich. 467; *Nolan v. Snodgrass*, 70 Miss. 794; *Harper v. Lacey*, 62 Miss. 5; *Manaudas v. Heilner*, 29 Oregon 222; *Younger v. Welch*, 22 Tex. 417.

Payment to Third Person.—An allegation of payment to a third person under an arrangement with the defendant is a sufficient allegation of payment. *Bigbee v. Bigbee*, 50 Mich. 467.

Offer by Plaintiff to Perform—Generally.—Plaintiff must aver his readiness and willingness to perform his part of the agreement, and that he had done all that he could do under the contract to induce the defendant to perform. *Munford v. Pearce*, 70 Ala. 452; *Hart v. McClellan*, 41 Ala. 251;

Bell v. Thompson, 34 Ala. 633; *McCleroy v. Tulane*, 34 Ala. 78; *Jordon v. Deaton*, 23 Ark. 704; *Chadbourn v. Stockton Sav., etc., Soc.*, 88 Cal. 636; *Frixen v. Castro*, 58 Cal. 442; *Duff v. Fisher*, 15 Cal. 375; *Gilpin v. Watts*, 1 Colo. 479; *D'Wolf v. Pratt*, 42 Ill. 198; *Moore v. Higbee*, 45 Ind. 487; *Fall v. Hazelrigg*, 45 Ind. 576; *Hubbard v. Johnson*, 77 Me. 139; *Carswell v. Walsh*, 70 Md. 504; *Palmer v. Palmer*, 114 Mich. 509; *Morris v. Hoyt*, 11 Mich. 9; *Mhoon v. Wilkerson*, 47 Miss. 633; *Buffum v. Buffum*, 11 N. H. 451; *Crosby v. Moses*, 48 N. Y. Super. Ct. 146; *Corning v. Roosevelt*, (Supreme Ct. Spec. T.) 18 Civ. Proc. (N. Y.), 399; *Wilson v. Lineberger*, 92 N. Car. 547; *Irvin v. Bleakley*, 67 Pa. St. 24; *Chess's Appeal*, 4 Pa. St. 52; *De Ford v. Hyde*, 10 S. Dak. 386.

Executor or Administrator. — An executor or administrator of the assignee of the vendor need not tender the deed, as he has no connection with the contract and no act to perform in respect to it. *Mhoon v. Wilkerson*, 47 Miss. 633.

Tender of Deed. — Ordinarily it is not essential that a plaintiff in a suit for the specific performance of a contract for the sale of land should tender with his bill a deed to the defendant for the land, and failure so to do will not make the bill demurrable. *Vaught v. Cain*, 31 W. Va. 424.

Ability of Plaintiff to Perform. — The ability of the plaintiff to perform should be stated. *Gilpin v. Watts*, 1 Colo. 479; *Corning v. Roosevelt*, (Supreme Ct. Spec. T.) 18 Civ. Proc. (N. Y.) 399.

Tender of Performance — Generally. — A tender of performance should be alleged in the bill or complaint. *Johnston v. Wadsworth*, 24 Oregon 494. But see, to the effect that it is not essential to the maintenance of a bill for the specific performance of a contract of sale that the vendee offer to perform or tender a deed before filing the bill. *Ashurst v. Peck*, 101 Ala. 499; *Morris v. Hoyt*, 11 Mich. 9.

Where a party's right to a conveyance depends upon a tender of the purchase money, such tender need not be averred in the bill to compel a conveyance, provided the fact of tender is shown by the evidence and made in the bill, and the money brought into court. *Ewins v. Gordon*, 49 N. H. 444.

Where Defendant Repudiates Contract.

— An averment of tender of performance is not necessary where the complaint shows that the defendant has expressly repudiated the contract and notified the plaintiff that all tender upon his part was waived. *Martin v. Merritt*, 57 Ind. 34.

Where, by the terms of a contract for the sale and conveyance of land, the payment of the first installment of the purchase money was to precede the execution of the deed, but the vendor refused to receive the money and execute the deed, a complaint by the vendee for specific performance is not bad for not containing an averment of a tender of the notes and mortgage for the subsequent installments. *Parker v. McAllister*, 14 Ind. 12.

Where the vendor of land claims to have rescinded, and repudiates and denies the obligation of the contract, and places himself in such a position as to make it appear that if tender were made its acceptance would be refused, no tender need be made by the vendee. In such case, if the vendee offer by his bill to bring in the money when the amount is liquidated, it is sufficient. *Deichmann v. Deichmann*, 49 Mo. 107.

Defendant Beyond Jurisdiction of the Court. — Where the vendee is beyond the jurisdiction of the court, in a bill by the vendor for specific performance, an allegation of tender before suit is not necessary; if the deed is tendered with the bill, it is sufficient. *Watson v. Sawyers*, 54 Miss. 64.

Payment Into Court. — Where part of the purchase money is unpaid, the plaintiff should aver tender and offer to bring the money unpaid into court. *Bass v. Gilliland*, 5 Ala. 761; *Stratton v. California Land, etc., Co.*, 86 Cal. 353; *Frixen v. Castro*, 58 Cal. 442; *Duff v. Fisher*, 15 Cal. 375; *Hull v. Peer*, 27 Ill. 312; *Fall v. Hazelrigg*, 45 Ind. 576; *Bradford v. Foster*, 87 Tenn. 4; *Jones v. Jones*, 49 Tex. 683. But it is sufficient to plead a tender and offer to bring the purchase money into court for the use of the vendor whenever the amount shall be liquidated. *Fall v. Hazelrigg*, 45 Ind. 576.

Demand for Performance by Defendant — Generally. — As a general rule, a bill or complaint for specific performance must show not only a performance, or offer to perform, on the part of the plaintiff, but also a demand for performance by the defendant and that

the defendant refused to comply with such demand. *Carter v. Thompson*, 41 Ala. 375; *Bell v. Thompson*, 34 Ala. 633; *Lattin v. Hazard*, 85 Cal. 58; *Dodge v. Clark*, 17 Cal. 586; *Burns v. Fox*, 113 Ind. 205; *Harless v. Petty*, 84 Ind. 269; *Hauser v. Roth*, 37 Ind. 89; *Younger v. Welch*, 22 Tex. 417; *Freytag v. Northern Pac. R. Co.*, 1 Wash. 214.

Insolvency of Defendant.—To aver that the defendant was insolvent is not a sufficient excuse for failure to aver a demand. *Carter v. Thompson*, 41 Ala. 375.

When defendant denies contract to convey, a demand for a conveyance is not necessary. *Harshman v. Mitchell*, 117 Ind. 312; *Cutsinger v. Ballard*, 115 Ind. 93; *Burns v. Fox*, 113 Ind. 205; *Stix v. Sadler*, 109 Ind. 254; *Pawlak v. Granowski*, 54 Minn. 130. But if the defendant has repudiated the contract, such fact must be alleged. *Burns v. Fox*, 113 Ind. 205.

Ability of Defendant to Perform.—That the defendant is able to perform the contract need not be averred. *Greenfield v. Carlton*, 30 Ark. 547; *Borden v. Curtis*, 46 N. J. Eq. 468. But see *Joseph v. Holt*, 37 Cal. 250, holding that the complainant, when he calls upon the court to compel another to do a particular thing, ought to allege that such person can do it.

Breach of contract on the part of the defendant must be alleged. *Bell v. Thompson*, 34 Ala. 633; *Lattin v. Hazard*, 85 Cal. 58; *Reed v. Hodges*, 80 Ind. 304; *Hauser v. Roth*, 37 Ind. 89; *Sons of Temperance v. Brown*, 9 Minn. 157; *De Lacy v. Walcott*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 132; *Younger v. Welch*, 22 Tex. 417; *Holman v. Criswell*, 15 Tex. 394.

Allegations of a general character as to the nonperformance by the defendant are insufficient. The facts showing nonperformance, and not mere conclusions, must be stated. *Gentry v. Rogers*, 40 Ala. 442.

A demand for a performance before bringing the suit, and a refusal by the defendant to perform, is a sufficient allegation of a breach. *Bell v. Thompson*, 34 Ala. 633.

Where the acts to be done by the plaintiff and defendant are mutual and concurrent, an allegation that the plaintiff offered to perform on his part and that the defendant refused to perform is sufficient. *Sons of Temperance v. Brown*, 9 Minn. 157.

An allegation that the obligee failed and refused and still fails and refuses to perform the stipulations and conditions of the bond is a sufficient averment of breach. *Holman v. Criswell*, 15 Tex. 394.

Reformation of Contract.—The complainant in a bill for specific performance may allege, and prove by parol, a mistake in a written contract, have it rectified and specifically executed as reformed. *Popplein v. Foley*, 61 Md. 381. But where the complaint attempts to vary or contradict the contract as made, it is bad. *Farrington v. Tourtelott*, 39 Fed. Rep. 738; *Park v. Johnson*, 4 Allen (Mass.) 259. And where the party seeks to correct a mistake in a written agreement, he must state in his bill what ought to have been reduced to writing and allege the substance of the written agreement itself. *Coles v. Bowne*, 10 Paige (N. Y.) 526.

Charging Third Party.—Where the bill to enforce specific performance joins a third party as defendant, to whom a conveyance has been made, the bill must aver that such third party was a purchaser with notice. *Farwell v. Johnston*, 34 Mich. 342.

Conveyance of Stock.—A bill to compel the conveyance of shares of stock must allege that the respondent is the owner of the stock agreed to be conveyed; but to set out that respondent "being or pretending to be possessed of or otherwise entitled to certain shares of stock" does not amount to an averment of ownership and renders the bill demurrable. *Manton v. Ray*, 18 R. I. 672.

Probate of Will.—Where the bill is brought by a trustee under a will, it is enough to allege a devise to his executors in trust to sell and that the will is made so as to pass real estate, without showing that the will has been proved as a will of real estate. *Chapman v. Parish*, 3 Edw. (N. Y.) 581.

Promise of Husband to Convey Property of Deceased Wife.—In an action to enforce a promise of a husband made to his wife to turn over all of her property after her death to the plaintiff, the bill must show that the wife's estate was solvent or that it had been settled. *Caylor v. Caylor*, 22 Ind. App. 666.

Multifariousness.—Where the bill seeks either specific performance or a repayment of what has been expended if specific performance cannot be decreed, and if the right to such relief

is based upon the same facts, the bill is not multifarious. *San Diego Water Co. v. San Diego Flume Co.*, 108 Cal. 549; *Young v. Young*, 45 N. J. Eq. 27; *Henry v. McKittrick*, 42 Kan. 485.

Prayer — Generally. — The bill must pray for the specific performance of the contract. *Cantrell v. Rice*, 6 J. J. Marsh. (Ky.) 338. Where the bill prays for damages merely, it is demurrable. *Townsend v. Vanderwerker*, 20 D. C. 197.

Damages. — In addition to the prayer for specific performance, the plaintiff may pray for compensation in damages if specific performance cannot be decreed. *Henry v. McKittrick*, 42 Kan. 485; *Peabody v. Tarbell*, 2 Cush. (Mass.) 226; *Farwell v. Johnston*, 34 Mich. 342; *Young v. Young*, 45 N. J. Eq. 27; *Konnerup v. Frandsen*, 8 Wash. 551.

Injunction. — A prayer for an injunction, to be continued during the term of the contract which is the subject-matter of controversy, restraining the defendant from threatened breaches of the contract, is the equivalent of a prayer for specific performance, and converts the bill, in substance and spirit, into a bill of that character, although there is no special prayer for enforcement. *Electric Lighting Co. v. Mobile, etc., R. Co.*, 109 Ala. 190.

Return of Purchase Money. — The prayer may be for a specific performance of the contract or that the money paid be returned. *Wiley v. Mullins*, 22 Ark. 394.

Reformation of Contract. — The bill may pray that the contract be corrected and that specific performance of the contract so corrected be decreed or that the contract be rescinded. *Columbus, etc., R. Co. v. Steinfeld*, 42 Ohio St. 449.

Rescission of Contract. — The prayer may be for a performance of the contract or for a rescission thereof. *Griffith v. Maxfield*, 63 Ark. 548.

General Relief. — The prayer for specific performance is broad enough to cover whatever relief is shown to be necessary to an enforcement of the contract. *Lindsey v. Western Mut. Aid Soc.*, 84 Iowa 734.

Precedents. — In *Hurd v. Hotchkiss*, 72 Conn. 472, the complaint was as follows:

"1. On the 6th day of September, 1886, *John Hurd* and *Charles B. Hotchkiss*, then in full life, executed a certain agreement upon the consideration ap-

pearing therein, of which exhibit A, hereto annexed, is a copy. 2. On said day the said *Charles B. Hotchkiss* owned in fee an undivided one-half of a large tract of land in said *Franklin* county, embracing within its limits the following described premises (description omitted). 3. Said corporation was duly formed as contemplated by said agreement, and consists of the said *St. Regis River Lumber Company*, one of the plaintiffs herein, and the said *John Hurd*, and said corporation duly performed on its part all of the undertakings appearing in said agreement. 4. Said *Charles B. Hotchkiss* in his lifetime performed all of his part of said covenants in said agreement, except the conveyance of his interest in the tract of land above described. 5. The plaintiffs, by *John Hurd*, duly demanded of *Elizabeth E. Hotchkiss*, on or about July 1st, 1897, a conveyance of said lands to said corporation in accordance with the terms of said agreement. 6. The said *Charles B. Hotchkiss* died October 10th, 1886. 7. Said *Elizabeth E. Hotchkiss* is the widow of said *Charles B. Hotchkiss*, and by the terms of the will, duly executed by him and admitted to probate, obtained title to all of the property and effects of said *Charles B. Hotchkiss*, including said piece of land above described, and still retains the title to the same. 8. There was a limitation for the presentation of claims on the estate of said *Hotchkiss*, which was six months from October 23d, 1886, and a further time of two months from July 25th, 1887. 9. Said claim was not presented to said estate during said time."

Upon the evidence, specific performance was refused.

In *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, the complaint, upon which judgment was rendered for the plaintiff, was as follows:

"That the plaintiff and defendant are each corporations; that the defendant was the owner of certain water power, in the city of *Elkhart*, created by a dam across the *St. Joseph* river, and that it owned a head-race extending from the river above the dam on the north side westwardly to a point below the dam; that the defendant, being desirous of furnishing the plaintiff a certain portion of said water power, agreed to furnish to the plaintiff, 9,927 cubic feet of water per minute under a

working head of *ten* feet, and more or less, proportionately, as the head may vary above or below said *ten* feet; said water to be furnished from said hydraulic head-race, and to be delivered to said *Globe Tissue Paper Company* in their flume or flumes adjacent to said head-race; that at said time there was standing upon the south side of said head-race, and between it and the *St. Joseph* river, large brick buildings which formerly had been used in the manufacture of paper, using water therefor from said head-race; that said buildings were then empty, but the flumes connecting said head-race with said buildings and the water-wheels in said buildings and the machinery for the manufacture of paper were all then intact in said buildings; that plaintiff had in contemplation at said time the purchase of said buildings and the ground under and about the same, all of which the defendant well knew; that at said time it was further agreed by and between the plaintiff and defendant that all measurements of said water, to determine the quantity used or drawn by said *Globe Tissue Paper Company*, should be by means of a weir in the tail-race or waste below the discharge of the water-wheels in said buildings and on the premises of which said buildings composed a part; that it was further agreed that the *Globe Tissue Paper Company* might cancel the obligations of the contract upon giving six months' notice of a total suspension of business; that it was further agreed that in case the defendant should fail to furnish the water as specified, by reason of the natural shrinkage of the river, the plaintiff should not be liable for any rental; that the plaintiff should pay the defendant the sum of \$2,000 yearly rental for said water power, payable quarterly, and that if the rent named should remain unpaid for a period of *thirty* days the defendant should have the privilege of shutting off the supply of water until the rental should be paid, and that the plaintiff should have a priority of rights of water over all other leases, and that the defendant reserved the right to draw the water from said race when necessary to make repairs or to construct flumes, but not to exceed *thirty* days in one year, and that said race was not to be unnecessarily filled up by waste from said mill, and that lease should commence on *September 1*,

1891, or such time as the mill should be ready to run; that at that time plaintiff caused a written memorandum of said verbal agreement to be made, a copy of which is as follows: '*Elkhart, Indiana, May 29, 1891. The St. Joseph Hydraulic Company, for the sum of \$2,000 yearly rental, payable quarterly, agrees to furnish the Globe Tissue Paper Company 9,927 cubic feet of water per minute, under a working head of ten feet, and more or less, proportionately, as the head may vary below or above the said ten feet, above named, from their hydraulic head-race, to be delivered to said Globe Tissue Paper Company in their flume or flumes, and adjacent to said above named head-race, for the term of — years. All measurements of said water to determine the quantity used or drawn by the said Globe Tissue Paper Company shall be made by means of a weir in the tail-race or waste way, below the discharge of the wheels into said waste way on the premises of the said Globe Tissue Paper Company. The Globe Tissue Paper Company may cancel the obligations of this lease upon giving six months' notice of a total suspension of business. In case the Hydraulic Company fail to furnish the water as specified herein, by reason of the natural shrinkage of the river, said Globe Tissue Paper Company shall not be liable for said rental named. In case the rental above named remains unpaid after due, for a period of thirty days, said Hydraulic Company shall have the privilege of shutting off the water until said rental shall be paid. Said Globe Paper Company shall have priority of rights of water over all other leases. The Hydraulic Company reserves the right to draw the water from the races for a period of time necessary to make repairs or to construct flumes, but not to exceed thirty days in any one year. Races not to be unnecessarily filled up by waste from the mill. Lease to commence September 1st, or such time as the mill may be made ready to run, to use power to make paper.' And that soon after plaintiff delivered a copy of this written memorandum to the defendant, it was agreed by the parties at said time that the defendant would execute to the plaintiff a written lease in accordance with said parol agreement as above set forth, and that the plaintiff should have the option of determining the number of years for which said lease should run; that plain-*

tiff afterwards exercised its said option, and determined to have the lease run *twenty-five* years, and so notified the defendant, and the defendant consented thereto; that, relying upon said parol agreement, and relying upon the agreement of defendant to execute to plaintiff a formal written lease in accordance with said written memorandum above set forth, plaintiff purchased said grounds and buildings, and repaired and equipped the same with proper machinery for the manufacture of paper, at an expense of \$25,000, and took possession thereof, and began the operation of its said mill on or about the — day of *September*, 1891, and in accordance with said written memorandum aforesaid, and plaintiff has ever since said time continuously operated said paper-mill plant under and by virtue of the terms of said written memorandum, excepting such times as plaintiff was obliged to shut its mill down by lack of water, and for other necessary causes; that plaintiff has duly performed all of the conditions of said agreement on its part, and has always been ready and willing, and still is, to accept a lease for said water power to the plaintiff, and in the future faithfully to keep and perform all of the conditions and agreements of said contract; but the defendant refused and still refuses to execute and deliver said lease."

In *Perrine v. Mayberry*, 37 Kan. 258, the petition, upon which judgment for the plaintiffs was affirmed, was as follows:

"That heretofore, to wit, on or about the 14th day of *September*, 1871, said defendant *John A. Perrine*, then being married to the defendant *Emeline Perrine*, entered into a written contract with the *Atchison, Topeka & Santa Fe Railroad Company*, a corporation duly organized under the laws of the state of *Kansas*, by the terms of which contract said *John A. Perrine* agreed to purchase of said railroad company a certain piece and parcel of land lying and being in the county of *Harvey* and state of *Kansas*, and described as follows, to wit: The southeast quarter of section number *one*, in township number *twenty-four* south, of range number *one*, east of the *sixth* principal meridian, containing *one hundred and sixty* acres, more or less, according to the United States surveys; that said written contract is not in the possession or within

the control or reach of this plaintiff, and it is impossible for him to procure the same or a copy thereof; that by the terms and conditions of said contract the said *John A. Perrine* was to pay for said land the sum of \$—— in annual installments, the last payment to be made upon the 14th day of *September*, 1882; and that upon the full payment of said sum and amount of money, with the interest and charges thereon, said railroad company agreed to execute and deliver to the said *John A. Perrine* a deed of general warranty, with the usual covenants therein for said land; that on or about the 28th day of *January*, 1874, the said *John A. Perrine* and *Emeline Perrine*, having ascertained that they would not be able to meet the payments as they would become due by virtue of said contract, proposed to this plaintiff that if he would pay the said *John A. Perrine* the sum of *one hundred and seventy-five* dollars, and afterward pay *one-half* of all subsequent payments falling due to said railroad company for the purchase money of said premises, the plaintiff should be considered and held to be the owner of the west *one-half* of said quarter-section of land, and that when such payments were all made, and said railroad company should, in pursuance of its contract with said *John A. Perrine*, execute to him a deed conveying to him the legal title to said premises, the said defendants should immediately convey to this plaintiff, by a deed of general warranty with the usual covenants, the said *one-half* of said premises; that this plaintiff accepted said proposition, and thereupon paid to said *John A. Perrine* the sum of *one hundred and seventy-five* dollars; * * * that in pursuance of said contract, the plaintiff, in the month of *September*, in the years 1874, 1875 and 1876, duly paid to said defendant *John A. Perrine*, *one-half* of all the money falling due to said railroad company under said *Perrine's* contract of purchase from said company; that on or about the — day of *September*, 1877, at the instance and request of the said defendants, this plaintiff made a full settlement for the west *one-half* of said quarter-section of land by then paying to said *Perrine* the sum of *three hundred and twenty-five* dollars, or thereabouts, as nearly as plaintiff can recollect, the same so paid being the full amount of *one-half* of all the payments yet to become due to said

railroad company upon said contract of purchase from said railroad company to said *Perrine*, and that in consideration of said payment so made, and the payments made prior thereto by this plaintiff to said defendant, the defendants then verbally agreed with this plaintiff that they would make punctual payments of all sums yet to fall due to said railroad company at the time the same should become due, and that they would, when said railroad company should deed said land to said *John A. Perrine*, make to this plaintiff a good and sufficient warranty deed with the usual covenants therein."

In *O'Neill v. Martin*, 26 Kan. 494, the complaint, in which judgment was rendered for the plaintiff, was as follows:

"That the said defendant, *Jane O'Neill*, is the mother and only heir of *A. T. O'Neill*, deceased; that said *A. T. O'Neill* died intestate, on the 27th day of *January*, 1879; that in the lifetime of said *A. T. O'Neill*, and on or about the 22d day of *May*, 1871, said *A. T. O'Neill* entered into an agreement with the plaintiff, whereby he agreed to sell, and did sell, to the said plaintiff, the following tract of land, lying and situate in the county of *Elk*, and state of *Kansas*, described and bounded as follows, to wit: Commencing at the northwest corner of the northeast quarter of the northwest quarter of section number sixteen, township number thirty-one, south of range number ten, east; thence running east 1342 links, then south 710 links, thence west 1342 links to the 80-acre line, thence north to the place of beginning, containing nine and 52-100 acres of land; and to convey the said lands to the said plaintiff by deed of general warranty, on the payment of \$57 12-100, and at the time when said *A. T. O'Neill* should purchase said land, the lands at that time being school lands. That said *A. T. O'Neill*, under said contract of sale, delivered to said plaintiff the possession of said premises; that said plaintiff has been in possession of said lands ever since, has paid the full purchase price therefor to the said *A. T. O'Neill*, and made lasting valuable improvements thereon, consisting of fencing, setting hedge, building corrals, and otherwise improving the lands to the value of \$200 and more. And the said plaintiff avers that he has always paid the taxes and

assessments of every nature on said premises. And said plaintiff avers that on the 18th day of *June*, 1872, said *A. T. O'Neill* purchased said lands from the state of *Kansas*; that on the first day of *March*, 1880, the governor of said state of *Kansas* issued his patent to said lands to one *John F. O'Neill*, administrator of the estate of said *A. T. O'Neill*, deceased, for the benefit of the heirs of said *A. T. O'Neill*; that neither said lands, nor any part thereof, have passed to the administrator of said estate, as assets belonging to said estate, but descended to said defendant, as the sole heir of said *A. T. O'Neill*; that said *O'Neill* did not in his lifetime execute a deed of conveyance to said *Martin*, nor has his administrator, nor his heirs, executed to said *Jane Martin*, since the decease of *A. T. O'Neill*, a good and sufficient deed of conveyance, or any deed of conveyance whatever, conveying said land, or any part thereof, to said plaintiff, or any person for him, but have refused, and still refuse, to execute said deed."

In *Green v. Ditsch*, 143 Mo. 1, the petition, on which the decree for the plaintiff was granted, charged that on the fifteenth day of *November*, 1890, the plaintiff *Green* was the owner of a certain lot, describing it, and on said day a contract between him and *P. W. Ditsch* was entered into, "by the terms of which the plaintiff agreed to sell and the said *P. W. Ditsch* agreed to buy said property at and for the price and sum of three thousand dollars, and that it was further agreed that an addition to the house then standing on said premises should be constructed by the plaintiff at the price not exceeding five hundred dollars, which amount said *Ditsch* should repay to the said *Green*. It was further agreed that the said contract should be consummated when said addition to said house should be completed. That plaintiff proceeded at once to the erection of said addition, and completed the same at the cost of five hundred dollars, and that it was agreed between the parties that as a means to pay plaintiff for said lot before the consummation of said contract and the erection of said addition, the said *Ditsch* should pay to the plaintiff the said sum of three thousand dollars, and the plaintiff should execute to said *Ditsch* a note for said amount, secured by deed of trust on said prop-

erty. That said note and deed of trust were accordingly executed, and plaintiff has completed said addition and has complied with all the terms and conditions of said contract on his part. That pending the said performance of said contract the said *P. W. Ditsch* departed this life, leaving the said defendant as his heir, and the said defendant thereupon assumed the said contract, and has reaped, and is now enjoying the benefits thereof, having entered into the possession of said property under said contract and accepted the additions so erected by plaintiff as aforesaid, but that the said defendant failed and refused to carry out and perform his part of said contract, and on the contrary thereof undertook to cause a sale to be made under the terms of the deed of trust aforesaid on the *twenty-eighth day of December, 1891*, and claims to have acquired the title to said property under and by virtue of said trustee's sale. But the plaintiff alleges that it was a part of the contract hereinbefore mentioned, that said deed of trust should not be thus foreclosed, but should simply be held to secure the performance by the plaintiff of his part of the contract for the conveyance of said lot and the erection of said addition for the aggregate sum of *thirty-five hundred dollars*. Plaintiff has at all times been ready and willing to comply with his part of said contract, and he prays the court to require the defendant to specifically perform his part thereof; to set aside the trustee's sale, to cancel and annul the plaintiff's said note and the deed of trust given to secure the same; to require the defendant to pay the balance of the purchase money, to wit, the sum of *five hundred dollars* with interest from the *first day of May, 1891*, and for such other and further relief as to the court may seem meet and proper."

In *Gates v. Gates*, 34 N. Y. App. Div. 608, the complaint, among other things, alleged:

"That on or about the *1st day of Jan., 1862*, this plaintiff then being an infant of the age of *two years*, his father being dead and his mother being the sister of the said *Alonzo W. Gates'* wife, the said *Alonzo W. Gates*, with the consent of his said wife, entered into a contract with the said *Sophia Carr*, this plaintiff's mother, whereby the said *Sophia Carr*, this plaintiff's mother, agreed to surrender up forever this plaintiff to the

said *Alonzo W. Gates*, and to surrender and release all claims or rights of every name and nature which she had over said child by reason of being its mother, to the said *Alonzo W. Gates*, and whereby and in consideration of the said agreement of the said *Sophia Carr* the said *Alonzo W. Gates* agreed to take this plaintiff and to adopt him as his child, to rear, educate and maintain him, and to treat him as a member of his family, and as a son in all respects, and to make this plaintiff an heir of the said *Alonzo W. Gates*, and to give to him the same interest which a son would have in whatever property he owned or might have at the time of his decease.

That said agreement was fully understood and consented to by the wife of said *Alonzo W. Gates*, and was fully understood and agreed to by the said *Alonzo W. Gates* and by the said *Sophia Carr*, the mother of this plaintiff, and that immediately thereafter and in pursuance to said agreement the said *Sophia Carr* did surrender and give over to the said *Alonzo W. Gates* this plaintiff, and release to the said *Alonzo W. Gates* all rights or claims of every name and nature which she had to this plaintiff by reason of being its mother, and the said *Alonzo W. Gates* took and adopted this plaintiff as his child, took him into his family, and thereafter this plaintiff lived as a member of the said *Alonzo W. Gates'* family, took the name of the said *Alonzo W. Gates* and performed all the duties and obligations which a son owes to his parents to the said *Alonzo W. Gates* and his wife, and lived continuously with the said *Alonzo W. Gates* as his son and as a member of his family, and lived as a member of his household, except during temporary absences, continuously to the time of the marriage of this plaintiff, and thereafter, although this plaintiff, after his said marriage, which occurred on the *19th day of September, 1889*, took up a residence apart from the said *Alonzo W. Gates*, he nevertheless continued to perform and discharge his duties as a son to the said *Alonzo W. Gates* in all respects, and was treated as a son by the said *Alonzo W. Gates* up to the time of his decease, and that frequently during said time the said *Alonzo W. Gates* promised and agreed to so fix, arrange and dispose of his property that at the time of his death this plaintiff should have the same interest in whatever property the said

Alonzo W. Gates died possessed of as a son, but the said *Alonzo W. Gates* died intestate and without making any provision whatever as to the disposition of his property, and the plaintiff further alleges that he was, on or about the first day of January, 1862, legally and formally adopted as the son of the said *Alonzo W. Gates*, and thereafter and up to the time of the death of the said *Alonzo W. Gates* said adoption was repeatedly and continuously affirmed and ratified by the said *Alonzo W. Gates*, and the said *Alonzo W. Gates* agreed to give to this plaintiff at the time of his death the same interest in whatever property he then had which a son would be entitled to, and the plaintiff alleges that, by reason of the facts aforesaid, he is the only heir now living who is entitled to share in the estate of the said *Alonzo W. Gates*, subject, however, to the rights and interests of the said defendant *Alvira B. Gates*, the widow of the said *Alonzo W. Gates*, deceased, and is entitled both in law and in equity to share in the estate as aforesaid.

The plaintiff further alleges that, notwithstanding the facts aforesaid, the said defendants claim to be the only heirs and next of kin of the said *Alonzo W. Gates* and claim the right to his estate to the exclusion of this plaintiff.

That when letters of administration were issued, as aforesaid, no citations whatever were issued to or served upon this plaintiff."

Judgment was demanded:

"1st. That he be adjudged and decreed to be the son and heir at law of the said *Alonzo W. Gates*, deceased, and owner in fee simple of the lands and tenements hereinbefore described, subject to the right of dower of the said *Alvira B. Gates*.

2nd. That this plaintiff be adjudged and decreed to be entitled to a specific performance of the contract herein set forth.

3rd. That this plaintiff have an order of this court, ordering and directing that the said defendants *Frank H. Sears* and *Alvira B. Gates*, as administrator and administratrix of the estate of *Alonzo W. Gates*, deceased, and *Beritha E. Owen*, *Olive M. Kelley*, *Clara Kimball*, *Lottie Anderson*, *Ella Gates*, *Anna Miller* and *Fred Gates* be required to make, execute and deliver to this plaintiff a quitclaim deed of said premi-

ses, and for such other and further relief as to the court shall seem just and equitable, together with the costs and disbursements of this action."

Against demurrer, it was held that the complaint set forth only a cause of action which was based upon the contract, and that the statement that the plaintiff was the only heir, and therefore entitled to the possession of the property, was a mere conclusion and that two causes of action were not joined.

In *Boswell v. Sharp*, 15 Ohio 447, the following bill is set out:

"Humbly complaining, sheweth unto your honors, your orator, *Thomas L. Hawkins*, that some time in the year 1816, *Thomas E. Boswell*, then and now of the state of *Kentucky*, your orator, one *Reed*, and also one *Owings*, engaged in building a sawmill at the town of *Lower Sandusky*, with a view and intent of purchasing of the government, eventually, the land where said mill was to be created. Orator further shows, that said *Boswell* advanced a part of the expenses necessary to the commencement of said mill, how much, orator does not now remember; *Owings* about \$200, and *Reed* nothing.

Orator further says that all parties interested agreed that orator should be the acting agent in erecting said mill, and should advance his — of expense in said mill by labor, and if he advanced more than his share the other parties to refund; that orator went on and expended his time, labor, and money, from 1816 until the land at *Sandusky Reservation* was sold by government at *Wooster* in 1818, when *Reed* and *Owings* abandoned the purchase of land on which said mill was commenced, or to proceed with said mill any further. It was then agreed by *Boswell*, *William T. Barry*, of *Kentucky*, and *William Whitmore*, of *Boston* (all three of whom orator prays may be made defendants to this bill), and orator, to go on and purchase lot No. 9 in said reservation, or a large part of it, and the same on which said mill was commenced; that said purchase was made, and purchasers agreed that orator should advance his share of purchase money in labor on said mill and the improvements of said land; and, further, that said orator should be the acting agent of said *Boswell*, *Barry*, and *Whitmore* — should go on and make contracts for the erection of said mill.

Orator further says he did go on and superintend the building of said mill, and continued to labor upon the same until 1823, and laid out for himself and others interested in said mill about \$5,000—about \$2,600 thereof orator advanced himself, besides his own time; that orator believed that said *Whitmore*, *Boswell*, and *Barry* would convey to him one equal share of the land in said lot—that is, *one-fourth* of all that they should obtain a legal title to of said land. Orator further says that said defendants have obtained a legal title to *two-thirds* of said lot, and now refuse to convey to orator any part of said land, or to account and refund to him the money he has laid out, more than his share, on said mill, or pay him for his time expended for his agency, etc.; all which actions and doings are contrary to equity and good conscience, in tender consideration whereof, and inasmuch as orator is remediless by the strict rules of common law, and can only be relieved by this court sitting as a court of equity.

To the end therefore, that said *Boswell*, *Barry*, and *Whitmore* may, upon their corporal oaths, true answers make to all matters herein charged, and, on the final hearing of this cause, your honors will decree that said defendants convey *one-fourth* of the said land to which they have obtained a legal title, and also to account to your orator for the money and time he has expended, more than his share, on said mill, and the improvements of said land, and that notice be given for defendants," etc.

It was held that the description of the land in the bill was not very certain, but it was sufficient to bring the case within the statute and that the fault did not go to the jurisdiction of the court.

In *Newell's Appeal*, 100 Pa. St. 513, the bill alleged in substance that defendant, by indenture bearing date April sixteenth, 1877, leased to the complainant a certain lot of ground in the borough of Bradford, for the term of one year from the date thereof, at the rate of sixty dollars per annum, payable semi-annually in advance, with the privilege of four years additional; that the lease contained, *inter alia*, a covenant by which the defendant granted to the complainant the privilege of purchasing the said lot at any time within one year from the date of the lease for the sum

of four hundred dollars; that about the first day of April, 1878, the complainant demanded a deed from the defendant, offering to pay him the sum of four hundred dollars; that the defendant told the complainant that he had not time to make the deed, but would attend to it soon, adding that he was busy, and that it made no particular difference to him; that afterwards, before the sixteenth day of April, 1878, the complainant again demanded a deed of the defendant, tendering him the sum of four hundred dollars in lawful money, which the defendant refused to accept, saying that he had not time to make a deed but that he would attend to it soon; that the complainant at divers times in the year 1878 asked the defendant to deliver the deed, tendering him at the same time the said sum of money, which the defendant refused to accept, saying that he was in no hurry; that afterward the defendant tendered a deed, but upon the complainant's request for a little more time to pay, the defendant granted further time, saying that it would make no difference to him; that on January eighth, 1879, the complainant again tendered to the defendant the sum of four hundred dollars, who refused to accept the money and deliver the deed; that the plaintiff had been and was ready to make payment, but that the defendant refused to make the conveyance; that the complainant in contemplation of ownership has made improvements at a cost of two thousand five hundred dollars, and that failure to convey the lot would work him irreparable injury. The bill prayed for a decree directing a conveyance of the lot, and for general relief. The decree for the plaintiff was affirmed.

In *Plymouth Mfg. Co.'s Appeal*, 81 1-2 Pa. St. 147, the petition set out that on the 1st of March, 1860, George H. Dietrick entered into a contract with John F. Derby, as follows:

"Whereas, *John F. Derby*, of, etc., is about erecting a building on lands of *Henderson Gaylord* and *Draper Smith*, in *Plymouth*, etc., of about *two hundred* feet in length and about *thirty* feet in width, to be used as a foundry and machine shop, according to the general acceptance of the term: And whereas it is necessary to have more land to lay down a railroad track and several switches for the convenience of building and repairing railroad cars, and a

connection of the said railroad and switches with the *Lackawanna and Bloomsburg Railroad*.

Now *George H. Dietrick*, etc., agrees, etc., in consideration of the erection and completion of said building, and the further consideration of the sum of *fifty dollars*, etc., that he will make and execute unto the said *John F. Derby*, his heirs or assigns, a good and sufficient deed for the following described piece of land, situated in *Plymouth* aforesaid, whenever the said building as aforesaid shall be erected and business above mentioned shall be in operation, being part of the middle tier of house lots in said *Plymouth*, bounded as follows, viz., *Gaylord's* railroad running to the river on the west, and by lands of *Gaylord* and others on the south, and by lands of *McAlarney* on the east, and by fence of the *Lackawanna and Bloomsburg Railroad* on the north, being about *one hundred and fifty feet* on the line of the *Gaylord* railroad on the west, and about *ninety feet* wide on the line of lands of *Gaylord* and others on the south, and about *one hundred and sixty-five feet* on the line of *McAlarney's* land on the east, and about *eighty-five feet* wide on the line of the *Lackawanna and Bloomsburg Railroad* on the north. Also, to hold and use in common with *George H. Dietrick*, a strip of land *ten feet* wide, extending from the southwest corner of the aforesaid described piece of land to the river. The said *George H. Dietrick* reserves a small building now standing on the lot, used for a butcher shop; also, a privilege to move the same to the south end of the premises, where it may remain *two years*, and then to be removed from the land altogether."

The petition further averred:

"That in execution of said contract, said *J. F. Derby* immediately erected upon the premises, etc., a building of the dimensions referred to in the contract, and finished the same, and commenced and put in operation the business mentioned in said contract, and also paid to said *George H. Dietrick* the sum of *fifty dollars* mentioned in said contract, or the assigns of said *J. F. Derby* now stand ready, and have offered, and do now offer to pay the heirs of said *George H. Dietrick* the said sum of *fifty dollars*, and the said *George H. Dietrick* thereupon delivered possession of said lot of land described in said

contract to said *J. F. Derby*, and the said *J. F. Derby* entered upon said lot described in said contract, and at his own expense put down switches and railroad tracks upon the same, and connected them with the *Lackawanna and Bloomsburg Railroad*, and by himself and his assigns since and constantly continued to use said lot as a whole for the purposes and uses of said business mentioned in said contract. That subsequently said *J. F. Derby* died, and his executors made an Orphans Court sale of the real estate of said *J. F. Derby*, deceased, and sold the same, including the land above referred to and described in said contract, to the *Plymouth Manufacturing Company*. * * * That said company is now seised of said lot of land described in said contract, etc.

That the said contract is so far executed that it would be against equity to rescind the same; and that no provision for the performance of said contract was made by the defendant, *George H. Dietrick*, in his lifetime; and as your petitioners have shown that said *J. F. Derby* and his assigns have entered and made valuable improvements upon said premises, pursuant to said contract; and that the *Plymouth Manufacturing Company* are now and at all times have been ready to pay any balance of purchase money due on said premises to the administrator and heirs at law of said *George H. Dietrick*; your petitioners therefore pray the honorable court to award a citation to *A. J. Dietrick*, administrator as aforesaid, and to the heirs at law of said *George H. Dietrick*, deceased, etc. commanding them to appear in court and answer this petition, etc., and your petitioners further pray the decree of the court for a specific performance of said contract according to the true intent and meaning thereof, and that a conveyance may be made under said decree by the administrator unto your petitioners of said land, etc."

It was held that the plaintiff was entitled to a decree.

In *Kenton v. Vandergrift*, 42 Pa. St. 339, the complaint set forth in substance that Benjamin Vandergrift, the father of complainant, on the twenty-third day of May, 1838, owed Kenton, the defendant, one hundred and forty dollars. That Benjamin Vandergrift, who was then seised of a lot in Oxford township, agreed with Kenton to convey it to him as security for said debt;

that Jacob Vandergrift agreed with Benjamin and Kenton that he, Jacob, would repay Kenton said sum; in consideration thereof Kenton agreed that whenever he should be paid by Jacob Vandergrift said debt of one hundred and forty dollars, he would, by good and lawful deed, convey said lot to Jacob in fee, free from all incumbrances; that Benjamin Vandergrift and wife, in pursuance of said agreement, executed a deed, absolute on its face, conveying said lot to Kenton, in fee, to hold as security for the payment of the said sum of one hundred and forty dollars; that at the time of the said conveyance the lot was not worth the sum of one hundred and forty dollars, and that subsequently Jacob Vandergrift, with the knowledge and consent of Kenton, entered upon and took exclusive possession of said lot, which he held, down to the time of the filing of the bill. That, on the twenty-eighth day of May, 1838, Jacob Vandergrift, the complainant, was indebted to divers persons in the sum of one hundred and forty dollars, and was seised as of fee of a frame message and lot in said township, and agreed with Kenton to convey to him the same, to hold as security for the payment. In consideration whereof Kenton agreed with Jacob to pay the said sum of one hundred and forty dollars to the persons to whom Jacob owed the same, and that whenever Jacob should repay Kenton said sum, Kenton would reconvey the premises to him, in fee simple, clear of all incumbrances; that in accordance with this agreement, Jacob and wife executed a deed conveying said frame message and lot to Kenton in fee simple, to hold as security for said last mentioned sum of one hundred and forty dollars. That at the time of the execution of said deed, and to the time of filing said bill, Jacob was and remained in exclusive possession of the premises. That from the date of said deeds to the twenty-fourth day of July, A. D. 1855, Jacob Vandergrift paid Kenton interest on said two sums of one hundred and forty dollars each, at the rate of six per cent. per annum; that on or about the fourth day of July, A. D. 1855, Jacob, through his agents, tendered to Kenton two hundred and eighty dollars, for the purpose of paying said two sums of one hundred and forty dollars each, and also a deed for Kenton to

execute, conveying to him, Jacob, in fee, said two properties, and requested him to execute said deed; that Kenton refused to accept said two hundred and eighty dollars, and execute the deed; that Jacob then tendered Kenton one hundred and forty dollars, and requested Kenton to accept the same on account, and in payment of the debt for which the last of said two properties was conveyed, which was also refused; that on the fourth day of December, 1857, Kenton brought an action of ejectment in the District Court against Jacob Vandergrift; that on the trial of said issue the said defendant set up as a defense, that said properties were conveyed to Kenton, to hold as security for the payment by said Jacob of one hundred and forty dollars as above set forth, and that he, Kenton, on payment of said sums, would convey said properties to Jacob Vandergrift; that said Jacob succeeded in establishing said defense, and that the jury in said case rendered their verdict for plaintiff, with this condition, that if Jacob Vandergrift, the defendant, should pay the plaintiff two hundred and eighty-three dollars, in one year from the first day of April, A. D. 1858, with interest, this verdict should be null and void. That on the ninth day of April, A. D. 1857, said Jacob paid to said Kenton, in compliance with the condition of said verdict, two hundred and eighty-three dollars in full, the amount of said verdict, with interest, and that Kenton received said sum, and, by his attorney, gave a receipt on the docket of said suit; that the verdict of two hundred and eighty-three dollars was the amount of the sum which the jury found due at the time of its rendition from said Jacob to Kenton, for and on account of said sums, to secure the payment of which the said deeds to Kenton were made. Complainant, averring compliance with his agreement to pay Kenton said two sums of one hundred and forty dollars each, and also all legal and equitable claims and demands which said Kenton ever had against complainant, in any way or manner connected with said two properties, or with the debts to secure which said properties were conveyed, further averred that, on the twenty-sixth day of March, 1861, he had tendered to said Kenton a deed for the said two properties for his execution, with a notice demanding the

execution of a proper conveyance from him to complainant for each of said two properties, and that he had refused to execute it. Complainant further alleged a request made by him, for the execution and delivery to him by Kenton of a deed of said two properties, in compliance with said alleged agreement, and the refusal of Kenton to convey to him, by good and lawful deed, the legal title to said two properties, and, that although Kenton had no right to the legal title to said properties, but in consequence of said legal title to said properties being in him, they were greatly depreciated in value, and their sale by complainant rendered impossible; that complainant had suffered and was suffering great loss and damage in not being able to sell properties, or raise money thereon by mortgage or otherwise, as complainant had been unable to find a purchaser, at a fair price, or mortgagee, while the legal title was not in him; and that he was remediless in a court of law, and could have relief only in a court of equity, and prayed that Kenton might be decreed to execute to him a deed conveying said two properties in fee simple, free of all incumbrances, and further relief, etc."

The decree for a reconveyance by respondents to the complainant was affirmed.

In *Baker v. Hawkins*, 14 R. I. 359, the bill stated in substance that in November and December, 1872, and previously, the complainant, who was without capital or credit, was carrying on business in Providence by means of credit obtained by the indorsement of his negotiable paper by one Lewis P. Child, who was in good financial standing. The complainant was also in the habit of indorsing for Child, not because his indorsement was worth anything, but because banks and brokers made it a rule not to negotiate paper without indorsement. In November, 1872, the defendant bought through a broker a note dated November 27, 1872, signed by Child and indorsed by the complainant for six thousand dollars, payable six months after date, and in December a note dated December 21, 1872, signed by the complainant and indorsed by Child for three thousand five hundred dollars, payable six months after date. Before either of these notes fell due, Child failed, and afterwards the notes went to protest and were left

overdue in the hands of the defendant. After the failure of Child, the complainant being no longer able to carry on his business, which was that of manufacturing under a patent, in his own name, formed the plan of carrying it on by means of an incorporated company, and accordingly obtained a charter under which the company was organized by the name of the Seth W. Baker Manufacturing Company, and proceeded to business. The defendant, knowing that the notes which he held were, after the failure of Child, of little value, entered into an agreement with the complainant which is set forth as follows in the bill, to wit: In consideration that your orator would pay to the respondent when requested the sum of thirty-five hundred dollars, being the amount of said note hereinafter referred to, made by the said Child and indorsed by your said orator, and in further consideration that your orator would permit and procure the said respondent to become a subscriber to the capital stock of the said Seth W. Baker Manufacturing Company in a like sum of thirty-five hundred dollars, he, the said respondent, would release and discharge your orator of and from all liability to him as indorser of said note, hereinafter referred to, signed by the said Lewis P. Child and indorsed by your orator as aforesaid; and that your orator thereupon and in consideration of the said agreement on the part of the respondent did agree to pay the said respondent the said sum of thirty-five hundred dollars when requested, and did permit and procure the said respondent to become a subscriber to the capital stock of the said Seth W. Baker Manufacturing Company in a like sum of thirty-five hundred dollars, and your orator avers that the respondent did become a subscriber to said stock in said amount, and your orator further avers that the said respondent did not and hath not paid for the same in accordance with the terms of his said subscription.

The bill alleged that the complainant had always been ready and willing to pay the three thousand five hundred dollars when requested on receipt of the release or discharge, but that the defendant had never requested payment or offered to release or discharge him. The bill also alleged that May 29, 1879, when the statute of limitations was about to run against the liability

of the complainant, he gave a note payable on demand for an amount equal to the liability on both notes, but with the express understanding that it should not prejudice his agreement aforesaid. The bill alleged that the defendant had commenced an action at law on this note, and that he refused, though requested by the complainant, to perform the agreement. The bill prayed that the defendant be enjoined from prosecuting his action, and be decreed to specifically perform his agreement.

It was held that this bill should be sustained.

In *Providence v. St. John's Lodge*, 2 R. I. 46, the bill, which was held good against demurrer, alleged that on the fifteenth day of May, 1797, James Arnold, Esq., Town Treasurer of the Town of Providence, being duly authorized by a vote of the freeman of said town, by his deed, gave, granted and confirmed to the Master, Wardens and Brethren of St. John's Lodge of Free and Accepted Masons, No. 1, in the Town of Providence, the right and privilege of erecting and constructing upon the Market House in said Providence, an additional story, and, to that end, to enter upon and pass through said Market House by themselves, their workmen and servants, and to do all and every act and thing, necessary for the erecting and constructing said story, both within and about said house, and having so erected and constructed said story, to have and to hold, use, occupy and possess the same at all times, together with all the entries, passages and staircases necessary and convenient for the using and occupying, to and for the sole use and benefit of them, the said Master, Wardens and Brethren, until the freemen of said town should think proper to take the same into their possession, according to the provisions following; that is to say, if at any time, after the erecting and constructing said story, the Freemen of said Town should think proper so to do, it should and might be lawful for said Town to take the said story into their possession, upon paying to the said Master, Wardens and Brethren, for the said additional story and the roof, the value thereof at the time of taking the same into possession, as the same should be appraised, without regard to the central situation thereof. Provided that the said Master, War-

dens and Brethren should make and construct the jet of the roof of the said Market House of brick, and should keep the said roof and the additional story aforesaid, in good repair, during the time of their using and occupying the same, as aforesaid.

In pursuance of this deed, the defendants constructed the additional story and thenceforth used and occupied it.

The bill stated the succession of the City of Providence to the rights and privileges of the Town of Providence, and of the City Council to the rights of the Freemen of said Town; and that on the — day of —, 1850, the said council thought it proper to take said story into their possession, and passed a vote to that effect; that the plaintiffs requested a delivery of the story and offered to pay the value of the same, according to the provisions of the deed, and requested the defendants to join with them in appointing appraisers who should appraise the value thereof; and that the plaintiffs proposed to the defendants that they should choose one appraiser, and the plaintiffs another, and that the two so chosen should choose a third, the appraisal of which three or any two of them should be final and binding upon the parties; and that they offered to assent to any other fair mode of making an appraisal of said story and roof, according to the provisions of said deed; with which said requests and proposals the defendants refused to comply.

The prayer of the bill was that the court would ascertain, by themselves or by some persons by them appointed, the value of said story and roof, or would appoint suitable persons as appraisers to appraise the same, or would order the defendants to choose an appraiser, who, with an appraiser to be chosen by the plaintiffs, should choose a third, the appraisal of which three or any two of them should be taken to be the true value of the same, or that the court would ascertain the value in any way which they should deem meet; and for a decree ordering the defendants, upon payment of the sum so appraised, to deliver said story and roof into the possession of the plaintiffs.

In *Gammon v. Bunnell*, 22 Utah 421, the complaint alleged in substance:

1. That Thomas Gammon died on the twenty-seventh day of July, 1897,

and that Elizabeth Gammon died on the twenty-third day of February, 1899.

2. That in consideration of the payment by plaintiff to Thomas Gammon and Elizabeth of one dollar, they made, executed and delivered in escrow, for the benefit of plaintiff, the written instrument set forth in the complaint, which said instrument was intended by all parties thereto to be a warranty deed fully sufficient to convey title to plaintiff of all the land described therein.

3. That the deed was duly acknowledged, but by inadvertence and mistake the officer before whom it was acknowledged neglected to attach his official seal and signature to the certificate of acknowledgment of said instrument.

4. That the further consideration for the said land was the payment by plaintiff to one Martha Ann Gammon Roberts, of Independence, Missouri, of the sum of three hundred dollars, gold coin, which should become payable after the death of the grantors, and that said payment should be evidenced by a receipt signed by the said Martha Ann Gammon Roberts, which receipt should entitle plaintiff to the said intended warranty deed aforesaid.

5. That while said deed was still in escrow, an offer, by letter, was made to pay said Martha Ann Gammon Roberts the said sum of three hundred dollars, and a refusal, by letter, either to accept or receipt for the same by her, or to accept less than seven acres of land covered by the deed. It was further alleged that while the petition for the appointment of an administratrix of the estate of the grantors was pending in the probate court plaintiff filed a petition in said court praying a specific performance of the contract, and that said court dismissed said petition, without prejudice, under the provision of sections 3935-6-7-8 Rev. Stat. Utah 1898.

6. It was further alleged that the plaintiff had deposited with the clerk of the district court, and placed in the hands of the court for the use of said Martha Ann Gammon Roberts, the sum of three hundred and one dollars U. S. gold coin as a tender for the balance of the purchase money of said land.

7. A full and complete compliance by the plaintiff of all of the conditions on his part to be performed to fulfil the

terms of said contract of purchase was alleged.

8. It was alleged that at the date of making said purchase, to wit, April 22d, 1894, and by virtue of said contract of purchase, the plaintiff went into possession of all of said land, and had ever since exclusively possessed the same, and had paid all of the taxes thereon ever since.

9. It was further alleged that the defendants claimed to own some interest in and to the premises adversely to plaintiff, and that they would, unless restrained, put a cloud upon plaintiff's title.

10. The complaint further alleged jurisdiction, and prayed for specific and general relief, and also alleged that said deed was placed in an envelope and delivered to one Joe E. Daniels in escrow, and on the outside of said envelope was written and signed by said parties the following contract:

"Whereas the undersigned, *Thomas Gammon*, is desirous of providing out of his estate, which consists of the lands described in the within deed, the payment of \$300 United States gold coin, to one *Martha Ann Gammon Roberts*, now of the state of *Missouri (Independence)*;

Now, therefore, the within warranty deed is placed in escrow with *Joe E. Daniels*, to be by him held till the grantee, *William Gammon*, shall exhibit and deliver to him a receipt, payable, signed and witnessed by the said *Martha Ann Gammon Roberts*, acknowledging receipt in full of said \$300, and upon receipt of such proof of such payment of said sum of money, the within deed shall be delivered without further question to said *William Gammon*.

(Signed) *Thomas Gammon.*
William Gammon."

It was held that this complaint stated a cause of action.

In *Abbott v. L'Hommedieu*, 10 W. Va. 677, the bill, upon which a decree was rendered for the plaintiff, was as follows:

"Humbly complaining, your orator, *L. L. Abbott*, respectfully shows unto your honor, that on the 11th day of *December*, 1858, your orator's father, *Isaac H. Abbott*, entered into an agreement, in writing, with the above named defendant, *Charles L'Hommedieu*, which agreement is signed by the said defendant, by which the said defend-

ant covenanted and agreed, upon payment to him of the sum of \$464.00, with legal interest thereon from September 5, 1853, to convey to the said Isaac H. Abbott a tract of land containing 509 acres, on Laurel creek, in Fayette county, West Virginia; that under the said agreement there has been paid to the said defendant, two sums of money on account of the said sum of \$464.00, aforesaid, viz: \$200.00 on July 1, 1859, and \$72.83 on November 1, 1860; that subsequent to the agreement aforesaid, the said Isaac H. Abbott, for a valuable consideration, assigned, transferred and conveyed his interest in the aforesaid agreement to your orator, which assignment is in writing, and together with the first agreement hereinbefore described, is recorded in the office of the clerk of the county court of Fayette county, West Virginia; that this complainant, by virtue of the aforesaid agreement and assignment, is in possession of the said tract of 509 acres; that he is entitled to a deed therefor; that he has been ready and has offered to pay to the said defendant the balance due him, according to the tenor and effect of the said original agreement; that he has paid the taxes on the whole tract for many years, and for the defendant's proportion thereof he is entitled to a credit — (he files an account of the taxes as a part of this bill, marked taxes); that he has made a legal tender of the actual amount due thereon to the said defendant, but the said defendant has hitherto, and still continues to refuse to receive and accept the same, and to convey to your orator the same tract of land. Inasmuch as your orator is remediless except in a court of equity, he prays for a specific performance of the said agreement; that a decree be made by your honor requiring the defendant to convey to your orator the tract of land in said agreement specified; which agreement, and the assignment aforesaid, are herewith filed, marked A and B, and prayed to be read as part hereof; and that such other orders and decrees be entered as your orator's cause may require. And as in duty, etc."

In *Jones v. Pease*, 21 Wis. 644, the complaint averred, in substance, that on the twenty-first day of March, 1866, defendant was owner in fee and in possession of a certain grist-mill and water-power, in the village of Lowell, in said

county, and also of a certain other lot in said village described as lot 15, block D, etc., and also owned a team of horses, a double wagon, sleigh and harness; that on that day plaintiff and defendant entered into a mutual agreement, by which defendant was to convey and transfer to plaintiff said lot 15, and the undivided half of all the rest of said property, and give him immediate possession thereof (in common with defendant, except as to lot 15), for eight thousand dollars, payable as follows: upon the defendant's executing the deed and giving possession of the property, five hundred dollars in money, and one thousand dollars in land belonging to plaintiff; November 1, 1866, five hundred dollars; March 21, 1867, one thousand five hundred dollars; and there being a mortgage upon said mill property, on which four thousand two hundred dollars was then due, plaintiff was to assume one half thereof, as a part of said eight thousand dollars; and the balance thereof, after deducting the amounts above stated, was to be paid in two equal installments, on the twenty-first day of March, 1869, and 1870, with interest, to be secured by plaintiff's notes and a mortgage on his undivided half of said mill property. On receipt by defendant of the deed for the land to be conveyed to him by plaintiff in payment of one thousand dollars, defendant was to execute a bond to reconvey it upon payment of one thousand dollars in money, with interest. For the purpose of carrying into effect this agreement, the parties met on the same day at Lowell, and entered upon the business of drawing the necessary papers, etc.; and plaintiff and wife then executed to defendant a deed of said land reckoned at one thousand dollars, which deed defendant still has; and defendant and wife executed to plaintiff a deed of said lot 15. The notes and mortgage, and the deed for the undivided half of said mill property, had been prepared and were present, but for want of time and revenue stamps the further consummation of the contract was postponed until March 26, 1866. On the twenty-second day of that month, plaintiff with his family moved into the house on said lot 15, giving up possession of the premises previously occupied by them, and they have ever since been in possession and occupancy of said lot 15. At defendant's request, the completion of the

contract was further postponed until March 31, 1866, but about the twenty-eighth day of that month, plaintiff, at defendant's request, paid him four hundred dollars in money as part of the five hundred dollars to be paid down as aforesaid. On the 31st, the parties again met, all the necessary papers for the completion of the contract being present; and defendant signed and sealed the deed of the undivided half of the mill property; and plaintiff had duly executed the required notes and the mortgage on his half of said mill property, as security for the sums agreed to be so secured, and was then ready to complete the contract on his part; but defendant, after signing his deed, retained it, saying that his wife did not want to sign it that day, but would do so in a day or two; and at the same time he handed to one Lowth, a notary public who was present, plaintiff's mortgage and notes which were lying on the table in front of the parties. Supposing defendant's statement to be made in good faith, plaintiff did not insist upon the completion of the contract at that time, and the parties separated with the understanding on plaintiff's part that defendant's wife would execute said deed within a day or two; but since that time defendant has utterly refused to complete said contract or deliver said deed. On the fourteenth day of April following, plaintiff tendered defendant one hundred dollars and said mortgage and notes, and demanded of him a conveyance of the half of the mill property pursuant to the agreement, and tendered him the bond to be executed by him for the reconveyance of the land conveyed to him by plaintiff as above stated; but defendant refused to execute said conveyance or said bond. On and since the twenty-first day of March plaintiff has repeatedly had the keys of said mill in his possession, doing business therein, has paid a part of the insurance on the mill at defendant's request, and, supposing himself to be in possession of said property in common with defendant under said contract, has labored himself and has hired help to labor with defendant and his workman on repairing the dam. At the time a part of the papers were executed on the twenty-first day of March, it was not possible to procure revenue stamps, and it was agreed that stamps should be procured and

placed on the several instruments necessary to be used, when the business should be finally consummated, defendant authorizing plaintiff to place the necessary stamps on the deed of lot 15, and to cancel them; which plaintiff accordingly did. The mortgage from plaintiff was duly stamped when produced at the meeting of the parties on the thirty-first of March, and stamps were procured and ready at that time to stamp the other instruments that were to be executed. Plaintiff has always been ready and willing to fulfil the agreement on his part. Prayer, that on payment of the residue of said five hundred dollars of the purchase money first to be paid, and the execution and delivery of said notes and mortgage for the balance (after deducting one-half the rental value of said mill property since March 31, 1866, and also the value of the outstanding dower right of defendant's wife in said property, if she refuse to join in the conveyance), defendant be adjudged to perform said agreement, except as to the release of the right of dower; and for general relief.

Judgment for plaintiff was affirmed. It was held that there was sufficient part performance to take the oral contract out of the statute of frauds.

In *Morrow v. Lawrence University*, 7 Wis. 574, the complaint, after alleging the legal corporate existence of Lawrence University, alleged in substance that the defendant Amos A. Lawrence, who resides in the city of Boston, in the State of Massachusetts, is seised in fee simple, but in trust for the said Lawrence University of Wisconsin, of the said premises hereinafter described. And the plaintiff further shows that, by the act of incorporation and the act amendatory thereto, hereinbefore referred to, all the business of said corporation, which they might lawfully transact by virtue of such incorporation, was intrusted to the Board of Trustees, and to an executive committee of such Board; and that said corporation was empowered, in such acts, to acquire, hold and convey property, real and personal. And the plaintiff further shows, that he is informed and believes, that in the month of January, A. D. 1853, the Board of Trustees of said University, by a resolution thereof, duly passed and recorded, made, constituted, and appointed, one Henry L. Blood, the

agent of the University, for that purpose, and authorized him to bargain and sell the premises hereinafter described, among others, to such persons and for such price, as to him should seem meet. And the plaintiff further shows that thereafter, to wit, on the 4th day of July, A. D. 1853, the said Blood, by virtue and in pursuance of the authority so in him vested, sold the said premises to one Robert Morrow, in consideration of the sum of one hundred dollars to him then paid to said Morrow; and did, on that day, execute and deliver to said Morrow, an instrument in writing of the tenor and effect following, that is to say:

"This memorandum of agreement, entered into this tenth day of July, A. D. 1853, between *Henry L. Blood*, for and in behalf of the *Lawrence University*, as a party of the first part, and *Robert Morrow*, party of the second part, both of *Appleton, Outagamie county, Wisconsin*: witnesseth, that for and in consideration of the sum of one hundred dollars, paid by the said party of the second part to the said party of the first part, the receipt of which is hereby acknowledged, the said party of the first part, for and in behalf of the said *Lawrence University*, is hereby bound and obligated to execute, or to have executed, as soon as the same can be conveniently done, a good and sufficient deed of conveyance, in fee simple, to the said party of the second part, or his assigns, for a certain lot lying on *College Avenue* (north side), adjoining on the west a certain other lot sold to *John Stephens*, and being the third lot from the *Edgar-ton House* in the town of *Appleton*; said lot of land being about 74 or 75 feet front on said *College Avenue*. In witness whereof, I have hereunto set my hand and seal the day and year above written.

(Signed) *Henry L. Blood* (SEAL)
Robert Morrow."

And the plaintiff further shows that, on the 22d day of June, A. D. 1854, the said Robert Morrow, for and in consideration of the sum of five hundred dollars to him in hand paid, did assign, transfer, and set over to *Elisha Morrow*, or his assigns, the said contract with all its rights and privileges, authorizing said *Elisha*, the plaintiff, or his assigns, to demand and receive thereon a deed of conveyance for the said lot, in all respects as

fully as the said Robert might or could do.

And the plaintiff further avers, that he has since been, and is now, the owner of said contract; that he has repeatedly demanded of said defendant, the *Lawrence University*, a deed of conveyance of said premises to him, said plaintiff, which they have hitherto and still do neglect and refuse to give. Wherefore the said plaintiff prays that the said defendant, *Amos A. Lawrence*, be adjudged and directed, by the judgment of this court, to execute and deliver to said plaintiff, a good and sufficient deed of conveyance of the premises above described, discharged from all trusts or claims of the said *Lawrence University* of *Wisconsin* therein, with the costs of this action, and for such other or further relief as shall seem just.

A demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action, and for defect to parties defendant, was overruled and the complaint was held good in substance.

In *Wilson v. McLaughlin*, 11 Colo. 465, the cross-complaint of defendants was as follows:

"And the defendants, by way of cross-complaint against the said plaintiffs, do allege: First. That on, to wit, the 15th day of October, 1883, the said plaintiffs, being the owners of an undivided three-fourths interest in and to the *Aspen Mammoth* lode mining claim, and the undivided three-eighths interest in and to the *Vallejo* lode mining claim, described in the said complaint, did make and enter into a certain agreement in writing with the defendants, *Wilson* and *McMurchey*, which said agreement in writing was in the words and figures following, that is to say:

"This agreement made and entered into this 15th day of October, 1883, between *James McLaughlin*, *Sue McLaughlin* and *Charles A. Marshall*, parties of the first part, and *R. C. Wilson* and *Wm. McMurchey*, party of the second part, of the county of *Pitkin* and state of *Colorado*, witnesseth, that whereas, the parties of the first part are the owners of the undivided three-eighths interest in and to the *Vallejo* lode, and of an undivided three-fourths interest in and to the *Aspen Mammoth* lode, situated in *Aspen* mountain, in the *Roaring Fork* mining district, in the

county and state aforesaid, and the parties of the second part are desirous of leasing said mining property, with the privilege of buying the same, for time and at the price herein-after stated; now, therefore, this indenture witnesseth, that *James McLaughlin, Sue McLaughlin and Charles A. Marshall*, of the county of *Pitkin*, in the state aforesaid, parties of the first part, are held and firmly bound unto *R. C. Wilson and Wm. McMurchey*, parties of the second part, in the penal sum of \$20,000, lawful money of the United States, for the payment of which, well and truly to be made, we hereby bind ourselves, our heirs, executors, administrators and assigns, firmly by these presents. Sealed with our seals, and dated this 15th day of *October*, A. D. 1883. But the conditions of the above obligation are such that the above-bounden parties, *James McLaughlin, Sue McLaughlin and Charles A. Marshall*, in consideration of \$1 to them in hand paid by the parties of the second part, the receipt of which is hereby acknowledged and confessed, have agreed to sell to the said *Wilson and McMurchey* the above described premises, to wit, an undivided three-eighths interest in and to the *Vallejo* lode, and an undivided three-fourths interest in and to the *Aspen Mammoth* lode, for the sum of five thousand (\$5,000) dollars lawful money, which sum of money is to be paid to the said *Marshall, James and Sue McLaughlin*, or deposited to the credit of the last named parties in a banking-house in the city of *Leadville*, or in the town of *Aspen*, on or before the 15th day of *October*, A. D. 1884; and the said *Charles A. Marshall, James and Sue McLaughlin* shall, on the 15th day of *October*, 1884, or at any time before, on the payment of the said sum of five thousand (\$5,000) dollars, so to be paid as hereinbefore mentioned, make, execute, acknowledge and deliver to the said *Wilson and McMurchey*, or to such person or persons as they shall designate, a good and sufficient deed or deeds of conveyance of all the above-described property, showing a clear and perfect title, free from all liens and incumbrances whatsoever (except as against the government of the United States). Now, if the said *R. C. Wilson and Wm. McMurchey* shall fail to pay the said sum of money at the time aforesaid, and if the said *Charles A. Marshall, James McLaughlin*

and *Sue McLaughlin* shall well and faithfully perform the covenants and agreements herein contained or to be kept and performed by the parties hereto, then this obligation to be null and void and of no effect whatever, otherwise to be and remain in full force and effect. Now, therefore, it is especially agreed and understood by the parties hereto, that the said *R. C. Wilson and Wm. McMurchey*, parties of the first part, shall enter into the said premises, and shall have full and entire possession and control of the said premises, as of their own property, and shall perform work and make improvements on said property, from time to time, as they may deem best, to the amount of seven hundred and fifty (\$750) dollars; provided, however, that the said work shall be done and completed, and improvements made, on or before *May 15, 1884*, and they shall, after *May 15, 1884*, perform work or labor, or make improvements, on said claim to the value of one hundred and fifty (\$150) dollars on each and every month during the life of this contract. And it is further agreed, by and between the parties hereto, that out of all ore taken from either of said mines or lodes the parties of the first part shall receive fifteen per cent. of the amount so taken, after first deducting the cost of transportation and treatment; that is to say, they shall receive for their share at the rate of fifteen per cent. of the whole, as their interest in said property may appear, after deductions are made as hereinbefore provided. And it is further agreed that the parties of the second part shall dispose of all ore taken from said mines to such person or persons as they may deem best, and, after deducting the cost of transportation, milling or smelting, pay, or cause to be paid, the royalty as herein provided, at the rate of fifteen per cent. on the whole. And it is further agreed that this contract shall be binding and apply to any purchaser or purchasers, heirs or assigns, of any or all of the interests of the parties of the first part in and to the premises herein described. And it is further agreed that, in case the parties of the second part shall fail to perform the work on said lodes to the amount of seven hundred and fifty (\$750) dollars, as hereinbefore mentioned, then it shall be at the option of the parties of the first part to declare this contract at an end, and re-enter

and take possession of said lodes; and it is also agreed that the parties of the first part shall enter into and take possession of said lodes should the parties of the second part fail to perform the work, or to keep the agreements and covenants after May 15, 1884, as hereinbefore provided.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

James McLaughlin. (SEAL)

Sue McLaughlin. (SEAL)

C. A. Marshall. (SEAL)

R. C. Wilson. (SEAL)

Wm. McMurchee. (SEAL)

That, in pursuance and under and by virtue of the terms and conditions of said instrument of writing, the said *Wilson* and *McMurchee* — the said *Wilson* then being co-tenant with the said plaintiffs in and to the said mining claims — entered into possession of each and every part and portion thereof, and did begin the work of development thereon, as in and by said agreement in writing it was required. That one of the essential and paramount considerations of the said agreement was the right given therein to the said defendants *Wilson* and *McMurchee* to purchase the said interests of the plaintiffs in and to said properties, for the sum of \$5,000 within the time aforesaid; and that without such consideration as a part and parcel of the said agreement, they, the said two last named defendants, would not have entered into the terms and conditions thereof. That, as required by the said agreement, they did, before the 17th day of May, 1884, expend upon the said premises the sum of more than \$750, and since that time they have expended the sum of more than \$150 per month thereon, as required in and by the terms of the said contract of purchase. That during the time which elapsed between the said 15th day of October, 1883, and the 14th day of June, 1884, they did take and extract from the said mines about three hundred and seventy-nine tons of metalliferous-bearing ore, of which, during said time, they transported and sold about one hundred and thirty-four tons, receiving therefor, less the cost of transportation and treatment, the sum of about \$11,209.79. That, with the returns and receipts from the smelters for each and every lot of ore so shipped as aforesaid, the said defendants did cause to be tendered to the plaintiffs, and each of

them, their proportion of the royalties received from sales of said ores, as provided in said contract, which said tender was declined. That on, to wit, about the 22d day of March, 1884, the defendant *McMurchee* did sell, assign and transfer and convey, for a valuable consideration, an undivided half of his interest in and to the said contract and agreement with plaintiffs to the defendant *Vandegriff*, who thereupon entered into possession of said premises with the said *Wilson* and *McMurchee*. That afterwards, and on, to wit, about the 11th day of May, 1884, said defendants *McMurchee* and *Vandegriff*, the said contract then and thereon, to wit, the day and year last aforesaid, did make payment of the first instalment of money, as in and by the said contract of sale he was required to do. That on, to wit, the 11th day of June, 1884, said defendant *R. C. Wilson*, said contract then and there being in full force and effect between the parties thereto, did make and enter into a certain contract of sale of all his interest in the said *Aspen Mammoth* and *Vallejo* claims to the defendant *Gillaspie*, in pursuance whereof the said *Wilson* did make and execute to the said *Gillaspie* a deed of conveyance of the said premises, which was deposited in escrow according to the terms and conditions of the said contract of sale. That the said *Gillaspie* did then and there pay to said *Wilson* the moneys required by the terms of said escrow to be paid at that time, and that the said defendants *Hewitt* and *Gillaspie*, under and by virtue of the said contract of sale made with the defendants *McMurchee*, *Wilson* and *Vandegriff*, as aforesaid, did, on or about the date last mentioned, enter upon and into the possession of all the interests of the said defendants last above named in and to the said mining premises. That the said defendants *Wilson*, *McMurchee* and *Vandegriff*, on, to wit, the 14th day of June, 1884, did tender and offer to the said plaintiffs, in lawful currency of the United States, the just and full sum of \$5,000, together with the said deed of conveyance, and did then and there also tender, in such lawful currency of the United States, to the said plaintiffs, in full, the amount of royalty to which they were entitled under and by virtue of the terms of the said agreement, to wit, the said sums of money in gross

Form No. 18767.¹

John Doe }
 against } In Chancery,
 Richard Roe. } Kent County, ss.

To the Chancellor of the State of *Delaware*:

Humbly complaining sheweth unto your honor *John Doe*, of *Kent* county and state of *Delaware*, as follows:

I. That your orator is now and was on and previous to the *first* day of *April*, A. D. 1899, seised in fee simple of a certain message or dwelling-house situated in the city of *Dover*, in the county of *Kent* and state of *Delaware*, which message or dwelling-house is more particularly described as follows, viz: (*Here describe the premises*).

II. That your orator being desirous of selling the said premises, and *Richard Roe*, the defendant, of *Kent* county and state of *Delaware*, being minded to purchase the same from your orator, your orator and the said *Richard Roe*, on or about the *first* day of *April*, 1899, entered into and signed a memorandum of agreement in writing respecting the said sale and purchase in the words and figures and to the purport and effect as follows, that is to say: (*Here set forth the agreement verbatim*). And your orator prays leave to exhibit

which had accrued, and which had been previously offered, as hereinbefore stated, together with a just and full statement of the amount of ore taken, the amount of ore sold, the amount of ore on hand, the receipts for ore sold, and the cost of transportation and treatment, for their examination; whereupon plaintiffs, and each of them, did decline to take said statement, or to examine the same, and did wholly decline and refuse to receive the said sum of money so tendered as royalty, and as a consideration for the said deed of conveyance, and did also wholly refuse to sign the said deed prepared and tendered by the said defendants as aforesaid, or to execute, acknowledge or deliver the same, or any other deed of conveyance, either to the said *Hewitt* or any other person or persons whomsoever. That the said *Hewitt* and *Gillaspie*, the defendants aforesaid, being purchasers under said contract of sale, and as of right they should do, did enter into and upon the said premises, and take possession thereof, and ever since have been in the possession thereof as the purchasers of the said premises; and they are now ready and willing, and are at all times ready and willing, to perform the said contract of sale and agreement with said plaintiffs of all and singular the terms and conditions thereof. And the defendants, further complaining, allege that, after the ten-

der of said several sums of money, they did cause the same to be deposited in the banking-house of *J. B. Wheeler & Company*, at, as, and for the use and benefit of the said plaintiffs, and each of them, to be by the said banking-house paid over to them upon the performance by them of the terms and conditions of their said agreement, and upon the delivery to said bank, or to any other person or persons, for these defendants, of said deed of conveyance, as therein required; and they hereby offer to pay the same, and each and every part thereof, or to deposit the same with this honorable court, for the purposes aforesaid, as this honorable court shall direct. And the defendants, further complaining, allege that they did also, on the day last aforesaid, deposit, in the said banking-house, for the use and benefit of the said plaintiffs, and each of them, the said sum of money then and there tendered by them to the plaintiffs as royalty, pursuant to the terms and conditions of the said contract, as herein required to be by the said bank delivered to the said plaintiffs upon the performance by them of the terms and conditions of the said agreement."

Some further allegations were made and specific performance prayed. A decree dismissing this cross-complaint was reversed.

1. See, generally, *supra*, note 1, p. 316.

and prove the said paper at the hearing of this cause, and he prays that the same may be taken and considered as part of this his bill of complaint.

III. That the said *Richard Roe* paid to your orator the sum of *five hundred* dollars, part of the said purchase money, at the time of signing said agreement.

IV. But afterwards, to wit, on the *first* day of *May*, A. D. 1899, the same being the time specified in said written agreement for the sale and purchase of the premises aforesaid, at which the said agreement was to be completed and ended by and between your orator and the said *Richard Roe*, as by said written agreement will fully appear; your orator procured to be drawn by counsel a deed of bargain and sale in the usual and customary form conveying the premises hereinabove described in fee simple to the said *Richard Roe* and his heirs thereafter. And your orator prays leave here to exhibit said deed of bargain and sale and that the same may be taken as a part of this bill of complaint.

V. That your orator did then, on the *first* day of *May*, A. D. 1899, aforesaid, at *Dover*, in the county of *Kent* and state of *Delaware*, tender and make offer of said deed of bargain and sale to the said *Richard Roe*, and did then and there tender the deliverance of said deed of bargain and sale to him upon the said *Richard Roe* paying to your orator the sum of *three thousand* dollars, being a part of the purchase money set out in said written agreement of purchase and sale of the premises aforesaid, then remaining due and unpaid to your orator by the terms of said agreement.

VI. That the said *Richard Roe* did then and there wholly refuse to accept such tender of the deed of bargain and sale so made by your orator as aforesaid, and still refuses so to do.

VII. And your orator further sheweth unto your honor that the said *Richard Roe* did not pay and has not paid to your orator the sum of *three thousand* dollars, then remaining due and unpaid by the terms of said written agreement as aforesaid, but did wholly refuse and still refuses so to do, although your orator hath frequently requested him so to do.

The complainant prays as follows:

1. That the said *Richard Roe* may be decreed specifically to perform the said agreement entered into by him with your orator, your orator being ready and willing and hereby offers specifically to perform the said agreement on his part.

2. That your orator may have such other relief as the nature of the case may require.

3. That a subpoena may issue to the said *Richard Roe* as defendant in this cause.

Jeremiah Mason,
Solicitor and of Counsel for Complainant.

Form No. 18768.¹

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to this court:

1. See, generally, *supra*, note 1, p. 316.

1. That on and before the *first day of April, 1899*, plaintiff was and still is the owner in fee (*or otherwise, as the case may be*) and possessed of certain real property hereinafter described.

2. That the defendant being desirous to purchase the said property, entered into an agreement in writing with the plaintiff, dated on said *first day of April, 1899*, of which agreement the following is a copy: (*set out copy of the agreement, giving description of the property*).

3. That on the said *first day of April, 1899*, the defendant paid to the plaintiff *five hundred* dollars as a deposit and a part of the purchase money as in said agreement mentioned.

4. That the plaintiff has always been and still is ready and willing to perform the said agreement on his part, and, on being paid the remainder of said purchase money with interest, to convey (*stating offer according to the agreement*), and to let the defendant into possession of said premises and the rents and privileges thereof from the time in the said agreement specified.

5. That on the *first day of May, 1899*, at (*stating the place agreed upon in the contract*), and at the hour mentioned in the said contract, the plaintiff duly tendered to the defendant a deed to the premises pursuant to and in accordance with the terms of the said agreement, and then and there demanded of the defendant that he pay the balance of the purchase money and interest pursuant to said agreement, but the defendant then and ever since has refused to accept the said deed and to pay the balance of the purchase money with interest, according to the said agreement.

Wherefore plaintiff demands judgment that the defendant perform said agreement and pay to the plaintiff the sum of *twenty-five hundred* dollars, the remainder of the said purchase money, with interest thereon from the *first day of April, 1899*, the time when it ought to have been paid, and for such further and other judgment in the premises as may be proper, and for costs and expense of this action.

(*Signature, post-office address and verification as in Form No. 11457.*)

b. Where Agreement was Entered Into with Agent of Vendor.

Form No. 18769.¹

(2 Rev. Swift's Dig. 765.)

(*Commencement as in usual form.*)

The petition of *John Doe*, of (*stating place*), humbly sheweth that your petitioner now is, and for a long time before the *tenth day of June, 1899*, was, seised in fee of certain lands and tenements lying in (*stating place*), in the county of *Kent*, and your petitioner being so seised and desirous to make sale thereof did, some time before the *tenth day of June, 1899*, employ and empower *Richard Roe*, of (*stating place*), to be his agent to make an agreement with any person or persons for the sale thereof, at such price as he should think fit; and accordingly the said *Richard Roe* treated with *Samuel Short*, of (*stating place*), for the sale of such lands and tenements, and at length they came to an agreement for such purchase; and thereupon

1. See, generally, *supra*, note 1, p. 316.

articles of agreement in writing, bearing date the *tenth* day of *June*, 1899, and made between the said *Richard Roe*, in behalf of the petitioner of the one part, and the respondent, the said *Samuel Short*, of the other part, were duly executed by the said *Richard Roe*, and the respondent, whereby the said *Richard Roe*, in consideration of the sum of *one thousand* dollars, to be paid as therein and hereinafter mentioned, agreed that your petitioner or his heirs should, on or before the *tenth* day of *July* then *next*, to the satisfaction of the respondent or his heirs, and of his or their counsel, make a good and sufficient conveyance of the premises herein mentioned to the respondent, with reasonable covenants and assurances that the same were free from all incumbrances; and in consideration thereof the respondent did thereby covenant and agree with your petitioner that he would pay or cause to be paid to him, his heirs, executors or administrators, the said sum of *one thousand* dollars, immediately upon the execution of such conveyance as aforesaid, provided the purchase of the said premises should be completed on or before the *first* day of *July*, 1899, as by one part of said articles of agreement in custody of the petitioner ready to be produced, reference being thereto had, will more fully appear. And your petitioner further says that, in consequence of the said articles of agreement, and in performance thereof on his part, he has always been ready and willing to make and execute a proper conveyance of the premises on payment of the said sum of *one thousand* dollars, and on the *first* day of *July*, 1899, offered to deliver a deed of said premises to the respondent, on receiving said sum, and has often requested the respondent to pay the same to him; yet the defendant has wholly neglected and refused to do the same. And your petitioner says that he is without adequate remedy at law, and must forever lose his just claim, unless relieved by the interposition of your honor as a Court of Equity. Your petitioner therefore prays your honor to take his case into consideration, and inquire into the truth of the foregoing facts, and, on their being found to be true, to order and decree that the said articles of agreement, dated the *tenth* day of *June*, 1899, may be specifically performed and carried into execution by the respondent, your petitioner hereby offering to perform on his part, and that the respondent may pay to your petitioner the said sum of *one thousand* dollars, your petitioner offering thereon to convey to him said lands and tenements, or that your honor would grant such other relief as to your honor may seem just and proper, and your petitioner as in duty bound shall pray.

(Signature and verification as in Form No. 4277.)

Form No. 18770.¹

(Curt. Eq. Prec. 10.)

(Address as in usual form.)

Humbly complaining sheweth unto your honors your orator *John Doe*, of (*stating place*), Esq., That your orator now is, and for some time before the year 1900 was, seised or entitled in fee simple of or

1. See, generally, *supra*, note 1, p. 316.

to the freehold messuages or tenements with the lands and other appurtenances thereto belonging situate in (*stating place*), hereinafter described, and your orator being so seised or entitled and being desirous to sell the same, did some time before the *first day of April*, in the year 1900, employ and empower *Samuel Short*, of (*stating place*), *gentleman*, to agree on behalf of your orator with any person or persons at and for such price or prices as he should think fit, and accordingly the said *Samuel Short* treated with *Richard Roe*, of (*stating place*), in the said county of *Kent*, *gentleman* (the defendant hereinafter named), for the sale of such messuages, tenements and hereditaments unto him the said *Richard Roe*, and at length they came to an agreement for said purchase, and thereupon articles of agreement in writing bearing date the *tenth day of June*, 1900, and made between the said *Samuel Short*, on behalf of your orator, of the one part, and the said *Richard Roe* of the other part, were duly executed by the said *Samuel Short* and *Richard Roe*, whereby the said *Samuel Short*, in consideration of the sum of *one thousand* dollars, to be paid as therein and hereinafter mentioned, agreed that your orator or his heirs should or would on or before the *first day of July* then *next*, to the satisfaction of the said *Richard Roe* or of his heirs, and of his or their counsel, make out a good title to the premises hereinafter mentioned, and by good and sufficient conveyances, surrenders and assurances in the law, with reasonable covenants, such as the counsel of the said *Richard Roe* should advise, convey and assure, or cause to be conveyed and assured, unto the said *Richard Roe* and his heirs, as he or they should appoint, free from all incumbrances, (except *stating exceptions, if any*), and particularly a good estate of inheritance of, in and to all that messuage, (*describing the premises*), and in consideration thereof the said *Richard Roe* did thereby covenant and agree with the said *Samuel Short* that he, the said *Richard Roe*, would pay or cause to be paid to your orator, his heirs, executors or administrators, the said sum of *one thousand* dollars, immediately upon the executing such conveyance as aforesaid; and it was thereby mutually agreed that your orator or his heirs should be at the expense of making a good title to the said premises, and that the said *Richard Roe* should be at the expense of the conveyances and assurances to be made thereof to him as aforesaid, and that the said *Richard Roe* should have the rents and profits of the said premises from the said *first day of July*, 1900, provided the purchase of the said premises should be completed on or before that day, but not otherwise. As in and by the said articles of agreement, to which your orator craves leave to refer, when produced, reference being thereto had, will more fully appear. And your orator further sheweth unto your honors, that in consequence of the said articles of agreement, and in order to the performance thereof on the part of your orator, who hath been ever since willing to perform the same, an abstract of the title to the said estate was on your orator's behalf shortly after the date of the said articles of agreement sent unto the attorney concerned for the said *Richard Roe*, for his perusal, together with all and most of the deeds mentioned in such abstract, for the inspection of such attorney or of the counsel of the said *Richard Roe*,

and several objections having been from time to time made to your orator's title to the said estate by the counsel or conveyancer before whom such abstract was laid, by or on behalf of the said *Richard Roe*, all of such objections were long since answered or cleared up to the satisfaction of such counsel or conveyancer, who long since, by writing under his hand or otherwise, approved of your said orator's title to the said messuages and premises, wherefore the said *Richard Roe* ought long since to have paid to your orator the sum of *one thousand* dollars on having a proper conveyance of said messuages and premises according to the said articles of agreement and upon having possession of the said messuages and premises delivered unto him. And your orator hath, at several times since your orator's title to the said messuages and premises was so approved, in and by letters and by your orator's agent in a friendly manner, applied unto the said *Richard Roe*, and informed him of your orator's readiness to make and execute a proper conveyance of the said messuages and premises on payment of the said sum of *one thousand* dollars, and therefore requested the said *Richard Roe* to pay unto your orator the said sum of *one thousand* dollars, and your orator well hoped that such his request would have been complied with.

But now so it is, may it please your honors, that the said *Richard Roe*, combining and confederating with divers persons at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, absolutely refuses to comply with such request. And the said *Richard Roe* sometimes pretends that he did not execute any such or the like articles of agreement as aforesaid, or that your orator cannot make out a good title to the messuages or tenements, lands and hereditaments, or not to all the parts thereof, or that your orator hath not made out such title to the satisfaction of him or his counsel or conveyancer. Whereas your orator charges the contrary of all such pretenses to be true, but nevertheless under such and the like pretenses as aforesaid, or some other equally unjust, the said *Richard Roe* refuses to perform the said articles of agreement on his part. All which actings, doings and pretenses of the said defendant (or defendants) are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the Common Law, and can only have relief in a Court of Equity where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said *Richard Roe*, and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged (or to all and singular the premises or to all and singular the charges and matters aforesaid), as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated (or as fully in every respect as if the same were here again repeated and they thereunto

particularly interrogated): and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or *according to the best of their respective knowledge, information and belief*); and more especially, that they may answer and set forth whether (*Here follow the interrogatories to be answered by the defendant*). And that the said articles of agreement dated the *tenth* day of *June*, 1900, may be specifically performed and carried into execution by the said *Richard Roe*, your orator hereby offering to perform the same on his part, and that the said *Richard Roe* may pay unto your orator the said sum of *one thousand* dollars, your orator offering thereon to convey the said messuages, tenements, lands and hereditaments unto the said *Richard Roe*. And that your orator may have such further or other relief in the premises as to your honors shall seem just and proper. May it please your honors to grant unto your orator the most gracious writ of subpoena of the state of (*naming state, or of the United States of America*), to be directed to the said *Richard Roe* and the rest of the confederates when discovered, thereby commanding them, and every of them, at a certain day and under a certain pain therein to be specified (*or therein to be inserted*) personally to be and appear before your honors in this Honorable Court and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors shall seem meet (*or shall seem agreeable to equity and good conscience*), and your orator shall ever pray.

(*Signature and verification as in Form No. 4277.*)

c. Where Title Only to Estate is in Dispute.

Form No. 18771.¹

(Curt. Eq. Prec. 9.)

(*Address as in usual form.*)

Humbly complaining sheweth unto your honors your orator, *John Doe*, of (*stating place*), Esq., That your orator being seised or well entitled in fee simple of or to a certain message or dwelling-house with the appurtenances situate at (*stating place*), and hereinafter described, and being desirous of selling such premises, and *Richard Roe*, of (*stating place*), being minded to purchase the same, your orator and the said *Richard Roe*, on or about the *fifth* day of *April*, 1900, entered into and signed a memorandum or agreement respecting the said sale and purchase in the words following, that is to say: (*stating the agreement verbatim*). As by the said memorandum of agreement, to which your orator craves leave to refer, when produced, will appear. And your orator further sheweth that the said *Richard Roe* paid to your orator the sum of *one thousand five hundred* dollars, part of the said purchase money, at the time of signing the said agreement, and your orator delivered an abstract of his title to the said premises to the said *Richard Roe*; and your orator hath always been ready and willing to perform his part of the said agree-

1. See, generally, *supra*, note 1, p. 316.

ment, and, being paid the remainder of his said purchase money with interest, to convey the said message to the use of the said *Richard Roe* and his heirs, and to let him into possession and receipt of the rents and profits thereof from the time in the said agreement in that behalf mentioned; and your orator hoped that the said *Richard Roe* would have performed the said agreement on his part as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said *Richard Roe* alleges that he is and always hath been ready and willing to perform the said agreement on his part in case your orator could have made or can make him a good and marketable title to the said message and premises. But that your orator is not able to make a good title thereto; whereas your orator charges that he can make a good title to the said message and premises. To the end, therefore, that the said *Richard Roe* may upon his oath true answer make to the matters aforesaid, and more particularly that he may answer and set forth in manner aforesaid, whether, (*interrogating to the stating and charging parts*).

And that the said *Richard Roe* may be compelled by the decree of this honorable court specifically to perform the said agreement with your orator, and to pay to your orator the remainder of the said purchase money with interest for the same from the time the said purchase money ought to have been paid, your orator being willing and hereby offering specifically to perform the said agreement on his part, and, on being paid the said remaining purchase money and interest, to execute a proper conveyance of the said message and premises to the said *Richard Roe* and to let him into possession of the rents and profits thereof from the said *fifth day of April, 1900*. And that your orator may have such further or other relief in the premises as to your honors shall seem meet and this case may require. May it please (*concluding as in Form No. 4277*).

2. By Vendee.

a. In General.

Form No. 18772.¹

(Conn. Prac. Act, p. 165, No. 293.)

(*Commencement as in Form No. 5912.*)

1. On *July 1st, 1878*, the plaintiff and defendant executed a certain agreement, upon the considerations appearing therein; of which Exhibit *A*, hereto annexed, is a copy.

2. On said day the defendant owned in fee the lands described in said agreement.

3. On *August 15th, 1878*, the plaintiff tendered \$10,000 to the defendant, and demanded a conveyance of said lands.

4. The defendant has never executed such conveyance, and is in possession of said lands.

5. The plaintiff is still ready and willing to pay him said sum.

1. See, generally, *supra*, note 1, p. 316.

The plaintiff claims:

1. A decree for a conveyance, or that the title be otherwise vested in him.

2. \$1,000 damages.

(Concluding as in Form No. 5912.)

b. And for Discovery.

Form No. 18773.¹

(2 Rev. Swift's Dig. 764.)

(Address as in usual form.)

The petition of *John Doe*, of (*stating place*), humbly sheweth that, on the *tenth* day of *June*, 1899, *Richard Roe*, of (*stating place*), was the lawful owner in fee of a certain tract of land or farm lying in (*stating place*), containing about *one hundred* acres, and described as follows: (*describing land*); that on the *tenth* day of *June*, aforesaid, your petitioner made an agreement in writing for the purchase of said farm, at the price of *three thousand* dollars, and the respondent then agreed with your petitioner, that if the petitioner, within *one* week from said *tenth* day of *June*, should pay to the respondent *one thousand* dollars in money, and execute and deliver to him his promissory note for the sum of *two thousand* dollars, payable in *one* year with interest, he, the respondent, would then execute and deliver to the petitioner a good authentic deed of said farm, with the usual covenants, as by said written agreement ready in court to be produced appears. And your petitioner says that he did, on the *seventeenth* day of *June*, 1899, and within *one* week after the execution of said agreement, offer and tender to the respondent the sum of *one thousand* dollars, and his promissory note for the sum of *two thousand* dollars, payable in *one* year, in fulfilment of said written agreement; but the respondent then refused to receive or accept the same, or to execute and deliver to him a deed of said farm of land, in conformity to the agreement aforesaid; and though your petitioner has always been ready and willing to perform his part of said agreement, yet the respondent has always neglected to do the same. And your petitioner says that he is without any adequate remedy at law, and must forever lose his just claim, unless relieved by the interposition of your honor as a Court of Equity. Your petitioner therefore prays your honor to take his case into your consideration, and inquire into the truth of the facts aforesaid, and that the respondent may make a full and direct answer on oath to all the matters hereinbefore stated and charged; and more especially that he may answer and set forth whether he did not make the above recited agreement, and whether your petitioner did not offer and tender to him said sum of *one thousand* dollars and said promissory note for said sum of *two thousand* dollars, as before stated; and that, on finding the facts aforesaid to be true, your honor would order and decree that, on your petitioner's paying him said sum of *one thousand* dollars, and delivering to him said promissory note of *two thousand* dollars,

1. See, generally, *supra*, note 1, p. 316.

he, the respondent, should specifically perform said contract, and should make, execute and deliver to your petitioner a good authentic deed of conveyance, with the usual covenants of seisin and warranty, and duly acknowledged; or that your honor would in some other manner grant relief, as shall be deemed just and reasonable, and your petitioner as in duty bound shall pray.

(Signature and verification as in Form No. 4277.)

c. Charging that the Purchase Money has Remained Unproductive in the Plaintiff's Hands, the Estate had been Previously Put Up to Sale by Public Auction and Bought In and the Description in the Agreement Referred to the Particulars of Sale.

Form No. 18774.¹

(Curt. Eq. Prec. 12.)

(Address as in usual form.)

Humbly complaining showeth unto your honors your orator *John Doe*, of (*stating place*), Esq. That *Richard Roe*, of (*stating place*), Esq., being or pretending to be seised and possessed of or otherwise well entitled unto a certain parcel of land and the appurtenances thereunto adjoining or belonging, situate at (*stating place*), as herein-after mentioned, and the inheritance in fee simple thereof, did on or about the *tenth* day of *June*, 1899, cause all the said premises to be put up to sale by public auction by *Samuel Short*, auctioneer, at (*stating place*), in *three* lots pursuant to printed particulars and conditions of sale previously advertised and published. And your orator further showeth that the said premises were bought in by said *Richard Roe*, at the time of the said sale, and that in or about the month of *April* then *next* ensuing your orator entered into a treaty with the said *Richard Roe* for the absolute purchase of the same estate and premises, together with the timber and other trees, fixtures, and other effects in and about the same, discharged from all incumbrances, at or for the price or sum of *two thousand nine hundred* dollars. And your orator further showeth unto your honors that the said *Richard Roe* agreed to accept the said sum of *two thousand nine hundred* dollars as the consideration for the said estate and premises, and thereupon an agreement in writing was entered into and signed by your orator and the said *Richard Roe* respecting such sale and purchase, in the words and figures or to the purport and effect following, that is to say: (*stating the agreement verbatim*), as by the said agreement, to which your orator craves leave to refer, when the same shall be produced, will appear. And your orator further showeth, that previously to the signing of the said agreement your orator paid unto the said *Richard Roe* the sum of *five hundred* dollars, as a deposit and in part of his said purchase money or sum of *two thousand nine hundred* dollars; and the said *Richard Roe* hath since delivered up possession of the said purchased premises to your orator. And your orator further showeth unto your honors, that he hath always been ready and willing to perform his part of the said agreement, and, on having a good and marketable title

1. See, generally, *supra*, note 1, p. 316.

shown to the said estate and premises and a conveyance of the fee simple thereof, discharged of all incumbrances, made to him, to pay the residue of the said purchase money or sum of *two thousand nine hundred* dollars to the said *Richard Roe*. And your orator hoped that the said *Richard Roe* would have specifically performed his part of said agreement as in justice and equity he ought. But now so it is, may it please your honors, that the said *Richard Roe*, combining and confederating with divers persons (*or, if there are several defendants, thus: "combining and confederating with Francis Fern and William West, and with divers other persons," or "the said Richard Roe, Francis Fern and William West, combining and confederating together and with divers persons"*) at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, refuses to perform his part of the said agreement, and to color such refusal he gives out and pretends that he is unable to make out a good and marketable title to the said estate and premises, and that he is willing to cancel the said contract or agreement and to repay the said deposit or sum of *five hundred* dollars to your orator. Whereas your orator charges that the said *Richard Roe* is able to make out a good and marketable title to the said estate and premises if he thinks proper so to do, but that the said *Richard Roe* refuses and declines to make out a good and marketable title to the said estate and premises, notwithstanding your orator hath required him so to do and offered to pay him the residue of the purchase money upon having the title made out and a proper conveyance of the said premises executed to your orator, his heirs and assigns, by the said *Richard Roe*. And your orator charges, that the whole of the residue of his purchase money of the premises hath been ready and unproductive in his hands for completing the said purchase from the time it ought to have been completed by the terms of the said agreement. All which actings, refusals and pretenses of the said defendant (or *defendants*) are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the Common Law, and can only have relief in a Court of Equity where matters of this nature are properly cognizable and relievable: To the end, therefore, that the said *Richard Roe* and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged (*or to all and singular the premises or to all and singular the charges and matters aforesaid*), as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated (*or as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated*): and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay

and belief (or according to the best of their respective knowledge, information and belief); and more especially, that the said *Richard Roe* may in manner aforesaid answer and set forth:

Whether he was not seised and possessed of or otherwise well entitled unto the said estate with the appurtenances thereto adjoining or belonging and the inheritance in fee simple thereof; And whether, being so seised and entitled as aforesaid, he did not at the time hereinbefore in that behalf mentioned, or at some other, and what time, cause all the said estate and hereditaments to be put up to sale by public auction, by the said *Samuel Short*, at (*stating place*), in *three* lots, pursuant to printed particulars and conditions of sale previously advertised and published thereof; And whether the said premises were not bought in by him, the said defendant, at the time of the said sale, or how otherwise; And whether your orator did not in or about the said month of *April*, or when else, enter into a treaty with the said defendant for the absolute purchase of the same estate and premises together with the timber and other trees, fixtures, and other effects, in and about the same, discharged from all incumbrances, at or for the price or sum of *two thousand nine hundred* dollars, or at some other and what price; And whether the said defendant did not agree to accept the said sum of *two thousand nine hundred* dollars, as the consideration for the said estate and premises; And whether thereupon such agreement in writing of such date, or of or to such purport and effect as hereinbefore in that behalf mentioned, was not duly entered into and signed by the respective solicitors for your orator and the said defendant in the name and on the behalf of your orator and the said defendant, or how otherwise; And whether your orator did not previously to the signing of the said agreement pay the said defendant the sum of *five hundred* dollars as a deposit and in part of his said purchase money or sum of *two thousand nine hundred* dollars; And whether the said defendant hath not since delivered up possession of the said purchased premises to your orator; And whether your orator hath not always been ready and willing to perform his part of the said agreement, and on having a good and marketable title shown to the said estate and premises and a conveyance of the fee simple thereof, discharged of all incumbrances made to him, to pay the residue of the said purchase money or sum of *two thousand nine hundred* dollars to the said defendant; And whether the said defendant doth not, and why, refuse to perform his part of the said agreement; And whether the defendant is not able to make a good and marketable title to the said estate and premises, and, if not, why not; And whether he doth not, and why, decline or refuse to make a good and marketable title to the said premises; And whether your orator hath not required him so to do, and made such offer to him as in that behalf aforesaid, or to that, or the like, or some, and what, other purport or effect; And whether the whole of the residue of the purchase money of the said premises hath not been ready and unproductive in the hands of your orator for completing the said purchase from the time the same ought to have been completed by the terms of the said agreement, or from

some, and what, other time; And that the said defendant may be decreed specifically to perform the said agreement entered into with your orator as aforesaid and to make a good and marketable title to the said premises, your orator being ready and willing, and hereby offering specifically to perform the said agreement on his part, and upon the said defendant's making out a good and marketable title to the aforesaid estate and premises and executing a proper conveyance thereof to your orator pursuant to the terms of the said agreement, to pay to the said defendant the residue of the said purchase money or sum of *two thousand nine hundred* dollars. And that your orator may have such further and other relief in the premises as to your honors shall seem meet and the nature of this case may require. May it please your honors, the premises considered, to grant unto your orator, not only the most gracious writ of *ne exeat regno* of the state of (*naming state*), issuing out of and under the seal of this Honorable Court, to restrain the said defendant, *Richard Roe*, from departing out of the jurisdiction of this court, but also the most gracious writ of subpoena of the state of (*naming state*, or of the *United States of America*), to be directed to the said *Richard Roe* and the rest of the confederates when discovered, thereby commanding them and every of them at a certain day and under a certain pain therein to be specified (or *therein to be inserted*), personally to be and appear before your honors in this Honorable Court and then and there to answer all and singular the premises, and to stand to, perform and abide such order and decree therein as to your honors shall seem meet (or *shall seem agreeable to equity and good conscience*), and your orator shall ever pray.

(*Signature and verification as in Form No. 4277.*)

- d. By First Vendee Against Vendor and a Subsequent Purchaser from Him, for the Specific Performance of an Agreement Entered Into by the Vendor with the Plaintiff for the Sale of an Estate, Charging the Subsequent Purchaser with Notice, and Praying that He may Surrender the Estate to the Plaintiff, or, (in the alternative) if He had No Notice, Then that the Vendor may Account for the Difference in Price. Praying Also for an Injunction to Restrain the Defendants from Bringing an Ejectment.

Form No. 18775.¹

(Curt. Eq. Prec. 15.)

(*Address as in usual form.*)

Humbly complaining sheweth unto your honors your orator *John Doe*, of (*stating place*), that *Richard Roe*, of (*stating place*), one of the defendants hereinafter named, was in and before the month of *April*, 1898, seised to him and his heirs of a messuage or dwelling-house with the appurtenances situate at (*stating place*), and hereinafter described. And your orator further sheweth, that the said *Richard Roe*, being desirous to dispose of the said estate, entered into an agreement with your orator for the sale thereof to him, and which

1. See, generally, *supra*, note 1, p. 316.

agreement was reduced into writing and signed by the said defendant *Richard Roe* and your orator, and is in the words and figures or to the purport and effect following, that is to say: (*stating the agreement verbatim*), as by the said memorandum of agreement when produced will appear. And your orator further sheweth unto your honors, that in the said month of *April*, 1898, and before the day fixed for completing the said agreement, your orator called upon the said *Richard Roe* and offered to pay to him the said purchase money for the said house and premises. And your orator further sheweth, that he hath repeatedly applied to the said *Richard Roe* and hath requested him specifically to perform his aforesaid contract. And your orator well hoped that the said defendant *Richard Roe* would have complied with such your orator's reasonable requests, as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said *Richard Roe*, combining and confederating with *Samuel Short*, of (*stating place*), and with divers other persons (*or, if there are several defendants, thus: "combining and confederating with Samuel Short and William West and with divers other persons," or "the said Richard Roe, Samuel Short and William West, combining and confederating together and with diver other persons"*) at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, absolutely refuses so to do, and the said *Richard Roe* hath since actually sold the said messuage and premises to the said defendant *Samuel Short* at an advanced price, and hath surrendered the same to the use of the said *Samuel Short*, his heirs and assigns, and the said *Samuel Short* hath been admitted upon such surrender. And the said defendant *Richard Roe* sometimes pretends (*setting out anticipated defense*). Whereas your orator expressly charges the contrary thereof to be the truth. And your orator further charges, that before the said surrender was made by the said *Samuel Short*, to the use of the said *Samuel Short* as aforesaid, and before the said *Samuel Short* paid his purchase money for the same, if he has in fact paid such purchase money, the said *Samuel Short* had some notice or intimation, or some reason to suspect or believe, that he, the said *Richard Roe*, had entered into an agreement with your orator for the sale of the said premises to your orator; and in particular your orator charges that the said *Samuel Short* carries on the business of a brewer, in copartnership with *John Jones* and *William Wells*, and that the said *John Jones* and *William Wells* were both informed by your orator of his said agreement, and your orator actually delivered the said agreement to the said *William Wells* previously to the said surrender to the said *Samuel Short* or to the payment of his purchase money, and the said *John Jones* and *William Wells*, or one of them, acted as the agent or agents of the said *Samuel Short* in the treaty with the said *Richard Roe*, or were in some manner employed or took some part therein on behalf of the said *Samuel Short*. And the said *John Jones* and *William Wells*, or one of them, gave some information or intimation to the said *Samuel Short* respecting the agreement

made by your orator with the said *Richard Roe*. And the said *John Jones* and *William Wells*, as the partners of the said *Samuel Short*, have some right or interest in the said premises, although the surrender thereof was made as aforesaid to the said *Samuel Short* alone. And your orator further charges, that the said *Richard Roe* hath in some manner indemnified, or undertaken to indemnify, the said *Samuel Short* against the claims of your orator in respect of his said agreement, or there is some undertaking between the said *Richard Roe* and the said *Samuel Short*, that the said *Samuel Short* is to be indemnified against such claim. All which actings, doings and pretenses of the said defendant (or *defendants*) are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the Common Law, and can only have relief in a Court of Equity where matters of this nature are properly cognizable and relievable;

To the end, therefore, that the said *Richard Roe* and *Samuel Short* and the rest of the confederates, when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answer make to all and singular the matters hereinbefore stated and charged (or *to all and singular the premises or to all and singular the charges and matters aforesaid*), as fully and particularly as if the same were hereinafter repeated and they thereunto distinctly interrogated (or *as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated*): and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or *according to the best of their respective knowledge, information and belief*); and more especially, that they may answer and set forth whether (*Here follow the interrogatories to be answered by the defendants*). And that the said defendants may answer the premises: and that the said agreement so made between your orator and the said *Richard Roe*, as aforesaid, may be specifically performed, and that the said *Samuel Short* may be decreed to surrender the said messuage and premises to your orator and his heirs, your orator being ready and willing and hereby offering specifically to perform the said agreement in all things on his part and behalf. (Or if it should appear that the said *Samuel Short* is a purchaser without notice of the said agreement between your orator and the said *Richard Roe*, then that the said *Richard Roe* may account for and pay to your orator the difference between the price stipulated in the said agreement and the sum at which he sold the same to the said *Samuel Short*.) And that the said defendants may, in the meantime, be restrained from bringing any action of ejectment against your orator in order to turn him out of possession of the said premises. And that your orator may have such further and other relief in the premises as the nature of his case shall require, and to your honors shall seem meet. May it please your honors to grant to your orator not only the most gracious writ or writs of injunction of the state of (*naming state, or of the United States of America*) issuing out of and under the seal of

this honorable court, to be directed to the said *Richard Roe* and the said *Samuel Short* to restrain them and each of them from proceeding at law against your orator, touching any of the matters in question, but also the most gracious writ or writs of subpœna (*concluding as in Form No. 4277*).

e. Claiming Interest on Purchase Money which has Lain Idle and Deduction for Deficiency and for Outstanding Incumbrance.

Form No. 18776.¹

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to this court:

I. That on the *first* day of *April*, 1899, the defendant was the owner in fee (*or otherwise, as the case may be*), and possessed of certain real property hereinafter described, and being desirous to dispose of said property made (*or by one Samuel Short, his agent duly authorized therein, made*) an agreement in writing with the plaintiff of which the following is a copy: (*set out copy of the agreement, giving description of the property*).

II. That on the execution of said agreement the plaintiff paid to the defendant *five hundred* dollars as a deposit and in part of the purchase money therein mentioned.

III. That afterward, by mutual agreement between the plaintiff and the defendant, the time for completing said contract was extended to the *first* day of *June*, 1899.

IV. That the plaintiff duly performed all the conditions thereof on his part, and has always been ready and willing, and still is, to fulfil the agreement on his part, and on having a good and marketable title made of said premises, and a conveyance of the fee thereof, free from all incumbrances (*or otherwise, according to the contract*), to pay the residue of the purchase money to the defendant (*or to give the bond and mortgage agreed for*).

V. That on the *first* day of *June*, 1899, at (*stating place as in the contract*), the plaintiff duly tendered to the defendant the balance of the purchase money, to wit, the sum of *twenty-five hundred* dollars (*or offered to give the bond and mortgage agreed for*), and requested a conveyance of the property as agreed upon in said contract, but the defendant refused and still refuses to execute or deliver such conveyance.

(*Where the purchase money has lain idle, say*, "VI. That the said sum of *twenty-five hundred* dollars, the residue of said purchase money, has been ready and unproductive in the hands of the plaintiff, for completing the purchase, ever since the said *first* day of *June*, 1899, on which day it ought to have been completed.")

(*Where there is a deficiency, say*, "VII. That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity of said (*specifying the property*), and that the same does not contain *forty* acres, but only *thirty-eight* acres.")

(*Where a claim of a right of way proved unfounded, say*, "VIII. That

1. See, generally, *supra*, note 1, p. 316.

at the time of treating for said property the said defendant (or *the said agent for defendant*) represented to the plaintiff that there belonged to the said estate a right of way from the said estate to *West street*, and that the said defendant could make a good title in fee to said right of way, which said right of way rendered the said estate very convenient for the business which the plaintiff intended to carry on upon the said premises; and that before the agreement of the said *first day of April, 1899*, was signed, a certain plan, made for the purpose of showing how buildings might be erected on the said estate, was shown by the defendant (or *said agent of defendant*), and upon that building-plan the said right of way was delineated; and by the said building-plan, and the representations of the said defendant (or *the said agent of defendant*), the plaintiff was led to expect that he should have a right of way directly from the said estate to the said *West street*, and the expectation of having such right of way was a great inducement to the plaintiff to purchase the said estate, and when said agreement was signed the said building-plan was delivered to the plaintiff and the same is now in the plaintiff's possession, but since the signing of the said agreement one *William West* has claimed to be exclusively entitled to the said right of way, and he has brought an action in the *Supreme Court* of the State of *New York* for the determination of the right of said claimant and of the defendant herein thereto; and in said action the said *William West* has obtained a judgment that he is entitled to said right of way and has recovered possession of the said way from the said estate to said *West street*, and said *William West* has since sold the road or way and the plaintiff is now prohibited from using the said road or way; that the plaintiff, in expectation that he should have a good title made to the said estate, entered into the possession thereof soon after signing the said agreement, and has ever since been, and now is, in possession thereof, and has, at great expense, to wit, the sum of *one thousand* dollars, purchased a piece of ground and made a road from the said estate to said *West street*.")

(*Where there is an outstanding incumbrance, say, "IX. That the defendant's title to the premises is incumbered by a mortgage to one William West for two thousand dollars, with interest semi-annually, which mortgage is not payable until the first day of April, 1900."*)

Wherefore the plaintiff demands judgment:

1. That a just deduction from the purchase money be made on account of said deficiency, and on account of the plaintiff not having the benefit of said right of way, and on account of said incumbrance, and for interest on plaintiff's purchase money which has lain idle; and that on payment of the residue of said purchase money (or *upon the delivery of such bond and mortgage*) the defendant specifically perform said agreement.

2. That if the defendant cannot make good title he pay to the plaintiff *five hundred* dollars, his said deposit, interest and expenses, made and incurred under said agreement, and the sum of *one thousand* dollars, damages suffered by plaintiff as aforesaid.

3. For such other relief as may be just and proper, and for the costs of this action.

(*Signature, office address and verification as in Form No. 11457.*)

f. To Compel Vendor to Procure Mortgages on the Land to be Satisfied.**Form No. 18777.¹**(Precedent in *Barkley v. Barkley*, 14 Rich. Eq. (S. Car.) 12.)²[(*Venue and address as in usual form.*)]³

Humbly complaining, sheweth unto your Honors, *R. C. Barkley*, of the district and State aforesaid, that his brother, *James B. Barkley*, departed this life on or about the ——— day of *January*, 1864, intestate, unmarried, and without issue, leaving surviving him his brothers, *John Barkley*, *David Barkley*, *William C. Barkley*, *Hugh Barkley*, and your orator, and also a sister, *Eliza Ann*, the wife of *O. R. Thompson*, of *Winnsboro*.

And your orator further shows unto your Honors, that the said *Eliza Ann* departed this life some time on or about the *17th* day of *March*, 1866, leaving surviving her her said husband, the said *O. R. Thompson*, and four children, all of whom are infants of tender years, to wit: *Mary G. Thompson*, of the age of *nine* years; *William L. Thompson*, of the age of *seven* years; *Margaret Loss Thompson*, of the age of *four* years; and *Nancy S. Thompson*, of the age of about *one year and nine months*.

Your orator further shows unto your Honors, that on or about the *9th* of *February*, 1864, he applied for and received from *George Buist*, Esq., Ordinary for *Charleston* district, letters of administration upon the estate of said *James B. Barkley*, and took upon himself the burden of the administration of said estate.

And your orator further shows unto your Honors, that the said *James B. Barkley* died seised of a considerable personal estate, which was sold under orders from the Court of *Ordinary*, for funds of the late Confederate States, which said personal estate has been fully administered and accounted for before the Ordinary of *Charleston* district, as will more fully appear by reference to the decree of said Ordinary, a copy whereof is herewith filed and marked Exhibit "*A*."

And your orator further shows unto your Honors, that certain debts of *James B. Barkley* still remain unpaid, to wit: a debt to *George F. Meldau*, and some other debts to certain persons to your orator not positively known, but who, when discovered, your orator prays may be made parties to these proceedings.

Your orator further shows unto your Honors, that the said *James B. Barkley* was seised at the time of his death of an estate in fee simple, of all that lot, piece or parcel of land, with the dwellings and buildings thereon, situate, lying and being on the south side of *Liberty* street, in the city of *Charleston*, and the State aforesaid, measuring and containing in front, on *Liberty* street aforesaid, *thirty-three* feet by the same on the back line, and in depth *one hundred and forty-seven* feet, be the said dimensions more or less; butting and bounding to the north on *Liberty* street aforesaid; east, on lands now or late of *Mordecai Cohen*; south, on lands formerly of *William*

1. See, generally, *supra*. note 1, p. 316.

3. The matter to be supplied within

2. It was held that a demurrer to this [] will not be found in the reported case. complaint was properly overruled.

Graham, and more recently of ———; and west, on lands now or late of *Mordecai Cohen*.

Your orator further shows, that the said lot of land was purchased from *Michael McManmon*, on the 6th day of *January*, 1864, as will more fully appear by reference to the deed of conveyance, a copy whereof is herewith filed, and marked Exhibit "B."

Your orator further shows to your Honors, that at the time of the purchase by the said *James B. Barkley*, there were on record in the office of the Register of Mesne Conveyance for *Charleston* district, three mortgages on said lot of land and buildings, which are unsatisfied on the record, to wit: a mortgage from *Thomas Y. Simons* to *Elias Horlbeck*, dated *January 1st*, 1861, to secure a bond in the penal sum of \$4,480, conditioned to pay \$2,240, which said mortgage is recorded in the office of the said Register, in Book O, No. 14, page 390; also a mortgage from *Michael McManmon* to *Elias Horlbeck*, dated 16th April, 1863, given to secure a bond in the penal sum of \$4,000, conditioned to pay the sum of \$2,000, with interest, which said mortgage is recorded in the office of the said Register for *Charleston* district, in Book Q, No. 14, page 183; also a mortgage from *Michael McManmon* to *Thomas Y. Simons*, dated 28th January, 1863, given to secure a bond in the penal sum of \$5,150, conditioned for the payment of \$2,575, with interest, recorded in the office of the said Register, in Book Q, No. 14, page 204, on the 31st day of *June*, 1863.

Your orator has been informed, and believes, that the mortgage to *Elias Horlbeck* from *Thomas Y. Simons* has been paid, though the same remains unsatisfied on the records. And your orator is further informed, that the mortgage from *Michael McManmon* to *Thomas Y. Simons* has been assigned to some person to your orator unknown.

And your orator further shows unto your Honors, that at the time of the purchase of said house and lot by the said *James B. Barkley* from the said *Michael McManmon*, the said *Michael McManmon* agreed, and it was understood between the said parties, that he would procure the said mortgage to be satisfied, so that the title to the said house and lot should be without any defect, flaw, or incumbrance, and on this agreement the said *James B. Barkley*, relying on the good faith of the said *Michael McManmon*, paid to the said *Michael McManmon* the whole of the purchase money, and took title for the property.

And your orator further shows unto your Honors, that the said *James B. Barkley*, at the time of his death, was also seised of all that lot, piece or parcel of land, situate, lying and being in *Pitt* street, east side, adjoining the premises of *Joseph A. Sanders*, and known as No. 66, and distinguished in an original plat drawn by *Robert A. Payne*, known as *Duncan Square*, by the No. 25, and measuring and containing in front, westwardly on *Pitts* street, thirty-five feet, more or less, and the same on the back line; on the south line, on a lot now or formerly of *Daniel Johnson*, ninety-six feet, more or less; and on the north line on a lot now or formerly of *Mr. Walding*, ninety-nine feet, more or less.

And your orator further shows unto your Honors, that he, acting under a mistake, did, on the *28th March, 1864*, as administrator of *James B. Barkley*, convey the said house and lot on *Pittstreet* to one *Thomas Mulvaney*; but your orator having been subsequently advised that his conveyance was not good, and only conveyed the right and title of himself as one of the heirs of his brother, repaid to said *Thomas Mulvaney* the purchase money, which your orator had received, and took from him a conveyance of the said lot of land to himself, so as to cover the interest which he had by the said deed conveyed.

And your orator would further show, that the said title, a copy of which is hereto annexed and marked Exhibit "*C*," is dated *20th November, 1864*, has never been recorded, and has always been, and still is, held by your orator for the benefit of the estate of his brother, the said *James B. Barkley*.

And your orator further shows unto your Honors, that there is no personal estate other than the said Confederate notes, out of which the debts of the estate can be paid, and your orator fears that the said *George F. Meldau*, and the other creditors of the estate, whom your orator prays may be made parties to this bill, when discovered, with apt and proper words to charge them, will proceed at law to collect their debts to the serious injury of the estate.

And your orator further shows unto your Honors, that he has frequently applied to the said *John Barkley, David Barkley, Hugh Barkley* and *William C. Barkley, O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson* and *Nancy S. Thompson*, to join him in executing a conveyance of the said *two* houses and lots of land, for the purpose of enabling him to pay off the debts and liabilities of the estate, and dividing the remaining portion among them, which your orator had well and truly hoped they would have done.

And your orator further shows unto your Honors, that he frequently applied to the said *Michael McManmon* to perform the agreement made with the said *James B. Barkley*, and to cause the said mortgages to be satisfied on the record of the Register of Mesne Conveyance, and to pay any amount that may be due on any of the same, in accordance with his said agreement, which in justice and equity he ought to have done.

And your orator further shows unto your Honors, that he has frequently endeavored to find and ascertain the party to whom the mortgage from *Michael McManmon* to *Thomas Y. Simons* had been assigned, and has failed to discover the person; but your orator prays that the said person, when discovered, may be made a party to this bill, with fit and apt words to charge him as a party.

And your orator further shows unto your Honors, that he has frequently applied to *Elias Horlbeck* for the purpose of ascertaining what amount is due on said mortgage, and more particularly also for the purpose of ascertaining the true value and real character of the consideration for which the *two* mortgages by *Michael McManmon* and *Thomas Y. Simons* were given, and what portion, if any, of the said

value has been paid, and what portion of the real consideration is due, the said *two* mortgages having been executed between the *first* day of *January*, 1862, and the *15th May*, 1865; and your orator had well and truly hoped that the said *Elias Horlbeck* would have well and truly complied with this his reasonable request, as in justice and equity he ought to have done.

But now so it is, may it please your Honors, the said *John Barkley*, *David Barkley*, *Hugh Barkley*, and *William C. Barkley*, *O. R. Thompson*, *Mary G. Thompson*, *William L. Thompson*, *Margaret L. Thompson*, and *Nancy S. Thompson*, *Michael McManmon* and *Elias Horlbeck*, combining and confederating together, with divers other persons at present unknown to your orator, whose names, when discovered, he prays may be herein inserted, with fit and proper matter and words to charge them as parties hereto, contriving how to injure your orator, absolutely refuse to comply with such his reasonable request. All of which actings and doings and pretenses are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. In tender consideration whereof, and forasmuch as your orator is remediless in the premises by the strict rules of the common law, and cannot have adequate relief except in a court of equity, where matters of this kind are properly cognizable.

To the end, therefore, that the said *John Barkley*, *David Barkley*, *Hugh Barkley*, and *William C. Barkley*, *O. R. Thompson*, *Mary G. Thompson*, *William L. Thompson*, *Margaret L. Thompson*, and *Nancy S. Thompson*, *G. F. Meldau*, *Elias Horlbeck*, and *Michael McManmon*, may full, true and perfect answer make to all and singular the premises, and that as fully as if they had been thereunto specially interrogated. That the said *Michael McManmon* may be compelled to satisfy the said mortgages. That the said *Elias Horlbeck* may declare what amount is due on the mortgages held by him, and the nature and true value of the consideration received by him, and whether the said consideration was in specie, bank bills, or notes known as Confederate treasury notes, and that he may be enjoined from foreclosing either of the said mortgages. That the said *G. F. Meldau*, and other creditors, be enjoined from proceeding at law, but that they present and prove their accounts before this Honorable Court; and after the sale of the said houses and lots, that the surplus, if any, after payment of debts, may be divided among the distributees of the said *James B. Barkley*, in the shares to which each of them may be entitled; and that your orator may have such further and other relief in the premises as the nature and circumstances of the case may require. May it please your Honors to grant that the writ of injunction may issue out of this Honorable Court, under the seal of the court, directed to *Elias Horlbeck*, and enjoining him from proceeding for the purpose of foreclosing the said mortgage; and also to ——— and others when discovered, the creditors of the said *James Barkley*, enjoining them from suing at law for the said debts due to them. And also may it please your Honors to grant unto your orator a writ of subpœna ad respondendum, to be directed to *John Barkley*, *David Barkley*, *William C. Barkley*, *Hugh Barkley*,

O. R. Thompson, Mary G. Thompson, William L. Thompson, Margaret L. Thompson, and Nancy S. Thompson, Elias Horlbeck, Michael McManmon, and George F. Meldau, commanding them, on and by a certain day, and under a penalty to be therein named, to be and appear before this Honorable Court, and then and there, on their several corporal oaths, to the best of their knowledge and belief, full, true and perfect answer to make to all and singular the matters herein contained, and to stand to, abide by and perform such orders and decrees as to your Honors may seem meet and agreeable to equity and good conscience. And your orator will ever pray, etc.

*[(Signature and verification as in usual form.)]*¹

g. Where Agreement was by Parol and Title has been Transferred to a Third Party.

Form No. 18778.²

(2 Rev. Swift's Dig. 765.)

(Commencement as in usual form.)

That, on the *tenth* day of *June*, 1899, *John Doe*, of (*stating place*), bargained and sold to the petitioner a certain lot of land, with a dwelling-house thereon standing, situate in the town of (*stating town*), bounded, (*describing land*), for the consideration of *one thousand* dollars, to be paid to the respondent on the delivery by the respondent to the petitioner of a good and sufficient warranty deed of said land and dwelling-house; that the petitioner thereupon, on said *tenth* day of *June*, 1899, with the knowledge and consent of the respondent, entered into the possession and occupation of said land and house, and has ever since occupied the same; that he has, since he took possession of said premises as aforesaid, expended a large sum, to wit, *five hundred* dollars, in the improvement of the same, and that it would cause him great loss, trouble and inconvenience to remove from said premises. He further says that, after said contract was made, the said *John Doe* died, and by a will drawn up and executed before said contract was made, the said *John Doe* devised said land and house to *Henry Doe*, of (*stating place*), and made the said *Henry Doe* his executor; that said *Henry Doe* has caused said will to be proved, and now claims title to said premises, and threatens to eject the petitioner therefrom. The petitioner further says that, since said will was proved as aforesaid, he did, on the *first* day of *April*, 1900, offer to pay said executor the price which he agreed to give for said premises, and tendered to him the amount of the same, and demanded of the said *Henry Doe*, and also of *William Doe*, who is heir-at-law of said deceased, a good and sufficient warranty deed of said premises; but they severally refused to execute and deliver to the petitioner such deed. He further says that he is ready and willing to pay the price agreed upon as aforesaid for said premises, to any person entitled to receive the same, on receiving such deed, and hereby brings the same into court, subject to the direction of

1. The matter to be supplied within [] will not be found in the reported case. 2. See, generally, *supra*, note 1, p. 316.

this court; that he is without remedy at law, and is in danger of being ejected from said premises, unless this court shall interpose. He therefore prays this court to order and decree that said *Henry Doe* and *William Doe*, or one of them, do execute and deliver to the petitioner a good and sufficient warranty deed of said premises, or make a decree, vesting the title to the same in the petitioner; or grant (*concluding as in Form No. 18769*).

h. Where Vendee has Given Notes, Some of Which have been Paid.

Form No. 18779.¹

(Bullitt's Civ. Code Ky. (1895), p. 577, No. 57.)

<i>John Doe</i> , plaintiff,	} <i>Lee Circuit Court.</i>
against	
<i>Richard Roe</i> , defendant.	} <i>Petition in Equity.</i>

The plaintiff, *John Doe*, says that, on the *1st* day of *April*, 1890, the defendant, *Richard Roe*, signed and delivered to the plaintiff a contract of that date, which is filed herewith, and by which the defendant covenanted, on payment of the first note hereinafter mentioned, to convey to the plaintiff a tract of land situate in *Lee* county, and bounded as follows: (*describe it by abutments or metes and bounds*), and containing *one hundred* acres; that, in consideration thereof, the plaintiff gave *three* notes, of the date aforesaid, by each of which he promised to pay to the defendant *one thousand* dollars, in, respectively, *one, two* and *three* years after said date, with interest at the rate of *six* per cent. per annum; that, on *April 1st*, 1891, the plaintiff paid to the defendant the principal and interest due on the first of said notes; and, on the *1st* day of *October*, 1892, the plaintiff took *eleven hundred and fifty* dollars, being the amount of the principal and interest due on the *second* of said notes, to the defendant's residence in *Lee* county, *Kentucky*, where he still resides, for the purpose of paying the same to him, but, as the plaintiff then learned, he was absent from *Kentucky*, and he has not since returned thereto, and the plaintiff has ever since been ready and willing to pay said *eleven hundred and fifty* dollars to the defendant and hereby tenders the same to him and brings the same into court for delivery to him; and the plaintiff is ready and willing to pay the principal and interest on the last of said notes when the same shall become due; and he says that the defendant has not conveyed to him the said land.

Wherefore the plaintiff asks that the defendant be required to convey to him the said land, with a general warranty of title, and for a judgment against him for costs, and for any other relief the plaintiff may appear entitled to.

Jeremiah Mason, Attorney.

(*No verification necessary.*)

1. Where Defendant has Conveyed Part of the Land to a Third Party, and for Damages.

1. See, generally, *supra*, note 1, p. 316.

Form No. 18780.¹(Precedent in *Pomeroy v. Fullerton*, 113 Mo. 445.)²[[*Title of court and cause as in Form No. 5921.*]]³

Plaintiff states that heretofore, to wit, on the *nineteenth* day of *April*, 1883, the said defendant, *Joseph S. Fullerton*, was the owner in fee and seised of the following described real estate situate in the city of *St. Louis* and state of *Missouri*, to wit: A certain tract or parcel of land commencing at the intersection of the west line of *Boyle* avenue with the north line of *McPherson* avenue; thence running about *one thousand* feet west with the north line of *McPherson* avenue to the east line of *Newstead* avenue prolonged, and having a depth northwardly of *one hundred and forty-two* feet and *six* inches, to an alley running east and west. And that on the day aforesaid defendant bargained, contracted and agreed with one *M. P. Reveley* to sell the said tract of land to said *Reveley* at and for the price and sum of \$20 per front foot, of which price *one-fifth* was to be paid in cash, and the balance in equal payments in *one, two, three* and *four* years, with interest at *six* per cent. per annum, payable semiannually; and said deferred payments to be secured by a deed of trust on said real estate. And it was then and there further contracted that the said *Reveley*, for himself and assigns, should bind himself and them by deed that none of said property should be used or sold for any manufacturing or trade purposes, or for any horse-car or livery stable, and that said *Reveley* would further bind himself by said deed to improve said property by erecting thereon dwelling-houses suitable to the neighborhood, and to commence the erection thereof within *one* year from the date of said contract, and, after commencing the same, to finish them with all reasonable dispatch; and it was further stipulated in said agreement that said defendant *Fullerton* should make and deliver a deed for said property to *Reveley* not later than the middle of *May*, 1883.

Plaintiff further states that thereupon the said *Reveley* paid to said defendant *J. S. Fullerton* the sum of \$100, as a part payment of said purchase money, and the said *Fullerton* executed, signed and delivered to said *Reveley* a memorandum or instrument in writing, reciting therein the contract and several matters and stipulations hereinabove set out, and acknowledging the receipt of said \$100 in part payment, and on account of the purchase money of said tract of land. That afterwards, and on or about the ——— day of *April*, 1883, in order to render said contract more definite, certain and explicit, and in order to amplify and explain said contract, and as a part thereof, the said *Fullerton* and said *Reveley* further agreed that said *Reveley* should, by said above-mentioned deed, bind himself, his heirs and assigns, that no house or tenement of any description should be erected or placed upon said premises, or any part thereof, which should approach or be nearer than *ten* feet to the south line

1. See, generally, *supra*, note 1, p. 316.

2. It was held that the demurrer to this petition was improperly sustained.

3. The matter to be supplied within [] will not be found in the reported case.

of *McPherson* avenue; that said *Reveley* should further bind himself, his heirs and assigns, by said deed, to commence to erect said above-mentioned dwelling-houses within the term of *one* year from said date upon said premises, said houses to be built of brick or stone, or brick and stone, of good substantial character and condition, and to complete the same within a reasonable time after they had been so commenced; but that the time, if any, unavoidably consumed by the interference of the public authorities, or the period, if any, covered by financial disturbance in the country paralyzing business and depressing securities, should not be deemed a part of the time within which the construction of the houses should commence; that said *Reveley* should further bind himself and his heirs and assigns, by said deed, that for the term of *twenty-five* years next following the date thereof there should not be erected or established on the said premises, or any part thereof, any building, house, shed or structure of any kind for the purpose of a livery stable, public stable, or horse-railroad stable, or car-house, slaughterhouse, bone, glue or tobacco factory, or factory or manufacturing establishment of any kind, or beer-saloon or dramshop, and that no building, shed or structure thereof should be used for any such purposes, and that no business of the nature above indicated should be begun or carried on on said premises or any part thereof by said *Reveley*, his heirs or assigns, or by any tenant, subtenant or lessee holding under him or them, and should bind himself, his heirs and assigns, by said deed, that, in the event of any violation of the preceding covenants, agreements or stipulations, or any part thereof, by said *Reveley*, or by any person claiming or holding the said premises, or any part of the same, by, from, through or under said *Reveley*, the same should operate as an immediate and absolute forfeiture and reversion of said premises, or the portion thereof held by said parties so violating said covenants, agreements and stipulations, and the purchase money and all buildings and improvements thereon to the said *J. S. Fullerton*, or his heirs, and should completely and absolutely reinvest the title of said premises in him or them, and he or they should have lawful right to re-enter upon and repossess himself or themselves of the said premises and all buildings or improvements thereon situated, as fully as if the same had been conveyed to him or them by deed of bargain and sale duly executed according to the laws of the state of *Missouri*. That said supplemental and explanatory memorandum was also in writing, and is made an exhibit in this cause. That it was agreed between said *Fullerton* and said *Reveley* that said *Fullerton* would prepare and execute a valid deed embodying and setting out the agreements, conditions and stipulations hereinabove mentioned, and which said deed was, as aforesaid, to be delivered to said *Reveley* not later than the middle of *May*, 1883, as and upon the conditions hereinbefore recited.

Plaintiff further states that afterwards, to-wit, on the ——— day of ———, the said *Reveley*, for value, by indorsement in writing on the back of said first mentioned memorandum of agreement, assigned, sold, transferred and set over to this plaintiff all of his right, title and interest in said agreement, and, on the *ninth* day of *May*, 1884,

duly acknowledged his said transfer and assignment before an officer authorized to take the acknowledgment of deeds in the said city of *St. Louis*. And afterwards, to-wit, on the *nineteenth* day of *April*, 1890, said *Reveley*, by an instrument of writing, under seal, and duly acknowledged and delivered to plaintiff, further assigned and conveyed and confirmed to plaintiff all his right, title and interest in said real estate. Plaintiff files herewith the said memorandum of agreement and the said assignment and transfers as exhibits with this cause. That afterwards, on the *twenty-second* day of *April*, 1890, by his deed of that date, duly acknowledged, the said *Reveley* recited the said contract and agreement so made by him with said defendant, and the assignments and transfers aforesaid, and for value formally conveyed said real estate and all interest therein acquired by him in and to the same by virtue of said contract and agreement to said plaintiff, and delivered the said deed to said plaintiff, who, on the *twenty-third* day of *April*, 1890, caused the same to be filed for record in the office of the recorder of deeds for the city of *St. Louis*. Plaintiff will produce the said deed or a certified copy thereof in evidence on the trial of this cause. And plaintiff further states that said *Reveley* was at all times ready and willing to comply with the terms of said contract and agreement, and duly performed all the conditions of the same on his part, and that this plaintiff, since acquiring the interest of said *Reveley*, has also been ready and willing at all times to comply with the same, and he is still ready and willing so to do; but plaintiff avers the fact to be that said defendant has absolutely failed and refused to comply with said terms on his part, and has failed and neglected and refused to give said *Reveley* or to this plaintiff a good and sufficient title to said property, or the said deed, or any deed whatever, and still refuses so to do. And plaintiff further states that said property, at the time of making of said contract and agreement, was involved in litigation in the courts of this state, and that this fact was well known to the defendant at the time, and that it was not known to said *Reveley* or to plaintiff. That plaintiff is informed and believes that the said litigation has been recently terminated and settled, and that said *Fullerton* can now convey a good and valid title to said real estate, except as to that part sold, as hereinafter recited. And plaintiff says that since making said contract and agreement defendant has sold and conveyed a part of said property, to-wit, about half of the same, and that the purchaser thereof has taken possession of the property so sold, and defendant is unable, therefore, now to comply literally with the terms of his said contract and agreement, as to the parts so sold, and by reason thereof plaintiff is damaged in the sum of \$30,000. That defendant is yet in possession, and holds the title to the balance of said property, and plaintiff prays that he may be compelled by the judgment, order and decree of this court to perform specifically the terms of his said contract and agreement as to all said property yet remaining unsold, and that he be required to convey same to this plaintiff by good and sufficient deeds, and that he be required further to respond in damages to plaintiff for the part of said property so sold by him as aforesaid; and plaintiff prays for such other and

further relief, orders and decrees in the premises as to the court may seem proper, and as to equity belongs.

[(Signature as in Form No. 5921.)]¹

3. On an Exchange, the Parties having Taken Possession.

Form No. 18781.²

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiff respectfully shows to this court:

I. That on the *first* day of *April*, 1899, the plaintiff and the defendant entered into an agreement in writing, dated that day, whereby, in consideration of the covenants of the plaintiff herein-after mentioned, the defendant covenanted that he would, on the *first* day of *May*, 1899, convey to the plaintiff in fee, by warranty deed and with covenants for quiet enjoyment against incumbrances (*or otherwise, according to the agreement*), a lot of land situate in the town of *Huntington* and county of *Suffolk*, in the state of *New York*, and described as follows, to wit: (*describing the premises*), in consideration whereof the plaintiff covenanted in and by said agreement (*state covenant of the plaintiff in the same manner*). And it was further provided in said agreement that each party might enter into immediate possession of the premises so to be conveyed to him and have and receive the profits as to his own use.

II. That thereafter, in pursuance to said agreement, the plaintiff and defendant respectively took possession of the premises so to be conveyed to them and have still severally occupied the same.

III. That the plaintiff duly performed all the conditions of said contract on his part, and on the *first* day of *May*, 1899, tendered to the defendant a warranty deed of said premises in (*state location of the premises*), with covenants for quiet enjoyment and against incumbrances, duly signed and sealed by the plaintiff, and demanded of defendant a deed of said premises in (*state location of the premises*), but the defendant refused to execute and deliver such deed to the plaintiff, and still neglects and refuses so to do.

Wherefore the plaintiff demands judgment that the defendant specifically perform said agreement and that he convey to the plaintiff said lot in (*state location of the premises*), and receive from the plaintiff a deed of said premises in (*state location of the premises*), pursuant to the said contract, and that plaintiff have such other and further relief as may be just and proper, and the costs of this action.

(Signature, office address and verification as in Form No. 11457.)

4. By Creditor, to Compel Performance of Agreement to Give a Chattel Mortgage.

1. The matter to be supplied within [] will not be found in the reported case. 2. See, generally, *supra*, note 1, p. 316.

Form No. 18782.¹

(Title of court and cause as in Form No. 5926.)

The complaint of the above named plaintiff respectfully shows to this court:

I. That on the *first* day of *April*, 1899, the plaintiff and the defendant entered into an agreement whereby the plaintiff, then being the owner (*specifying the goods*), situate in house No. 20, in *West* street, in the village of *Huntington* and county of *Suffolk* and state of *New York*, agreed to sell and deliver the same to the defendant; in consideration whereof the defendant promised to pay the plaintiff *two hundred* dollars cash upon the delivery of said (*specifying the goods*) and *five hundred* dollars *six* months from the date of said delivery, and to give on the delivery of such (*specifying the goods*), a chattel mortgage thereon to the plaintiff to secure the payment of said *five hundred* dollars.

II. That pursuant to said contract the plaintiff, on the *fifth* day of *April*, 1899, sold and delivered said (*specifying the goods*) to the defendant, who is now in possession thereof, and who paid plaintiff the sum of *two hundred* dollars, but failed to deliver to him a chattel mortgage on the property so sold and delivered, pursuant to said agreement; and although afterward, on the *fifth* day of *April*, 1899, requested to deliver such chattel mortgage to plaintiff, he refused and still refuses so to do.

Wherefore the plaintiff demands judgment that the defendant execute and deliver to the plaintiff a chattel mortgage on (*specifying the goods*), pursuant to said contract, and that the plaintiff may have such other and further relief as is proper, and his costs of this action.

(Signature and verification as in Form No. 11457.)

5. By Lessee, for Specific Performance of a Written Agreement for the Lease of a House.

Form No. 18783.¹

(Curt. Eq. Prec. 17.)

(Address as in usual form.)

Humbly complaining sheweth unto your honors your orator *John Doe*, of (*stating place*). That *Richard Roe*, of (*stating place*), (the defendant hereinafter named) being or pretending to be seised or possessed of a messuage or tenement situate (*describing property*), and being willing and desirous to let the same, he, in the month of *June*, 1899, proposed and agreed to grant unto your orator a lease of the aforesaid premises with the appurtenances, and thereupon your orator and the said *Richard Roe*, duly executed or subscribed a certain memorandum of agreement bearing date the *tenth* of *June*, 1899, (*stating the agreement*) as in and by said memorandum of agreement, when produced, will appear. And your orator further sheweth that in expectation and confidence that a lease would have been made and executed to him of the said messuage or tenement and premises,

1. See, generally, *supra*, note 1, p. 316.

pursuant to the terms of the said agreement, your orator hath laid out sundry sums in repair of the said premises to a considerable amount. And your orator further showeth, that your orator hath been always ready to perform his part of the said agreement and to accept a lease of the said premises pursuant to the terms thereof. And your orator for that purpose caused a draft of a lease to be drawn pursuant to the terms of the aforesaid agreement, and tendered the same to the said defendant for his perusal and approbation, but he refused to accept or peruse the same. And your orator further showeth, that he hath frequently, by himself and his agents, applied to the said *Richard Roe* and in a friendly manner requested him to make and execute unto your orator a lease of the said message or tenement and premises conformably to the said agreement. And your orator well hoped that the said defendant, *Richard Roe*, would have complied with such your orator's reasonable request, as in justice and equity he ought to have done. But now so it is, may it please your honors, that the said *Richard Roe*, combining and confederating with divers persons (*or, if there are several defendants, thus: "combining and confederating with Samuel Short and William West and with divers other persons," or "the said Richard Roe, Samuel Short and William West, combining and confederating together and with divers persons"*) at present unknown to your orator, whose names when discovered your orator prays he may be at liberty to insert herein with apt words to charge them as parties defendant hereto, and contriving how to wrong and injure your orator in the premises, he, the said *Richard Roe*, absolutely refuses to comply with such request. Defendant pretends that no such agreement as aforesaid was ever made or entered into by or between the said defendant and your orator, or any agreement, or that he consented to grant a lease to your orator of the aforesaid message or tenement and premises. Whereas your orator charges the contrary of such pretenses to be the truth. And so the said defendant will at other times admit, but then he pretends that he hath always been ready and willing to make and execute a lease of the said message or tenement and premises pursuant to the terms of the said agreement, and in all respects to perform the same on his part. Whereas your orator charges the contrary thereof to be the truth. But nevertheless, the said defendant refuses to comply with your orator's aforesaid request, or to perform or fulfill the aforesaid agreement. All which actings, doings and pretenses of the said defendant (*or defendants*) are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises. In consideration whereof, and forasmuch as your orator is entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable: To the end, therefore, that the said *Richard Roe*, and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, direct and perfect answer make, to all and singular the matters hereinbefore stated and charged (*or to all and singular the premises, or to all and singular the charges and matters afore-*

said), as fully and particularly as if the same were hereinafter repeated, and they thereunto distinctly interrogated (or *as fully in every respect as if the same were here again repeated and they thereunto particularly interrogated*); and that not only as to the best of their respective knowledge and remembrance, but also as to the best of their several and respective information, hearsay and belief (or *according to the best of their respective knowledge, information and belief*); and more especially that they may answer and set forth whether (*Here follow the interrogatories to be answered by the defendants*). And that the said agreement may be specifically performed and carried into execution, and that the said defendant may be decreed to execute a lease of the aforesaid messuage or tenement and premises to your orator according to the terms of the aforesaid agreement. Your orator hereby offering to execute a counterpart thereof and in all other respects to perform his part of the said agreement. And that your orator may have such further and other relief in the premises as the nature of this case shall require, and to your honors shall seem meet. May it please (*concluding as in Form No. 4277*).

6. To Reform a Lease and for Specific Performance of the Lease as Reformed.

Form No. 18784.¹

(Precedent in *Cole v. Winnipisseogee Lake Cotton, etc., Mfg. Co.*, 54 N. H. 243.)²

[*(Commencement as in Form No. 4276.)*]³

Benjamin J. Cole, of *Gilford*, in said county, complains against the *Winnipisseogee Lake Cotton and Woolen Manufacturing Company*, a corporation duly established by law, and doing business at *Lake Village*, in said county of *Belknap*, and says:

1. That just prior to and on the *twenty-third* day of *November*, 1852, the plaintiff and *John A. Cole* and *John Davis 2d*, who were then partners in the business under the name of *Cole, Davis & Co.*, were in the occupation of a certain lot of land belonging to the defendants, situated at *Lake Village*, and of the water-rights connected therewith on which a certain foundry and other buildings belonging partly to the defendants and partly to the plaintiff, and the said *John A. Cole* and *John Davis 2d*, then stood.

2. That the plaintiff and *John A. Cole* and *John Davis 2d* had previously held a written lease of said premises from the defendants, which prior to said *twenty-third* day of *November* had expired.

3. That on said *twenty-third* day of *November*, the plaintiff and said *John A. Cole* and *John Davis 2d* purchased the premises of the defendants, and took a conveyance thereof in due form.

4. That on the said *twenty-third* day of *November*, the defendants and the plaintiff, and the said *John A. Cole* and *John Davis 2d*, interchangeably executed and delivered an indenture, as follows, viz:

1. See, generally, *supra*, note 1, p. 316. of the lease and as to the enforcement of the contract.

2. It was held in this case that the plaintiff was entitled to the relief prayed for, both as to the reformation case. 3. The matter to be supplied within [] will not be found in the reported case.

"This indenture, made the *twenty-third* day of *November*, A. D. 1852, witnesseth, that the *Winnipisseegee Lake Cotton and Woolen Manufacturing Company* do demise and lease unto *John A. Cole* and *Benjamin J. Cole*, both of *Gilford*, in the county of *Belknap* and state of *New Hampshire*, and *John Davis 2d*, of *Meredith*, in said county and state, the right to draw water from the canal leading from the *Lyford* sawmill, connected with the dam of said company at said *Lake Village*, in *Gilford*, through the flume leading from said canal to the mills and buildings on the premises, this day conveyed to them by the said company for the use and operation of their mills and machinery on said premises, provided the quantity of water so drawn and used shall not exceed a sufficient supply for driving the water-wheel at present used by said lessees, and one other water-wheel requiring an equal quantity of water; and provided, also, that said lessees shall maintain and keep in repair the said flume, having the right for that purpose to enter upon the premises of said company, doing no unnecessary damage, and leaving the surface in as good condition as they find it, excepting and reserving to the said lessors, however, the control of the water in the *Winnipisseegee* river, and in all mill-ponds, bays, lakes, and reservoirs at and above said premises, with the right of holding back and retaining and discharging the water therefrom at their pleasure, an abatement of the rent hereinafter mentioned being made in case said lessees shall be interrupted in the use of said mills thereby; to have and to hold said demised premises to said lessees for and during their pleasure, the said lessees yielding and paying therefor the yearly rent of *one hundred and fifty* dollars, by equal quarter-yearly payments, on the *first* days of *January*, *April*, *July* and *October*, in every year during said term. And the said lessees covenant with the said lessors that they will, during said term, pay the said rent, and that they will keep said flume in proper repair so as not to waste water from said dam; provided, that if said lessees shall fail to perform either of said covenants on their part to be performed, the said lessors may immediately or at any time thereafter, while said neglect or default continues, shut off the water and prevent its flowing through said flume without prejudice to any other remedy which said lessors may have for breaches of said covenants. And the said lessors covenant with the said lessees that they, performing the covenants aforesaid, shall peaceably enjoy said right during said term, and that they will keep said dam in repair so as to afford the use of the water as aforesaid, subject to the exercise of the right above reserved by said lessors to control the water.

And the said parties agree with each other, that all the covenants and agreements therein contained shall extend to and bind their legal representatives.

In testimony whereof the said parties have hereunto interchangeably set their hands and seals the day and year aforesaid.

The Winnipisseegee Lake Cotton and Woolen Manufacturing Company, by their agent,

Signed, sealed and delivered in
presence of *John A. Colby*.
Ira F. Folsom.

James Bell. (SEAL)
John A. Cole. (SEAL)
John Davis 2d. (SEAL)
Benj. J. Cole. (SEAL)

Belknap, ss. Dec. 6, 1862. Personally appearing, *James Bell* acknowledged the foregoing instrument to be the free act and deed of the said company.

Before me, *Ira F. Folsom*, Justice of the Peace.

Belknap County Records. Received *March 24, 1854, 8 P. M.*
Recorded Book 22, page 525.

Examined by *Nath'l Edgerly*, Regr."

5. That on the *eighteenth* day of *December*, 1856, the said *John Davis 2d*, for a valuable consideration, transferred and assigned to the plaintiff all his right, title and interest in said indenture.

6. That on the *ninth* day of *September*, 1857, the said *John A. Cole*, for a valuable consideration, transferred to the plaintiff all his right, title and interest in said indenture.

7. That on said *twenty-third* day of *November* the plaintiff contemplated the erection of a machine shop on a certain lot of land called the *Tucker* lot, lying adjacent to the land conveyed by the defendants as hereinbefore described, and the plaintiff procured in and by said indenture a grant of water for a second wheel for the use of said machine shop whenever the same should be erected, all of which was then understood and agreed to on the part of the defendants, by their duly authorized agent, the late *James Bell*.

8. That the said contract between the defendants and the said lessees, as verbally made a short time before said indenture was executed, was that the defendants should lease to them, for *seventy-five* dollars per annum, the right to draw water through the flume referred to in said indenture, for the use of the mills and machinery on the premises conveyed by the defendants to the said lessees, not exceeding a sufficient supply to drive the water-wheel then in use on said premises.

9. That subsequently, before said indenture was executed, an additional agreement was made between the parties for the leasing of an equal addition of water for the use of said machine shop, at an additional rent of *seventy-five* dollars per annum, making *one hundred and fifty* dollars per annum in the whole, but without any agreement or understanding that the right to draw said additional quantity of water was to depend in any degree on the capacity of said flume to discharge water, or that said additional water should be drawn through said flume, or that it should be used for driving mills or machinery situated on the premises conveyed as aforesaid by the defendants to the said lessees; nor had the plaintiff, nor the said *John A. Cole* or *John Davis 2d*, any thought or expectation, before the drafting of said indenture, that it was to contain any restriction in respect to the manner of driving water from said canal for the use of said second wheel, or to the place of using the same; nor did it at any time occur to them, or either of them, until after said *third* day of *October*, 1870, that the language contained in said indenture might in any event bear such a construction.

10. That the words, "through the flume leading from said canal to the mills and buildings on the premises this day conveyed to them by said company, for the use and operation of their mills and machinery on said premises," contained in said indenture, were never

intended by any of the parties thereto to be applicable to the words, "and one other water-wheel requiring an equal quantity of water," subsequently inserted in said indenture; and if the court shall hold that, upon a true construction of said indenture, they are so applicable, then the plaintiff says, that through mistake and accident the said indenture was drawn contrary to the true intent and meaning of the parties in that respect.

11. That the said *John A. Cole* and *John Davis 2d* were not at any time interested in said machine shop, but the same and the machinery therein were at all times owned by the plaintiff, and all that part of said indenture which provides for water for a second wheel was inserted for the benefit of the plaintiff, and the plaintiff at all times accounted to the said *John A. Cole* and *John Davis 2d* for one-half the rent provided for in said indenture, until they had severally transferred and assigned to him their interest therein.

12. That during the summer of 1854 the plaintiff erected said machine shop on the *Tucker* lot, and required water for an additional wheel, as was provided for in said indenture, and thereupon, in the fall of 1854, the plaintiff and the said *James Bell*, agent of the defendants as aforesaid, went upon the premises for the purpose of locating a penstock, through which water should be drawn from said canal for the use of said machine shop, in accordance with the said agreement and understanding of the parties, and did then and there agree upon the location of said penstock.

13. That the plaintiff immediately afterwards proceeded to erect a penstock between said canal and said machine shop, along the southerly side of said flume, in the precise place where the plaintiff and the said *James Bell* had agreed that the same should be located, as hereinbefore stated.

14. That about *forty-five* feet of said penstock was thus located and erected on land of the defendants, an excavation having been made for the purpose of receiving it.

15. That the said penstock was located and erected, as hereinbefore stated, without the slightest objection on the part of the defendants, or from any other source whatever.

16. That immediately afterwards the plaintiff commenced drawing water through said penstock for the use of said machine shop, and continued in the peaceable and uninterrupted exercise and enjoyment of the right to draw water for that purpose, for a period of about *sixteen* years, until on or about the *third* day of *October*, 1870.

17. That all the rents stipulated to be paid in and by said indentures have been paid, except the quarter's rents which fell due on the *first* day of *October*, 1870; and that was duly tendered to the defendants but was not received.

18. That neither the defendants, nor any person on their behalf, at any time called in question the right of the plaintiff to maintain said penstock, as it was originally located with the full consent and approbation of the defendants, by their duly authorized agent, as aforesaid, nor his right to draw water through it for the use of said machine shop, nor objected to his using said penstock for the purpose of supplying water for said machine shop, until on or about

the said *third* day of *October*, 1870; nor did the plaintiff during all that time have any understanding, expectation, or suspicion that his right to maintain said penstock, and use it as aforesaid, was never to be in any manner disputed.

19. That the expense of erecting said machine shop was about *ten thousand* dollars, and the cost of the machinery and tools therein was about *twenty-five thousand* dollars, which several sums were laid out by the plaintiff in full faith that said shop was to be supplied at all times (subject to the exception and reservation provided for in said indenture) with all the water necessary to drive the machinery therein, not exceeding a sufficient supply for driving a water-wheel like that which was used by the said lessees in said foundry on said *twenty-third* day of *November*; and the plaintiff never would have erected said machine shop, nor expended any money for machinery to be used in it, had he not relied upon said indenture as entitling him to draw water from said canal for the purpose of driving said machinery.

20. That the said penstock having become old and out of repair, the plaintiff provided all the materials for a new penstock, and prepared the same, ready to put together, in the months of *July* and *August*, 1870, at the expense of nearly *one thousand* dollars, and during the month of *November*, 1870, put the said materials together and constructed a new penstock, of the same size as the old one and in the same place.

21. That a part of the foundry, situated on the land conveyed by the defendants to the said lessees, was destroyed by fire about the last of *June*, 1867, since which time the plaintiff has drawn no water through said flume; but he intends soon to rebuild the part destroyed by fire, and to draw water through said flume for the use of machinery therein.

22. That the water-wheel which was used by the said lessees, at the time of the execution of said indenture, was a tub wheel, situated at the foot of said flume, which was driven by water flowing through two spouts in the end of said flume, each of which was about *sixteen and three-fourths* inches wide and *thirteen and three-fourths* high, from the bottom of said flume, making a space of discharge equal to about *two hundred and thirty* square inches to each spout.

23. That the length of said flume, on the day said indenture was executed, was about *eighty* feet, its width *five and a half* feet, and its depth *seven* feet, at the outlet of said canal, and about *nine and a half* feet at the end where said spouts were situated; and said flume has continued to be of the same dimensions from that to the present time.

24. That at the time of the execution of said indenture the quantity of water which could be discharged through said two spouts, in the time of the greatest depth of water in the flume, was never more than sufficient to drive the said tub wheel for the use of the mills and machinery situated on the premises conveyed by the defendants to the said lessees as aforesaid.

25. That said canal, on said *twenty-third* day of *November*, extended northwesterly from said flume a distance of about *ten* rods, of the

width of about *nineteen* feet, and, then turning, extending in a northerly direction to the dam of the defendant's about *five* rods, of the width of *twenty-five* feet or more, and was in good condition, and contained no timbers, stones, or other material to obstruct the flow of water and prevent its free passage through said canal.

26. That the defendants, about *twelve* years ago, more or less, erected a partition, for a temporary purpose, in the center of said canal, extending about *sixty* feet below said dam, and connected the southerly end of said partition with the westerly side of said canal, and thus prevented the flow of water into said canal except through that part of it lying easterly of said partition, being a width of only *twelve* feet, and without right have ever since continued to maintain said partition, and shut off a large portion of the water as aforesaid, thus greatly reducing the capacity of said canal to discharge water.

27. That the defendants, at the time of putting in said partition, placed large timbers across said canal, between said partition and the easterly side of the canal; and at other times the defendants have permitted stones and other materials to fall in said canal, which said timbers, stones and other materials now remain there; and thus the defendants have prevented the free passage of water through the said canal, as it of right ought to flow.

28. That the defendants, by the various acts hereinbefore charged, and by other acts of interference with the flow of water into and through said canal, have reduced the depth of water at the outlet of said canal greatly, to wit, *two* feet in low stages of water, and less at other times, and have thus greatly impaired the capacity of said canal to supply the quantity of water for the use of the plaintiff's wheels which the defendants engaged and are bound to furnish, subject only to the exceptions and reservations contained in said indenture.

29. That while the plaintiff was putting in said new penstock, during the month of *November*, 1870, the defendants threatened to prevent by force the completion of the same, and would have attempted to do so but for the interference of the court by temporary injunction.

30. That the defendants at the same time threatened to remove or destroy a portion of said penstock, or to shut off the water at the outlet of said canal, and prevent the same from entering the said penstock, and would have done so but for the interference of the court by said temporary injunction.

Wherefore the plaintiff prays that the defendants may be compelled (in addition to the lease of water for the first wheel as provided for in said indenture) to lease to the plaintiff (as a substitute for and lease of water for a second wheel, as provided for in said indenture) a right to draw water from said canal through said penstock for the use and operation of said machine shop, in accordance with the understanding of the parties, prior to, on, and after said *twenty-third* day of *November*, provided the quantity of water so drawn and used shall not exceed a sufficient supply for driving the water-wheel used in said foundry by said lessees on said *twenty-third* day of *November*; or, that the said indenture may be reformed by

correction of the errors and mistakes therein, so as to lease from the defendants to the plaintiff (as a substitute for the lease of water for a second wheel, as provided for in said indenture, and in addition to the lease of water for the first wheel, as provided for in said indenture) a right to draw water from said canal through said penstock, for the use and operation of said machine shop, in accordance with the understanding of the parties, prior to, on, and after said *twenty-third day of November*, provided the quantity of water so drawn and used shall not exceed a sufficient supply for driving the water-wheel used in said foundry by said lessees, on said *twenty-third day of November*; or, that the rights of the parties, by virtue of said indenture, may be defined by the court, and the right of the plaintiff to draw water for the use of said machine shop, through the penstock located by the parties as aforesaid, not exceeding a sufficient supply for driving the water-wheel used by said lessees on said *twenty-third day of November*, or to draw water for the use of said machine shop and of said foundry buildings not exceeding a sufficient supply for driving two water-wheels like the one used by said lessees at the date of said indenture, whether the same may be drawn through said penstock or through said flume, or to enlarge the capacity of said flume by making it sufficiently wide and deep to enable the plaintiff to draw through it the amount of water to which he is entitled, may be established, and that an injunction may issue enjoining the defendants against destroying, injuring, or in any manner interfering with the plaintiff's penstock, or preventing the water of said canal from freely flowing therein, or preventing the plaintiff from drawing from said canal, through said penstock and through said flume, all the water necessary for the use and operation of his mills and machinery situated on the land conveyed by the defendants as aforesaid, or on said *Tucker lot*, not exceeding a sufficient supply for driving a water-wheel like that used by said lessees on said *twenty-third day of November*, and one other wheel requiring an equal quantity of water, and that in and by said injunction the defendants may be enjoined against any further removing or filling up of the channel of said canal, and may be ordered by the court to remove therefrom the said partition so as to enlarge said canal from the dam to and below the southerly end of said partition to the full width of *twenty-five feet* or more, as the same was at the date of said indenture, and also to remove from said canal the said timbers, stones and other materials which now obstruct the free course of the water therein, and to restore the same to its original and true condition; and that such other and further relief may be granted to the plaintiff as may be just.

[(*Signatures as in Form No. 4276.*)]¹

7. For Specific Performance of a Contract of Partnership in the Purchase and Sale of Real Estate.

Form No. 18785.²

(Precedent in *Holmes v. McCray*, 51 Ind. 358.)³

1. The matter to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 316.

3. It was held that the contract set

[(Title of court and cause as in Form No. 5915.)]¹

William C. Holmes, plaintiff, complains of *Aaron McCray*, defendant, and says that heretofore, to wit, on the ——— day of ———, 1871, said defendant, knowing that plaintiff was engaged in dealing in real estate in the vicinity of *Indianapolis*, west of *White River*, and was acquainted with the value of the same, and relying upon plaintiff's judgment as to the probable increase in the value of such real estate, and wishing to profit by the experience and judgment of the plaintiff, requested and solicited plaintiff to enter into partnership with said defendant in the business and for the purpose of buying and selling again at such time as might be mutually agreed on, for profit and upon speculation, a certain tract of land in the vicinity of *Indianapolis*, west of *White River*, (*describing the land*), and in accordance with the solicitations of defendant, plaintiff agreed to enter into, and did form and enter into a partnership with said defendant, for the purpose of buying said real estate and selling the same at such time as might be mutually agreed upon, upon speculation; and it was then and there mutually agreed, by and between said plaintiff and defendant, that, for and in consideration of the covenants and promises at that time to each other concurrently and reciprocally made, they would and thereby did enter into a partnership, and agreed that as equal partners, they should purchase and procure to be conveyed to them the lands above described, to be held as partnership property, and that said *William C. Holmes* and *Aaron McCray* should each furnish *one-half* the money to be paid for said lands; and, at the instance of defendant, it was agreed that plaintiff should advance out of his portion the whole of the first payment, and would bear *one-half* of all costs, attorney's fees, traveling expenses and other outlays incurred in obtaining a perfect title to said land; that the negotiations of said land should be conducted for and on behalf of said firm by said *McCray*, who should report to plaintiff all disbursements and expenses incurred by him; that the land should be subdivided or not, as the partners should mutually agree, and sold at such time as would be mutually agreed on, and the profits or losses equally divided.

In pursuance of such agreement, said *McCray*, on behalf of the firm, procured a proposition in writing from the owner of said land to sell the same for *one hundred and forty-seven* dollars and *fifty* cents per acre, which proposition plaintiff and defendant agreed with each other to accept, and did accept, and a conveyance was made by the owner of said land, and the cash payment was made with the money of said firm.

And plaintiff shows that said *McCray*, in violation of his agreement and of his duty as partner, refuses to render any account to plaintiff of his dealings as such partner, and has taken possession of the partnership property and refuses to admit plaintiff's rights as such partner to share in the management of the partnership business, and refuses to render any account of the sums received or disbursed by him on

forth in the complaint was not within the statute of frauds, and the answer setting out the statute in defense was held bad on demurrer.

1. The matter to be supplied within [] will not be found in the reported case.

account of such partnership, * * * and though he has frequently admitted the existence of said partnership, yet, in the absence of plaintiff, he gives out that plaintiff has no interest in such partnership property.

Wherefore plaintiff prays the court to decree and declare that the agreement for a partnership made between plaintiff and defendant is a binding agreement on both parties thereto, and that the copartnership between them may be declared and established; that an account may be taken of the partnership dealings and transactions; that a receiver may be appointed to take possession of the effects belonging to said partnership; that the effects and property of said partnership may be sold, and the proceeds, after the payment of the debts of the firm, divided between the parties, or, if it shall seem more equitable, that partition may be made of said property according to the respective interests of the partners therein [and for other relief.

(*Signature and verification as in Form No. 5915.*)¹

8. For Specific Performance by Devisee of a Contract of His Testator.

Form No. 18786.²

(Precedent in *Fogle v. St. Michael Church*, 26 S. E. Rep. 99.)³

[(*Title of court and cause as in Form No. 5932.*)]⁴

The plaintiff above named, complaining of the defendant herein, alleges:

(1) That the defendant above named is, and at the times herein-after mentioned was, a corporation created by and under the laws of the state aforesaid.

(2) That heretofore, to wit, on the *fifteenth* day of *February*, eighteen hundred and *eighty-seven*, and at sundry other times, the late *Eusebia M. Greenland*, of the city of *Charleston*, in the state aforesaid, made overtures to the plaintiff above named, and endeavored to induce the said plaintiff to break up her home, and take up her abode at the residence of the said *Eusebia M. Greenland*, in order that she, the said *Eusebia M. Greenland*, might have the enjoyment of the companionship and society of the said plaintiff; and, as an inducement and consideration for the consent of this plaintiff to the above-stated arrangement, the said *Eusebia M. Greenland* promised this plaintiff to bequeath and devise unto her (the said plaintiff), absolutely a *one-half* portion of all her estate, real and personal.

(3) That, relying upon the said promise, this plaintiff was finally prevailed upon to enter into the above-stated arrangement, and agreed thereto; and acting upon the said promise and inducements of the said *Eusebia M. Greenland*, this plaintiff, shortly after the date

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 316.

3. A demurrer to this complaint was

sustained in the circuit court. On appeal, the judgment was reversed.

4. The matter to be supplied within [] will not be found in the reported case.

above mentioned, broke up her home, and removed to, and took up her abode in, the residence of the said *Eusebia M. Greenland*, on *Meeting St.*, in the said city of *Charleston*, and there remained until the death of the said *Eusebia M. Greenland*, as her companion, and in all other respects faithfully fulfilled her part of the said arrangement and agreement.

(4) This plaintiff further alleges that the said *Eusebia M. Greenland* departed this life on or about the *twenty-fifth* day of *October*, eighteen hundred and *ninety*, leaving in force her last will and testament, wherein she failed to comply with her part of the said agreement, and wherein she bequeathed and devised the whole of her said estate, real and personal, absolutely, unto the defendant herein, the Protestant Episcopal Church of the Parish of St. Michael, in *Charleston*, in the state of *South Carolina*, and appointed *Alexander W. Marshall*, of the city of *Charleston* aforesaid, as the executor thereof.

(5) That the said last will and testament were duly admitted to probate in the court of probate for *Charleston* county aforesaid, on the *29th* day of *October*, 1890; and on the same day the said *Alexander W. Marshall* duly qualified as executor thereof.

(6) This plaintiff further alleges that the said *Eusebia M. Greenland* wholly failed to fulfill and perform her said promise and agreement hereinabove set forth, and that since her death her executor, the said *Alexander W. Marshall*, has failed to transfer or convey tot his plaintiff any part of the said estate of said *Eusebia M. Greenland*, but, on the contrary, has surrendered and delivered the whole of the said estate to the Protestant Episcopal Church of the Parish of St. Michael, in *Charleston*, in the state of *South Carolina*, the defendant herein, on the ground that the said defendant was entitled thereto as the legatee and devisee under the said will.

(7) That the said defendant is now in the exclusive possession and enjoyment of the whole of the said estate of the said *Eusebia M. Greenland*, and, although thereunto requested, has refused, and still refuses, to transfer and convey to this plaintiff that portion thereof to which this plaintiff is entitled, or any part of the said estate whatsoever.

Wherefore this plaintiff prays judgment:

(1) That it be decreed that the said *Eusebia M. Greenland* was bound to leave by her last will and testament to the plaintiff above named, absolutely, the *one-half* part of her entire estate, real and personal.

(2) That the said defendant may be required to pay over, transfer, and convey to this plaintiff absolutely the *one-half* part of all the property, real and personal, of the said *Eusebia M. Greenland*, which has come into its hands or been delivered to it under the will of the said *Eusebia M. Greenland*, together with the income which has accrued thereon.

(3) That the said defendant do account before one of the masters of this court for all moneys, rents, and profits of the said estate which have come into its hands under the said will, and that it be required to file with the said master a schedule of all the property, real and personal, which came into its hands as aforesaid.

(4) That this plaintiff may have such other and further relief as she may be entitled to receive.

[(*Signature and verification as in Form No. 5932.*)]¹

9. For Specific Performance of a Contract of Decedent to Convey Property to a Child Whom He Adopted.

Form No. 18787.²

(Precedent in *Kofka v. Rosicky*, 41 Neb. 333.)³

[(*Title of court and cause as in Form No. 5923.*)]¹

The plaintiff, *Josephine Kofka*, appears by her next friend, *James Kofka*, and for her cause of action alleges the fact to be that this plaintiff was born in *Omaha, Nebraska*, on the 16th day of *March*, 1877; that her father's name is *James Kofka*, who appears as her next friend, and her mother's name is *Mary Kofka*, both of whom were then residing in *Omaha*, and have ever since here resided; that the parties to this suit are all of *Bohemian* nationality; that soon after her birth, to wit, in the month of *August*, 1878, there were living in *Omaha*, *John Spilinek*, deceased, and his wife, *Anna Spilinek*, the latter being a sister of the plaintiff's mother. During said month the said *John Spilinek* and *Anna Spilinek*, who never had any children of their own, requested of plaintiff's parents the privilege of taking this plaintiff with them to live with them as their child. The parents of plaintiff having several children, one of whom at that time was only a few weeks old, fully considered the matter, and having full confidence that plaintiff would receive at the hands of *John* and *Anna Spilinek* the care and affection which is due from parents to child, consented to said request, but only upon the expressed and well understood conditions, to be hereinafter named; that is to say, *James Kofka* and *Mary Kofka*, the parents of the plaintiff, gave up the care, custody, and control of said child, in the said month of *August*, 1878, on the consideration and agreement, then and there assented to by the said *John* and *Anna Spilinek*, that they would legally adopt and receive the said child as their own, would care for her, rear and educate her, and that she should have their fullest and best affection, and at their death she, the plaintiff, should inherit and be left all the property with which they died possessed.

Plaintiff further says that she went to live with the said *John* and *Anna Spilinek* at the time above mentioned, on the terms aforesaid; that she continued to live uninterruptedly with them until their death, which came to *John Spilinek* on *September 16*, 1888, and to *Anna Spilinek* on *September 19*, 1888. The plaintiff says that during all the time she conducted herself toward the said *Spilineks* as an affectionate and obedient child, and received at their hands all the

1. The matter to be supplied within [] will not be found in the reported case.

2. See generally, *supra*, note 1, p. 316.

3. The court said that the petition was probably as short and complete a

statement of the plaintiff's cause of action as could be made and fully set forth the same. A demurrer to the petition was overruled and judgment rendered for the defendant was reversed in the supreme court.

devotion and love a child should receive from parents; that she had, for several years previous to their death, assisted her aunt, *Anna Spilinek*, in the work about the house, in the way of washing, making up the beds, house cleaning, going on errands, and generally doing at their request anything within her power; that she has of late years been going to the public schools of the city of *Omaha*, where she was always enrolled and known as *Josephine Spilinek*, and, in fact, she has always gone by that name, and never knew any other until the death of the said *John* and *Anna Spilinek*. Plaintiff says the said *John* and *Anna Spilinek* always called her their own child, and so treated her, and she was told and given to understand by them that her own father was her uncle and her own mother her aunt, and she knew not the contrary until after *September 19, 1888*, and she always believed, and in her own mind cannot but believe yet, that the said *John* and *Anna Spilinek* were her real father and mother.

The plaintiff further says that the said deceased, *John Spilinek* and *Anna Spilinek*, often, during the last *ten* years, expressed and made known to friends and acquaintances, and to the plaintiff's parents, their intention to leave this plaintiff all their property at their death, and these promises and declarations on the part of both were made up to and within a few days of and on the very day of their death, and plaintiff says that up to the very time of their death they intended to leave their property to this plaintiff; that the said deceased always intended to fulfil their agreement of adoption by legal proceedings according to the statutes, but all parties concerned were on intimate and friendly terms, and the matter was allowed to go by, all feeling secure, and that for all intents and purposes plaintiff was as fully their child as if the formalities had been gone through, until it was finally prevented by his sudden death as hereinafter mentioned.

Plaintiff further says that on the *16th* day of *September, 1888*, the deceased *John Spilinek* was suddenly overtaken by a loss of control of his mental faculties and while thus affected shot himself dead, and inflicted mortal wounds at the same time upon his said wife; that *John Spilinek* died within a short time on the same day, but his said wife *Anna* lingered until *September 19, 1888*, when she died from the effects of said wounds. Plaintiff says there was no marital or family difficulty whatever to induce this conduct on the part of said *John Spilinek*, but it was wholly caused by despondency brought on by fancied business embarrassments.

Plaintiff says that the deceased *John Spilinek* died intestate, but had it not been for his sudden act of suicide, he would have made provision by will for his property to go to his wife during her life, and at her death, to this plaintiff, as was his oft-expressed desire and intention up to the very time of his death.

Plaintiff alleges that *Anna Spilinek*, deceased, while in the full and complete control of her mental faculties, and recalling her deceased husband's desire in the premises as well as their agreement, did on *September 17, 1888*, make and execute a will in writing, which said will was duly probated and allowed on the *20th* day of *November, A. D. 1888*, by the terms of which all the real and other property of which she died possessed, subject to two or three small debts, was

left to this plaintiff, whom she calls therein, "our adopted child, *Josepha Kofka*." The following is a copy of said will:

"Last will of

I, *Anna Spilinek*, of *Douglas* county and state of *Nebraska*, being aware of the uncertainty of life, but of sound mind and memory, do make and declare this to be my last will and testament in manner following, to-wit: I give, devise, and bequeath unto our adopted child, *Josepha Kofka*, all of mine real estate, money, personal property, and other effects that I may be possessed of or entitled to after my decease, subject, however, to all my legal debts; that is to say, I and my husband owe to *Karel Spilinek* \$150, and to *John Barta* \$50, and to *Barbara Spilinek* \$9. I also further declare that out of the above real estate and money \$100 be set and given to my father, *Frank Radil*. Signed this 17th day of *September*, 1888, at *Omaha, Nebraska*.
Anna Spilinek.

Signed in the presence of *James Engelthale*.

Frank Mrkwicka.

Vaclav Benak."

The plaintiff says that the defendant *John Rosicky* is the duly appointed, qualified, and acting administrator of the estate of the said *John Spilinek*; that the other defendants named, to wit, *Anton Spilinek*, *Frank Spilinek*, *Vincent Spilinek* and *Albert Spilinek*, being of ages respectively *fifty-three*, *fifty-one*, *forty-nine*, and *forty-two* years, are brothers of said *John Spilinek*, deceased; that they are all non-resident aliens living at *Skuhrov, Bohemia*, except *Anton*, and he is a resident and citizen of *Nebraska*.

Plaintiff alleges that the defendant *Anton Spilinek* claims to be the sole heir at law of the estate of *John Spilinek*, his brothers being non-resident aliens, and disputes the right of this plaintiff to inherit any property whatever from the estate of the said *John Spilinek*, and he claims to be the sole heir to the real estate mentioned herein, and maintains that this plaintiff has no rights in the premises. The other brothers are made defendants in this case and brought into court out of caution, in view of our present law with respect to non-resident aliens.

The plaintiff says that at the time of his death the deceased *John Spilinek* was possessed of the following real estate, situated in the city of *Omaha*, of the value of about \$6,500; that is to say: The east half of lot 4, in block 11, and the east half of the west half of lot 4, in said block 11, S. E. *Rogers'* addition to *Omaha, Nebraska*. The defendant *Herman Tombrinck* claims a mortgage on the property described herein for \$600, bearing date *May 4*, 1887, which appears of record in *Douglas* county as a lien on said property, but whether the same is genuine or unpaid this plaintiff has no information, and in order to put said *Herman Tombrinck* to his proof in the premises, she denies said mortgage is a bona fide and valid lien on said property.

The plaintiff says that since she and her parents have fully performed the agreement herein mentioned on their part, whereby they yielded the possession of and control over this plaintiff to said deceased parties, and she yielded to them the obedience, services,

and devotion of a child for over *ten* years, and would have continued so to do but for their death, and that by their own acts during their lives she knew no other mother or father save them, and that whereas these decedents fully expected and intended she should inherit their property at their death, plaintiff says it would be a fraud on her and on them to have their agreements in that particular violated. The plaintiff therefore brings her cause before this honorable court on its equity side and prays that she may be decreed a specific performance of the contract mentioned herein and that she be declared to be the lawfully adopted child of the deceased *John* and *Anna Spilinek*; that she may be declared the legal heir to the property described herein, and all other property of said deceased, and to hold the same free from any claim or right the other defendants may have or claim in or to the same, and for such further relief in the premises as the facts in the case may entitle her.

[(*Signature and verification as in Form No. 5923.*)]¹

10. For Specific Performance of a Contract of Decedent to Convey Land, if Plaintiff would Take Up His Residence Near Him.

Form No. 18788.²

(Precedent in *Law v. Henry*, 39 Ind. 414.)³

[(*Title of court and cause as in Form No. 5915.*)]¹

Thomas E. Henry, for himself, and *Clara Henry* and *Matt S. Henry*, infants, under the age of *twenty-one* years, by the said *Thomas E. Henry*, their father and guardian, plaintiffs, complain of *Joel Law*, defendant, and, complaining, say that the defendant, *Joel Law*, is and was the father of one *Jane Henry*, now deceased, late wife of the said *Thomas E. Henry* and mother of the said *Clara* and *Matt S. Henry*; that said defendant is a man of easy circumstances in life, and is and was at the time of the making of the contract, hereinafter stated, worth *forty thousand* dollars, and the father of *seven* children, *six* of whom are now living; that heretofore, to wit, on the *1st* day of *September*, 1867, said plaintiff, *Thomas E.*, together with his wife then living, and the said *Clara*, their infant child, were residing and living in *Shelby* county, in the State of *Indiana*, surrounded with friends and relatives, and although poor, were in prosperous circumstances in life, and that the said *Joel Law* was, and for some time had been, a resident of *Tipton* county, in said State; that said defendant, *Joel Law*, being desirous of the association of his children, and desiring that said plaintiff, his wife and child, should reside near to and in the immediate neighborhood with him, he, the said defendant, in order to induce said plaintiff and his said wife, then living, to remove to *Tipton* county, and in the immediate neighborhood of said defendant, promised and agreed that if the said *Thomas E. Henry*, together with his family, would remove to *Tipton* county, as aforesaid, the said defendant would purchase for and deed to the said *Jane Henry* thirty-

1. The matter to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 316.

3. This complaint was held sufficient.

five or forty acres of land, in said Tipton county, in the State of Indiana, and the plaintiffs aver that, in consideration of the aforesaid inducement, promise, and agreement of said defendant, he, the said Thomas E., together with his family, did remove to said Tipton county, Indiana, in consideration of the aforesaid promise of said defendant; that in said removal, as aforesaid, the plaintiff, Thomas E., incurred a great loss of time and incurred a large expense, to wit, one hundred dollars; that upon plaintiffs' arrival in said Tipton county, said defendant was the owner of a house and three acres of ground, which said house was situated in said Tipton county, and in the immediate neighborhood of said defendant; that said defendant was then negotiating for thirty-two acres more adjoining to and connected with said three acres as aforesaid, which two pieces constitute and are the southwest quarter of the southwest quarter of section number twelve, township number twenty-one north, of range number three east, except that part of said described real estate that is situate south of the Tipton, Tetersburg, and Berlin Gravel Road, said pieces of land then being owned and then being negotiated for containing thirty-five acres, and of the worth of one thousand five hundred dollars; and that defendant in pursuance of his said promise and agreement, put said plaintiff, Thomas E., and his said wife, into possession of said three-acre tract of ground, and further promised and agreed by and with plaintiff and his said wife that as soon as he, the said defendant, obtained a title to said thirty-two-acre tract, he would convey the whole of said thirty-five acres to said Jane Henry; that afterward, to wit, on the ——— day of ———, 186—, said defendant obtained deeds for said thirty-two-acre tract of land; that in pursuance of his said promise and contract, he immediately put said plaintiff and his wife into possession of said thirty-two-acre tract of land; and plaintiffs aver that said Jane Henry, by herself and her said husband, made permanent and lasting improvements on said real estate, to wit, to the amount of one hundred dollars; and the plaintiffs further aver that said defendant, in further consummation of said contract, did, on the 18th day of September, A. D. 1869, make, execute and acknowledge his certain warranty deed, a copy of which is filed herewith and made a part of this complaint, conveying to said Jane Henry the thirty-five acres of real estate hereinbefore described; that before the delivery of said deed to the said Jane Henry, to wit, on the 15th day of November, 1869, the said Jane Henry departed this life, leaving as her sole heirs at law her said husband, Thomas E. Henry, and her two infant children, Clara and Matt S. Henry. Plaintiffs herein say that said defendant has failed and refused to deliver said deed, and failed and refused to convey said real estate to these plaintiffs, or either of them; wherefore, plaintiffs ask the court to order the delivery of said deed to said plaintiffs, or to order the defendant to convey said real estate to said plaintiffs, in equal proportions to said plaintiffs, and on failure of the defendant so to do, then to appoint a commissioner to make such conveyance, and such other relief as may be just and proper.

*[(Signature and verification as in Form No. 5915.)]*¹

1. The matter to be supplied within [] will not be found in the reported case.

II. ANSWER.¹

1. Admitting Agreement, but Avoiding It.

1. Requisites of Answer, Generally. — For the formal parts of an answer in a particular jurisdiction see the titles ANSWERS IN CODE PLEADING, vol. 1, p. 799; ANSWERS IN EQUITY, vol. 1, p. 854.

Denial of Contract. — In a suit for specific performance of a written contract for the sale of land, the denial of the alleged contract puts upon the plaintiff the burden of proof, and he must establish, by clear and satisfactory evidence, not only the making of the contract, but the terms of it alleged to entitle him to specific performance thereof. *Edwards v. Rives*, 35 Fla. 89.

A mere denial of the execution of an alleged contract will not admit proof *aliunde* the contract to avoid it. *Brown v. Eaton*, 21 Minn. 409.

Different Contract. — The defendant may set out in his answer a contract materially different from that alleged in the bill, and may have a specific performance thereof without resorting to a cross-bill. *Sims v. McEwen*, 27 Ala. 184; *Morrill v. Cooper*, 65 Barb. (N. Y.) 512; *Thompson v. Hawley*, 14 Oregon 199. But the answer must state fully and specifically the understanding or agreement of the parties. *Spence v. Spence*, 17 Wis. 448.

Denial of Performance or Tender. — An allegation that the plaintiffs have never offered or tendered performance or demanded performance on the part of the defendant is immaterial, so long as the plaintiff alleges in the complaint a readiness and willingness to perform. *St. Paul Land Co. v. Dayton*, 39 Minn. 315.

Rescission by Plaintiff. — The defendant may in his answer set up acts by the plaintiff showing a rescission of the contract. *Lane v. Ready*, 12 Ind. 475.

Want of Title in Plaintiff. — Where the defendant intends to deny the title of the plaintiff, he must, by his answer, put the title in issue. *Logan v. Bull*, 78 Ky. 607; *Daily v. Litchfield*, 10 Mich. 29.

In order to entitle a vendee to demand an exhibition of the vendor's title, he must allege or point out the particular defects of which he complains. *Collins v. Park*, 93 Ky. 6; *Logan v. Bull*, 78 Ky. 607.

Incumbrance. — If the defendant wishes

to insist upon an incumbrance as an objection to the performance, he must allege the incumbrance. *Daily v. Litchfield*, 10 Mich. 29.

Homestead. — The defense that the land in question is the defendant's homestead, that he is a married man and that his wife did not join in the contract, must be set up specifically. *Brown v. Eaton*, 21 Minn. 409.

Bona Fide Purchaser — Generally. — A bona fide purchaser must, in his answer, deny notice, not only at the time of his purchase, but also before or at the time when the deed was executed and consideration paid. *Dean v. Anderson*, 34 N. J. Eq. 496.

Where a complaint for specific performance alleged that the plaintiffs went into and remained in possession of the premises from the time of their purchase, and made improvements, an answer "that the defendant admits it to be true that the plaintiffs have been in possession of the premises described in the complaint, and that they have erected a building and improvements thereon, and that they use and occupy the same for business purposes," and denying that defendant had any knowledge or information thereof, sufficient to form a belief, as to when the plaintiffs went into possession or occupation of the premises aforesaid, or when they commenced making or made improvements thereon, or what amount they had expended, was held bad. The answer should have denied any knowledge of plaintiffs' possession before the purchase by defendant. *Minor v. Wiloughby*, 3 Minn. 225.

Payment of the consideration must be averred by a bona fide purchaser, and giving a security for executing an obligation for payment is not sufficient. *Haughwout v. Murphy*, 22 N. J. Eq. 531; *Lozey v. Simpson*, 11 N. J. Eq. 246.

Discharge in Bankruptcy. — Where a defendant to a bill for specific performance of a contract to convey land alleged and relied upon his certificate of discharge as a bankrupt, and did not allege a proper assignment of his estate to his assignee, it was held that in the absence of any allegation or proof to the contrary, and where the case was before the appellate court, the court

would assume that proper assignment was made. *Swepson v. Rouse*, 65 N. Car. 34.

Illegal Consideration. — In *Sprague v. Rooney*, 104 Mo. 349, it was held that the defendant might show under a general denial an illegal consideration for the contract.

In *McDearmott v. Sedgwick*, 140 Mo. 172, it is said, "it is held in *Sprague v. Rooney*, 104 Mo. 349, that the effect of a general denial is to deny the legality of the contract sought to be enforced, and under it evidence is admissible to prove that the real contract, which on its face is valid, is in fact intended to accomplish an immoral and illegal object. The rule declared in *Sprague v. Rooney* (104 Mo. 349) seems to be in conflict with the weight of authority in this State, and a contrary doctrine was expressly declared by the same judge in the subsequent case of *St. Louis Agricultural, etc., Assoc. v. Delano*, 108 Mo. 217. The learned judge there says: 'There is nothing on the face of the petition herein which indicates any other than a valid contract between the plaintiff and the defendants; and when this is the case, the rule is that if the contract is to be invalidated by reason of some extrinsic matter, such matter must be pleaded in order that it may be made issuable at the trial, so that it may be considered on appeal.' The following cases cited fully sustain what is said: *Sybert v. Jones*, 19 Mo. 86; *Moore v. Ringo*, 82 Mo. 463; *Musser v. Adler*, 86 Mo. 445.

In the case last cited, Judge Black says: 'This defense [that services rendered were contrary to public policy], so far as pleading is concerned, is not unlike that of champerty, gaming, usury, and the like. It is an affirmative defense, and should be clearly and distinctly stated.' That a denial does put in issue the validity of the contract 'sued upon' is undoubtedly true. That is when the contract is offered in evidence in support of the allegations of the petition and its illegality appears upon its face relief should be denied, whatever the condition of the pleadings. The same is true where the plaintiff can only make out his case through the medium of an illegal transaction to which he himself is a party. Hence the common statement of the courts that, 'if it appear from the plaintiff's own showing that the contract arises from an immoral cause,

or the transgression of a positive law, the court will at once refuse its assistance.'

But when the illegality does not appear from the contract itself or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter, and must be pleaded in order to be available."

Fraud. — Where the defendant desires to set up fraud on the part of the complainant, the fraud must be directly and specifically stated in the answer. *Fitzpatrick v. Beatty*, 6 Ill. 454.

Statute of Frauds — Generally. — In some jurisdictions, it has been held that, to be available as a defense to a bill for specific performance, the statute of frauds must be specially pleaded. *Bragg v. Olson*, 128 Ill. 540; *McClure v. Otrich*, 118 Ill. 320; *Warren v. Dickson*, 27 Ill. 115; *Lear v. Chouteau*, 23 Ill. 39; *Esmay v. Gorton*, 18 Ill. 483; *Livesey v. Livesey*, 30 Ind. 398; *Chambers v. Lecompte*, 9 Mo. 575; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Adams v. Patrick*, 30 Vt. 516.

In other jurisdictions, it is held that under a general denial the defendant may take advantage of the statute when the plaintiff attempts to prove the contract. *Wynn v. Garland*, 19 Ark. 23; *Nunez v. Morgan*, 77 Cal. 427; *McDonald v. Mission Jew Homestead Assoc.*, 51 Cal. 210; *Devore v. Devore*, 138 Mo. 181; *Wildbahn v. Robidoux*, 11 Mo. 659; *Walker v. Hill*, 21 N. J. Eq. 191; *Haight v. Child*, 34 Barb. (N. Y.) 186; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Coles v. Bowne*, 10 Paige (N. Y.) 526.

Contract Alleged to be in Writing. — Where it is alleged that the existing contract is in writing, the defendant need not plead the statute of frauds in anticipation that the plaintiff will attempt to prove a parol contract. It is time enough for the defendant to plead the statute when it is alleged against him that he made a contract that comes within the purview of the statute. *Taylor v. Merrill*, 55 Ill. 52.

Complaint Showing Oral Contract. — Where the complaint shows upon its face that the alleged contract is not in writing and no facts are stated to take the contract out of the statute, the defense must be by demurrer and a general denial is not sufficient. *Livesey v. Livesey*, 30 Ind. 398.

Where Answer Admits Agreement. — Where an answer to a bill for the

specific performance of a parol agreement admits the agreement and does not plead the statute of frauds, the court will decree a performance. *Hollingshead v. McKenzie*, 8 Ga. 457; *Artz v. Grove*, 21 Md. 456; *Albert v. Winn*, 5 Md. 66; *Small v. Owings*, 1 Md. Ch. 363; *Newton v. Swazey*, 8 N. H. 9; *Walker v. Hill*, 21 N. J. Eq. 191; *Dean v. Dean*, 9 N. J. Eq. 425; *Duffy v. O'Donovan*, 46 N. Y. 223; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638. Upon the ground that the defendant has thereby renounced the statute. *Small v. Owings*, 1 Md. Ch. 363. But where the defendant, in his answer, admits agreement, but alleges that it was in parol, and claims the benefit of the statute, performance will not be decreed. *Hollingshead v. McKenzie*, 8 Ga. 457; *Van Dyne v. Vreeland*, 11 N. J. Eq. 370; *Haight v. Child*, 34 Barb. (N. Y.) 186; *Harris v. Knickerbacker*, 5 Wend. (N. Y.) 638; *Sneed v. Bradley*, 4 Sneed (Tenn.) 301.

Statute of Limitations. — The defense of the statute of limitations must be specially pleaded. *Hunt v. Hayt*, 10 Colo. 278.

Laches. — The defense of laches need not be raised by special plea. *Hagerman v. Bates*, 5 Colo. App. 391, 24 Colo. 71.

Want of Equity in Bill. — The defense that it would be inequitable to grant a specific performance need not be set up. The plaintiff must show that the specific performance would be, under the circumstance, an equitable and just remedy, and what he is required to establish the defendant may disprove without setting out in the answer the facts bearing upon the nature of the remedy which should be granted. *Miles v. Dover Furnace Iron Co.*, 125 N. Y. 294.

In *Goldberg v. Kirschstein*, (Supreme Ct. Spec. T.) 36 Misc. (N. Y.) 249, it was held that where the answer stated that the plaintiff had an adequate remedy at law, and that the defendant was financially solvent and able to respond in damages for the breach of any contract to which he was a party, and that the plaintiff could not maintain his suit in equity, the answer was not subject to demurrer for insufficiency; that unless the defendant pleaded that the plaintiff had an adequate remedy at law such objection could not be raised on trial.

Plea and Answer. — Where the facts set forth in the petition would take the case out of the statute of limitations, the statute cannot be successfully pleaded, unless the averments in the petition are denied by the accompanying answer. *Wright v. LeClaire*, 4 Greene (Iowa) 420.

Where there is a plea to a bill in equity, and an answer in support of the plea, no question can be raised by the answer which is not raised by the plea. *Andrews v. Brown*, 3 Cush. (Mass.) 130.

Where a defendant to a bill for the specific performance of a contract to convey land pleads that the contract was not in writing and was void, and the accompanying answer denies the contract set up in the bill, the answer overrules the plea. *Wildbahn v. Robidoux*, 11 Mo. 659.

Precedents. — In *Hurd v. Hotchkiss*, 72 Conn. 472, the answer was in five defenses, as follows:

First Defense.

"1. The defendant specifically denies that the plaintiff is, or at the time of the commencement of this suit was, an incorporated company with power as such to maintain this suit. 2. As to paragraph 1, it is denied that on the 6th day of September, 1886, or at any other time, *Charles B. Hotchkiss* executed and delivered the agreement Exhibit A. 3. Paragraph 3 is denied. 4. As to paragraph 5, it is denied that the plaintiff ever demanded of *Elizabeth E. Hotchkiss*, either directly or indirectly, on or about July 1st, 1897, a conveyance of said land to said corporation, in accordance with the terms of said agreement.

Second Defense.

The plaintiff has no legal or equitable interest in the subject-matter of this suit, but if there was any cause of action for the subject-matter set out in this complaint, the plaintiff has long before the commencement of this action sold and transferred the same, directly or indirectly, to the *St. Clara Lumber Company*, and has never since obtained, held or possessed any right in or over the cause set out in this complaint.

Third Defense.

By the law of the state of *New York*, where the property described in the second paragraph of this complaint is located, the defendant has an interest in said property as the wife during the

lifetime of the said *Charles B. Hotchkiss*, and as his widow since his decease, which was not, and could not be, affected by the agreement, Exhibit A, and this defendant, on the allegations of the complaint, cannot be compelled to transfer the title to said land.

Fourth Defense.

Subsequent to the 6th day of September, 1886, and before the commencement of this suit, and before the right of any other parties had intervened, the parties to said agreement, Exhibit A, mutually agreed each with the other that said agreement should not be carried out and carried into effect, and that the same should be rescinded and revoked so far as the conveyance to said corporation of the land described in this complaint was concerned, and thereupon both of said parties thereafter substituted the agreement herein referred to for, and in place of, any provisions to which it was applicable of the alleged agreement Exhibit A.

Fifth Defense.

The right of action for the cause stated in said amended complaint did not accrue within ten years next before the commencement of this action."

Upon the evidence, specific performance was refused.

In *Atchison, etc., R. Co. v. Benton*, 42 Kan. 698, the answer was as follows:

"Now comes the defendant, the *Atchison, Topeka & Santa Fe Railroad Company*, and by permission of the court hereinbefore obtained, files this its answer to the plaintiff's petition in the above-entitled suit:

1. This defendant says that on and prior to the 15th day of May, 1877, it was the owner in fee simple of the south half of the northwest quarter of section number one, in township number twenty-six south, of range number one east, in the county of *Sedgwick*, in the state of *Kansas*; that on the 15th day of May, 1877, it made and entered into a written contract with one *Martin S. Sproules*, a copy of which written contract is hereto attached, marked Exhibit A and made a part of this answer, by the terms of which contract it agreed to sell and convey to the said *Martin S. Sproules*, or his assigns, all of said premises, upon the compliance of the conditions contained in said contract; that afterward, to wit, on the 18th day of June, 1880, said *Sproules*, for a valid consideration, assigned all his right, title and interest in and to said

contract and in and to the lands therein described, to *A. Hagerty McKee*, which assignment was on said day duly acknowledged, a copy of which assignment and acknowledgment is hereto attached and made a part of this answer, and marked 'Exhibit B;' that afterward, on the 24th day of December, 1881, *A. Hagerty McKee* and *Amanda McKee*, his wife, for a valid consideration, duly transferred and assigned all their interest in and to the said contract and the lands described therein, to *Walter B. Davis*, which assignment was duly acknowledged on the 12th day of July, 1882, a copy of which assignment is hereto attached and made a part of this answer, and marked 'Exhibit C;' that afterward, to wit, on the 28th day of March, 1884, said *Walter B. Davis*, for a valid consideration, duly transferred and assigned all his interest in and to said contract and the lands therein described, to *Andrew Morris*, which assignment was duly acknowledged the 28th day of March, 1884, a copy of which assignment and acknowledgment is hereto attached, made a part of this answer, and marked 'Exhibit D;' that afterward, to wit, on the 17th day of August, 1885, said *Andrew Morris*, for a valid consideration, sold, assigned and transferred all his right, title and interest in and to said land contract and the lands therein described, to *Philip S. Doerr*, which said assignment was duly acknowledged on the 17th day of August, 1885, a copy of which assignment and acknowledgment is hereto attached and made a part of this answer, and marked 'Exhibit E.'

This defendant further says, that said *A. Hagerty McKee*, *Amanda McKee*, *Walter B. Davis* and *Andrew Morris* were each and all innocent purchasers for value of the interest assigned to them in said lands and said land contract, as hereinbefore set forth, without notice of any legal or equitable title or interest in or to the same in said plaintiff.

This defendant further says, that in accordance with the provisions of said contract and the said several assignments, upon the terms of said contract being fully complied with by said *M. S. Sproules* and the said several assigns hereinbefore mentioned, it did, on the 17th day of August, 1885, make, execute and deliver to said *Philip S. Doerr* its deed of conveyance to all its right,

Form No. 18789.¹

(2 Rev. Swift's Dig. 782.)

(Commencement as in usual form.)

The respondent, for answer to said petition, says that he admits that he did enter into said agreement in writing in said petition particularly set forth, and that the petitioner did offer to pay to the respondent the purchase-money for the same, as in said petition is alleged, and that he, the respondent, refused to execute and deliver a deed of said land, as in said petition is alleged; but he further says that, when said agreement was entered into as aforesaid, the petitioner was in possession of a certain dwelling-house belonging to the respondent, under a verbal agreement between the respondent and the petitioner, that the petitioner might occupy the same without being chargeable with rent therefor, for *three* years from the *first* day of *April*, 1899, that the petitioner, at the time of the execution of said written agreement, and as an inducement to the respondent to enter into said agreement, verbally promised the respondent that he would immediately give up said agreement regarding said dwelling-house, and yield the possession thereof to the respondent; that one principal object which the respondent had in view in entering into said written agreement was to obtain possession of said dwelling-house, but that the petitioner still continues to occupy the same, and denies the right of the petitioner to deprive him of the possession thereof until the expiration of said *three* years; that, on the *first* day of *June*, 1902, he refused to give up the possession of said dwelling-house to the respondent, though thereto requested, and that the respondent cannot by law deprive him of said possession; that the refusal of the petitioner to perform his said agreement has caused great loss and inconvenience to the respondent, and is contrary to equity and good faith; and the respondent denies all the allegations of said bill, except such as are herein expressly admitted; wherefore he says that the prayer of the petitioner ought not to be granted, and prays to be dismissed with his cost.

Richard Roe.

title and interest in and to said premises described in plaintiff's petition, as under the terms of said contract it was bound to do, and that it now has no interest in said premises. This defendant denies that it at any time had any knowledge of any interest, legal or equitable, owned or claimed by said plaintiff in the premises described in plaintiff's petition, paramount to the interest of said *Walter B. Davis* and his assigns, as hereinafter set forth, or any interest which in law or equity could or should prevent this defendant from completing and carrying out the terms of said land contract hereinbefore mentioned; and it denies having at any time received from said plaintiff any moneys as part payment for said lands.

2. For a second and further defense, this defendant says that there is a defect of parties defendant in said suit, and that *Amanda McKee, Walter B. Davis, Andrew Morris and Philip S. Doerr* are necessary parties to a final and complete determination of the same, for the reasons set forth in the first count of this answer, which by reference is hereby made a part of this second count of this answer. Wherefore, this defendant demands judgment for costs."

A judgment in favor of plaintiffs was reversed because all parties necessary were not joined in the petition.

1. See, generally, *supra*, note 1, p. 384.

2. Denying Delivery of Possession.

Form No. 18790.¹

(Commencing as in Form No. 18791, and continuing down to *.)

That the plaintiff did not give possession of the said premises to the defendant.

(Signature and verification as in Form No. 11431.)

3. Denying Payment or Tender.

Form No. 18791.¹

(Title of court and cause as in Form No. 11431.)

The defendant, *Richard Roe*, for answer to the complaint of the defendant in the above entitled action, says: *

That the plaintiff did not pay (or tender) to the defendant any part of (or said second instalment of) the said purchase money agreed.

(Signature and verification as in Form No. 11431.)

4. Denying Part Performance.

Form No. 18792.¹

(Commencing as in Form No. 18791, and continuing down to *.)

That said plaintiff did not take possession of the said premises and do the said acts and make the said improvements thereon alleged, nor has he in any part performed the alleged contract.

(Signature and verification as in Form No. 11431.)

Form No. 18793.¹

(Commencing as in Form No. 18791, and continuing down to *.)

That the defendant did not put the said plaintiff into nor did he consent to the said plaintiff's taking possession of the said premises under and in part execution of the alleged sale of the said premises, but the plaintiff of his own wrong and without a license and against the consent of the said defendant entered into the said premises and occupied and improved the same.

(Signature and verification as in Form No. 11431.)

5. Denying Readiness of Plaintiff to Convey.

Form No. 18794.¹

(Commencing as in Form No. 18791, and continuing down to *.)

That the plaintiff was not ready and willing to convey the premises as alleged, but (*Here state refusal or inability according to the fact*).

(Signature and verification as in Form No. 11431.)

6. Denying Title in Plaintiff.

Form No. 18795.¹

(Commencing as in Form No. 18791, and continuing down to *.)

That the plaintiff was not and is not the owner in fee (*or otherwise*,

1. See, generally, *supra*, note 1, p. 384.

according to the complaint) of the said premises and could not nor can he make to the defendant a good and sufficient title thereto free and clear of incumbrance *(or otherwise, according to the complaint)*, but on the contrary *(setting forth incumbrance, if any)*.

(Signature and verification as in Form No. 11431.)

7. To Complaint Against a Railroad Company, for Specific Performance of an Agreement to Construct a Farm Crossing.

Form No. 18796.¹

(Conn. Prac. Act, p. 229, No. 432.)

(Commencement as in Form No. 12216.)

1. Paragraph *fourth* is denied.
2. Paragraphs *third* and *fifth* are denied, except as hereinafter expressed.
3. The defendant, immediately upon making said fill, commenced to fill and grade the necessary approaches for a farm crossing, over said embankment.
4. In order to make the grades suitable, it was necessary to commence to fill in the approaches on each side, at a point on the plaintiff's meadow, about *ten* feet outside the location of the defendant's railroad.
5. The defendant entered upon the plaintiff's land for this purpose, when the plaintiff forbade such entry, and ordered the defendant's men to leave his premises, saying he wanted his farm crossing made under the embankment, and not over it.
6. To construct a crossing under the embankment would require a stone arch or abutments, which would cost not less than \$400, while a crossing, constructed as intended by the defendant, would cost not over \$50, and would be equally serviceable and safe.
7. The defendant is and has ever been ready and willing to construct a suitable farm crossing over said embankment.

(Signature as in Form No. 12216.)

III. ORDER OF REFERENCE.²

Form No. 18797.

(Precedent in *Abbott v. L'Hommedieu*, 10 W. Va. 687.)³

*[(Title of court and cause as in Form No. 12133.)]*⁴

This cause came on this day to be heard, upon the bill, answer and exhibits, and by consent of parties, the court, without passing upon the issues presented by the pleadings, doth adjudge, order and decree, that this cause be referred to *G. M. Blume*, Esq., who is appointed a commissioner for that purpose, to take, state and report the following accounts:

1. See, generally, *supra*, note 1, p. 384.

2. For forms in proceedings relating to reference, generally, see the title REFERENCES, vol. 15, p. 913.

3. A decree was rendered confirming the report made under this order.

4. The matter to be supplied within [] will not be found in the reported case.

1st. What quantity of land the defendant agreed to convey to *Isaac H. Abbott*, by the contract set out in and filed with the bill.

2d. How much money the said *Isaac H. Abbott* agreed to and did in part pay thereon.

3d. How much of the land agreed to be conveyed to the said *Isaac H. Abbott*, by defendant, the said defendant has, since the date of such contract, conveyed to other parties, and to whom.

4th. What abatement, if any, the plaintiff is entitled to on the balance due on said contract by reason of such conveyances or sales by the defendant or others, and also by reason of the payment of taxes, by complainant, on the whole of the tract described in the bill.

5th. At what time *Isaac H. Abbott* assigned the contract in the bill mentioned to the complainant, and what was the consideration for such assignment. In taking such account the said commissioner shall give the parties to this suit at least *ten days'* notice.

IV. DECREE OR JUDGMENT.¹

1. Against Vendor.

1. Requisites of Decree or Judgment, Generally.—For the formal parts of a decree or judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

The decree should settle the whole case, leaving no grounds for a new suit for either party. *Pollock v. Wilson*, 3 Dana (Ky.) 25.

Must Bind All Parties.—The decree must be such that it will bind all parties to the agreement. The court should not direct the performance of the terms in the agreement by the one party when at the time of such order the other party is at liberty to reject the obligations of such agreement. *Richards v. Green*, 23 N. J. Eq. 536; *Pope v. Hoopes*, 84 Fed. Rep. 927.

Where the form of the decree was such as to leave it optional for the vendee to pay the balance of the purchase money or not, but still required this to be done as a condition of the relief decreed, it was held that the decree was not for that reason erroneous. *Aman v. Merritt*, 13 Conn. 478.

Conformity to Pleadings.—The decree must conform to and be supported by the pleadings. *Cameron v. Abbott*, 30 Ala. 416; *Meyer v. Mowry*, 34 Cal. 514; *Holman v. Vallejo*, 19 Cal. 498; *McDole v. Kingsley*, 163 Ill. 433; *Brown v. McCord*, 105 Ill. 459; *Price v. Blackmore*, 65 Ill. 386; *McDaniel v. Watson*, 4 Bush (Ky.) 234; *Webster v. Brown*, 67 Mich. 328; *Harper v. Lacey*, 62

Miss. 5; *Schoomaker v. Bonnie*, 119 N. Y. 565; *Boze v. Davis*, 14 Tex. 331; *Metcalf v. Hart*, 3 Wyo. 513.

Conformity to Agreement.—The decree must not be broader than the agreement which it seeks to enforce, and must not award any right to which the party is not entitled under the agreement. *Cochrane v. Justice Min. Co.*, 4 Colo. App. 234; *Louisville, etc., R. Co. v. Illinois Cent. R. Co.*, 174 Ill. 448; *Hetfield v. Willey*, 105 Ill. 286; *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271; *McDaniel v. Watson*, 4 Bush (Ky.) 234; *Cairncross v. McGram*, 37 Minn. 130; *Lounsbery v. Locander*, 25 N. J. Eq. 554; *U. S. Life Ins. Co. v. Oswego Canal Co.*, 57 Hun (N. Y.) 204.

Alternative Decree.—The decree should not direct that the defendants specifically perform or make compensation for nonperformance. *Mealey v. Finnegan*, 46 Minn. 507.

Where a bill is filed for the specific performance of a contract, the assessment of damages against the defendant cannot properly be made until it appears that the defendant is or may be unable to perform his contract, and then not without giving him an opportunity to do so. Damages in such case should be awarded in the alternative. *Eastman v. Reid*, 101 Ala. 320.

Separate Decrees.—Where the action is brought jointly by two complainants, one of whom derives his interest in the contract from his co-complainant, there should be one joint decree in favor of

the complainants, and to render two decrees, one in favor of each complainant, is error. *Eastman v. Reid*, 101 Ala. 320.

Against Heirs.—The decree may direct a conveyance by an heir in pursuance of a contract of his ancestor, although not named in the contract; but ordinarily the courts will not compel the heir to enter into personal covenants in pursuance of such agreement. *Hill v. Ressegieu*, 17 Barb. (N. Y.) 162.

Against Infant.—The proper decree against an infant defendant is that he convey the legal title to the premises when he shall arrive at the proper age to enable him to do so, and that in the meantime the vendee be permitted to receive and retain the possession of the property. *Sutphen v. Fowler*, 9 Paige (N. Y.) 280.

Description of Property.—The description of property in the decree must correspond with the description in the contract and bill. *Burger v. Potter*, 32 Ill. 66. And where the bill contains no averment of a mistake in the description or prayer for its correction the court has no power to correct a mistake in the decree. *Burger v. Potter*, 32 Ill. 66.

General Relief.—Although the bill prays for specific performance and without any request for a money decree, such decree may be granted under the general prayer. *Cushman v. Bonfield*, 139 Ill. 219; *Powell v. Young*, 45 Md. 404; *Green v. Drummond*, 31 Md. 71; *Marquat v. Marquat*, 12 N. Y. 336; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273.

Precedents.—In *Whetstone v. Ottawa University*, 13 Kan. 320, the decree, which was affirmed, was as follows:

"It is therefore ordered, adjudged, and decreed that the said *John H. Whetstone*, *W. T. Pickrell*, *Levi C. Wasson*, *George S. Holt*, *J. L. Hawkins*, and *W. W. Roller*, defendants, within ten days from the rising of this court, execute and deliver to the said *Ottawa University* a good and sufficient deed, conveying to the said *Ottawa University*, in fee simple, all and every the lots, parcels, or tracts of land in said petition, and in the exhibit thereto, mentioned and described, to-wit, (*describing the lots as in the petition and exhibit*); and in default of the execution and delivery of said deed as aforesaid by the said defendants, it is ordered that this judgment and decree shall have the effect and operation, at law and in equity, of

such conveyance, so as to vest the title to the said premises in the said plaintiff in fee simple; and it is further considered and adjudged that the said plaintiff recover of the said defendants its costs in and about this suit in this behalf expended."

In *Blair v. St. Louis, etc., R. Co.*, 92 Mo. App. 538, the decree was as follows:

"It is, therefore, considered, ordered, adjudged, and decreed by the court that defendant, its successors and assigns, be and they are hereby required to specifically execute, perform and carry into effect the said several covenants and agreements made by said *St. Louis, Keokuk & Northwestern Railway Company* with plaintiff and contained in the said deed from plaintiff to the said *St. Louis, Keokuk & Northwestern Railway Company* as aforesaid by building and erecting a water gap, passway and a water-back gate at the south end of plaintiff's said tract of land as follows, to-wit: Said passway to be erected and built in an opening existing under defendant's said railroad track at the south end of plaintiff's said tract of land, and said passway to be twenty feet wide north and south, and to extend from the west line of plaintiff's said tract of land east into the *Mississippi* river far enough to afford water for stock, grazing, pasturing and running upon plaintiff's said land adjoining the west line of said right of way, when said river shall or may be at low-water mark; the passway under said railroad from plaintiff's said land to said water gap, and said water gap to be made and kept in good condition by defendant, its successors and assigns, so that cattle and other stock can pass from plaintiff's said land on the west side of said right of way of defendant to said water gap and so that they cannot escape over or through such passway and water gap from plaintiff's said tract of land, and by building and erecting in said passway under said railroad a back-water gate so as to prevent the water from the said *Mississippi* river, when the same is rising, from backing upon or overflowing the said land of plaintiff lying along and adjoining the west line of defendant's said right of way, through and over plaintiff's said land sixty feet wide as aforesaid; and said back-water gate to be made and maintained by defendant, its successors and assigns, so as not to interfere with,

the free passage of the stock aforesaid from plaintiff's said tract of land to and from said water gap.

And it is further considered, ordered, adjudged, and decreed by the court that when the said water gap, passway and back-water gate shall have been erected and completed as aforesaid, defendant, its successors and assigns, shall and must keep and maintain the same in good order and condition; and that defendant, its successors and assigns, are hereby directed and required to keep said back-water gate open except in high waters; and that plaintiff have and recover of defendant his costs and charges herein laid out and expended and have execution therefor."

This decree was reversed on the ground that the plaintiff's right of action for specific performance was barred by the statute of limitations.

In *Matter of Everit*, 2 Edw. (N. Y.) 597, it was held that in an action for the specific performance of a contract for the sale of land, made by a decedent, and not performed at the time of his death, and the application is under the statute for his infant children to perform it, the form of the final order should be as follows:

(After fully reciting the petition and master's report) "On motion of the said Mr. C. M., Esquire, on behalf of the petitioner; and hearing Mr. C. E., guardian for the infants, and due deliberation having been thereupon had, his honor the vice-chancellor, by virtue of the power and authority of this court, doth order, adjudge and decree a specific performance of the several contracts and agreements mentioned in the said petition; also that, on the receipt of the balance of the purchase money from the said purchasers respectively by the petitioner as such administrator, the said infants, by their said guardian ad litem, execute to the said purchasers respectively good and sufficient deeds in fee simple for the premises so contracted to be sold to them respectively (the said deeds to be first approved by the vice-chancellor of the first circuit); that out of the said balance of the purchase moneys the said petitioner, in the first place, pay off, satisfy and discharge, and cause to be canceled of record, the said mortgage to the said K. L., now upon the premises; that, in the second place, he pay to his solicitor and to the said guardian ad litem their costs in

this matter to be taxed, and that he retain the remainder of the money to be by the said administrator applied in the due course of administration. And also that the said widow release her right of dower in the premises."

In *Philadelphia, etc., R. Co. v. River Front R. Co.*, 168 Pa. St. 357, the following decree was affirmed:

"And now, Oct. 20, 1894, this cause coming on to be heard upon exceptions on behalf of the defendant to the report of the master, it is ordered, adjudged and decreed:

1. That the defendant keep, observe and perform all the terms, covenants, and conditions of the agreement of May 1, 1882, and especially that it keep and observe the covenant of said agreement authorizing the plaintiff in each alternate year to take charge of the maintenance of the line of railroad described in the bill in equity in this suit.

2. That the year commencing May 1, 1895, is the alternate year within which, according to the said agreement, the plaintiff is entitled to take charge of the maintenance of the said railroad.

3. That a perpetual injunction be granted, enjoining the defendant, its officers, agents and servants, from obstructing or interfering with the plaintiff, its officers, agents and servants, from taking charge of the maintenance of the said line of railroad during the year commencing May 1, 1895, and during each alternate year thereafter, as provided in said agreement.

4. That the costs of this suit be paid by defendant."

In *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514, the decree, which was affirmed, was as follows:

"And now, October 7, 1886, the report of the master, filed May 31, 1886, is confirmed absolutely, and thereupon it is ordered, adjudged and decreed that the plaintiff, *H. Dumont Wagner*, shall deliver to the defendant, *William Wallace Goodwin*, certificate No. —, for nine shares of the capital stock of the *Goodwin Gas Stove and Meter Company of Philadelphia*, and shall further surrender to the said *Goodwin Gas Stove and Meter Company* certificate No. 30 for fifty shares of said capital stock and certificate No. 47 for twenty shares of said capital stock, and thereupon the said *Goodwin Gas Stove and Meter Company* shall permit the said *H. Du-*

Form No. 18798.¹

(Commencement as in Form No. 12045), it is ordered, adjudged and decreed that the said report be and the same hereby is in all things

mont Wagner to transfer upon the books of said company, under the power of attorney indorsed upon the said certificates Nos. 30 and 47, thirteen of the said seventy shares to himself in his own right and fifty-seven of the said seventy shares to himself as trustee; and shall issue and deliver to the said H. Dumont Wagner certificates of ownership of said shares of stock in accordance with the said two several transfers. And it is further ordered, adjudged and decreed that the said Goodwin Gas Stove and Meter Company are enjoined at all times hereafter from paying to the said William Wallace Goodwin, and the said William Wallace Goodwin is enjoined from receiving at any time hereafter from the said company, any and all dividends which shall have been or shall hereafter be declared from and after March, 1885, upon the said seventy shares of stock or any part or parcel thereof.

And it is further ordered, adjudged and decreed that the said Goodwin Gas Stove and Meter Company shall pay over all dividends which shall hereafter be declared upon the said seventy shares of stock to the legal holder or holders thereof at the time such dividends shall be declared.

And it is further ordered, adjudged and decreed that the said William Wallace Goodwin shall pay over to the said H. Dumont Wagner in cash the sum of \$316 lawful money of the United States of America, together with lawful interest thereon as follows, to-wit: upon \$48 parcel thereof from March, 1882; upon \$72 parcel thereof from March, 1883; upon \$100 parcel thereof from March, 1884; and upon the remaining \$96 parcel thereof from March, 1885."

In this case, it was held that though, as a general rule, performance of an ordinary contract for the sale of chattels will not be enforced in equity, yet where, in the contract for sale of stocks in a private corporation, the transfer is subject to a trust imposed by the contract, and the facts are such that a remedy at law for damages would be inadequate, specific performance will be decreed. This decree was affirmed.

In Sunbury, etc., R. Co. v. Cooper, 33 Pa. St. 278, the decree was follows:

"And now, to wit, on the 13th day

of December, 1858, this cause having been heard upon bill and answer, and the counsel of the parties having argued the same, and the same having been duly considered by the court, it is ordered, declared, and decreed that the Act of Assembly in the said bill mentioned, entitled 'An Act for the sale of the state canals,' approved the 21st of April, 1858, is a valid and constitutional law of the state of Pennsylvania; and that the Delaware Division Canal Company of Pennsylvania have acquired a lawful title to the canal and property to them conveyed by the Sunbury and Erie Railroad Company; and that the bonds of the said The Delaware Division Canal Company in said bill mentioned, are valid, and are secured by a lawful mortgage of the said canal, and which mortgage is the first existing lien thereupon.

And it is further declared and decreed, that the said Lewis Cooper, the defendant, do specifically perform the agreement entered into with the said complainant in the said bill mentioned, and do receive the said bonds, and do pay to the complainant therefor as thereby agreed, with interest from the time when the same ought to have been paid. And inasmuch as before the filing of the said bill ten of the said bonds therein mentioned had been by the complainant tendered to the defendant according to the terms of the said agreement, it is further decreed and declared that the said defendant, on the delivery of the said ten bonds to him, do pay to the complainant the sum of eight thousand five hundred dollars, with interest from the 25th September, 1858, until such payment be made; and that the complainant have leave to apply, from time to time, for such other order and decree in respect to the residue of the said bonds as they may be advised.

And it is further ordered, that the said defendant pay the costs of this cause."

This case was argued before the court in banc and remitted to the court of nisi prius to be there decided. The decree was made at nisi prius and no appeal was taken therefrom.

1. See, generally, *supra*, note 1, p. 391.

confirmed; and it is further ordered, adjudged and decreed that the agreement set forth in the complaint and proven in this cause be specifically performed * and that the defendant execute and deliver to the plaintiff upon his demand in writing a good and sufficient conveyance in fee, with full covenants, the form of the same to be settled and approved by one of the justices of this court (or *by the referee hereinafter named*), in case the parties differ respecting it, of the following described premises, to wit: (*describing the premises*).

And it is further ordered, adjudged and decreed that the plaintiff upon the delivery or tender of said conveyance do pay to the defendant, or his attorney, *three thousand* dollars, the (or *the residue of the*) purchase money named in the contract set forth in the complaint, with interest from the *first day of April, A. D. 1899. (If there be deduction for deficiency, say, "subject, however, to a deduction and abatement for which the plaintiff is hereby adjudged to be entitled for the deficiency in the amount of the land agreed to be conveyed. And it is further ordered that it be referred to Andrew Jackson, Esq., in the city of Albany and said county of Albany, a counsellor at law, to compute and ascertain the amount of such abatement and the amount of purchase money remaining due after such deduction of the interest thereon.")*

And it is further ordered, adjudged and decreed that if the plaintiff upon a tender of said conveyance refuse to pay the same so found due, the premises hereinbefore described to be sold by said referee (or *by the sheriff of the county of Albany*) by public auction, (*Here set out directions for sale and decree over for deficiency as in foreclosure proceedings*).

(*Or, instead of directing a sale, say, "And it is further ordered, adjudged and decreed that if the plaintiff upon a tender of said conveyance refuse to pay the sum so found due, the plaintiff be barred of his right to a specific performance of said contract and that the contract be given up to be canceled and that the defendant recover of the plaintiff his costs in this action to be taxed."*)

It is further ordered, adjudged and decreed that the plaintiff recover of the defendant *fifty* dollars, costs of this action, and that he have execution therefor.

(*Signature as in Form No. 12045.*)

2. Against Heirs of Deceased Vendor.

Form No. 18799.¹

(Precedent in *Merritt v. Farmers' F. Ins. etc., Co.*, 2 Edw. (N. Y.) 551.)

[*(Title of court and cause as in usual form.)*]²

This cause coming on to be heard on bill taken *pro confesso* against the defendants *George Tibbits, Jacob L. Lane, John T. McCoun, Elizabeth Wait Tibbits* and *Margaret McCoun Tibbits*; and on bill, answer, pleadings and proofs as regards all the other defendants; and upon hearing Mr. *Charles Edwards*, of counsel for the complainants,

1. See, generally, *supra*, note 1, p. 391. [] will not be found in the reported

2. The matter to be supplied within case.

Mr. John L. Graham, of counsel for the defendants the *Farmers' Fire Insurance and Loan Company* of the city of New York, and Mr. William H. Bulkley, of counsel for the infant defendants, and due deliberation having been had: it is ordered, adjudged and decreed, and the court doth hereby declare, that the complainants are entitled to a specific performance of the agreement of the *seventeenth* day of *March*, one thousand eight hundred and *thirty-five*, mentioned in the pleadings in this cause, and the same is decreed accordingly. And it is hereby also declared, that the legal title of the lands and premises mentioned in the said agreement, which was in *Elisha Tibbits*, now deceased, and in the bill mentioned as a trustee for the said the *Farmers' Fire Insurance and Loan Company*, did descend, at his death, and has vested in his children, the defendants *Howard Tibbits*, *Tom McCoun Tibbits*, *Elizabeth Wait Tibbits*, *Margaret McCoun Tibbits*, and *Sarah Matilda Tibbits* as his heirs at law; and the same lands and premises did not vest in his executors under the devise to them contained in his last will and testament. And it is hereby further ordered, adjudged and decreed, that the said *Howard Tibbits*, *Tom McCoun Tibbits*, *Elizabeth Wait Tibbits*, *Margaret McCoun Tibbits* and *Sarah Matilda Tibbits* execute a conveyance to the complainants, the form whereof shall be settled and approved by *Frederick De Peyster*, Esquire, one of the masters of this court, and so that the guardian ad litem for such of the said children as are infants execute such conveyance on their behalf and as their act and deed; and that the said defendants, the *Farmers' Fire Insurance and Loan Company*, execute a deed of release to the said complainants of the lands and premises aforesaid, with covenants of title and warranty, pursuant to the terms of said agreement; and that, upon the delivery of such conveyance and release to the complainants, the said complainants shall execute and deliver to the said defendants, the *Farmers' Fire Insurance and Loan Company*, a bond and mortgage in fulfilment of and pursuant to the terms of the said agreement on their part. And it is also hereby ordered, adjudged and decreed, that the said defendants, the *Farmers' Fire Insurance and Loan Company*, pay to the complainants their costs of this suit to be taxed; and also the costs of the guardian ad litem for the infant defendants to be taxed; and that the said parties respectively have execution for the same, pursuant to the course and practice of this court.

3. Against Purchaser.

Form No. 18800.¹

(Commencing as in Form No. 18798, and continuing down to *) and that the plaintiff execute and deliver to the defendant a good and sufficient conveyance in fee with full covenants, the form of the same to be settled and approved by one of the justices of this court (or by the referee hereinafter named), in case the parties differ respecting it, of the following described premises, to wit: (*describing the premises*).

And it is further ordered, adjudged and decreed that if the defend-

1. See, generally, *supra*, note 1, p. 391.

ant refuse to receive said deed the plaintiff file the same with the clerk of this court, and that upon such delivery or filing of said conveyance the defendant pay to the plaintiff, or his attorney, the sum of *two thousand* dollars, the (or *the residue of the*) purchase money named in the contract set forth in the complaint, with interest thereon from the *first* day of *April*, A. D. 1899.

And it is further ordered, adjudged and decreed that the plaintiff recover of the defendant *fifty* dollars, costs of this action, and that he have execution therefor.

(Signature as in Form No. 12045.)

Form No. 18801.¹

(Precedent in *Lyles v. Kirkpatrick*, 9 S. Car. 265.)²

[[*Title of court and cause as in Form No. 1247.*)]³

The above case was commenced in this court by the service of a summons and complaint upon the defendant to obtain the specific performance of a contract on the part of the defendant with the plaintiff to purchase from the plaintiff a certain tract of land situate in *Fairfield* County and described in the pleadings, and to enforce the payment of the money agreed to be paid for the purchase of said land. Having come to issue at the *November* Term, 1875, of the Court of *Common Pleas* for said county, it was by mutual consent referred to *H. A. Gaillard*, Esq., counselor-at-law, as referee of the whole issue, to hear and determine all questions of law and fact arising upon the pleadings. And the referee having reported in favor of the contract alleged in said complaint, and that the plaintiff had shown a good and sufficient title to the premises agreed to be sold, after having removed certain objections to the title, upon the trial before him, on the *28th* day of *November*, 1875, then for the first time raised, and recommended that the plaintiff have the relief demanded in his complaint, the said report was excepted to by the defendant, and the exceptions, after full argument before me, at chambers, were overruled.

It is therefore adjudged —

I. That the agreement set forth in the complaint and proven in this cause be specifically performed, and that the plaintiff execute and deliver to the defendant a good and sufficient conveyance in fee, after the form prescribed in the statute law of the State, with full covenants, except the covenant of warranty against the balance of the mortgage debt due by *G. M. Chapman* to the estate of *E. F. Lyles*, and the judgment recovered by *Thomas M. Lyles* against *G. M. Chapman*, both of which being liens upon said land and being provided for in the contract of the defendant herein to purchase said land.

II. And it is further adjudged that if the defendant refuse to receive said conveyance the plaintiff file the same with the Clerk of the Court, and upon such delivery or filing of said conveyance the defendant pay to the plaintiff *four hundred and fifty* dollars, the pur-

1. See, generally, *supra*, note 1, p. 397.

2. This decree was affirmed.

3. The matter to be supplied within [] will not be found in the reported case.

chase money named in the contract, set forth in the complaint, the period for the payment of the credit portion of said purchase money having expired pending the suit, together with interest thereon from the 28th day of November, 1875, the date when a good title to the premises was first shown.

III. And it is further adjudged that if the defendant, upon a tender of said conveyance, refuse to pay the sum so found to be due, the premises described in the complaint as hereinafter set forth, or so much thereof as may be sufficient to raise the amount so adjudged to be due to the plaintiff as the purchase money of said tract of land, principal and interest, as well as the taxed costs of this action, and which may be sold separately without material injury to the parties interested, to be sold at public auction before the door of the courthouse for *Fairfield County*, by or under the direction of the sheriff of said County, on some convenient sales day hereafter, after due and public notice given by the sheriff of the time and place of said sale, according to law and the practice of this court; that said premises be sold subject to the balance of the mortgage debt due by *G. M. Chapman* to the estate of *E. F. Lyles*, and to the judgment of *Thomas M. Lyles*, against *G. M. Chapman*, both of which are hereinafter mentioned; that either of the parties to this action may become a purchaser on such sale; that the said sheriff execute to the purchaser or purchasers a deed or deeds of the said premises sold; that out of the proceeds of the sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold, at the time of such sale, for taxes or assessments, he pay to the plaintiff such amount as may be adjudged to be due him for his taxable costs and disbursements in this action, and also the amount heretofore adjudged to be due plaintiff as the purchase money of said land, together with interest thereon from said 28th day of November, 1875, or so much thereof as the proceeds of the sale of said premises will pay for the same; and that he take a receipt of the plaintiff for the amount so paid and file the same with his report of sale; and that the purchaser or purchasers at said sale be let into possession of the premises upon the production of the deed by the sheriff; that the said sheriff pay the surplus money, if any, into this court, subject to the further order of this court, and that he make a report of such sale to this court with all convenient speed.

IV. And it is further adjudged that if the proceeds of such sale be insufficient to pay the amount so adjudged due to the plaintiff, with interest and costs as aforesaid, the said sheriff specify the amount of such deficiency in his report of sale; and that the defendant *George W. Kirkpatrick*, pay the same to the plaintiff, with interest from the date of such report, and the plaintiff have execution therefor.

SPENDTHRIFTS.

BY HAROLD N. ELDRIDGE.

- I. PETITION FOR APPOINTMENT OF GUARDIAN, 399.
- II. CITATION, 401.
- III. SERVICE OF CITATION, 402.
- IV. DECREE APPOINTING GUARDIAN, 402.
- V. BOND OF GUARDIAN, 403.

CROSS-REFERENCES.

For a Form of Complaint Against Selectmen for Maliciously Appointing an Overseer of an Alleged Spendthrift, see the title PUBLIC OFFICERS, vol. 15, Form No. 16765.

I. PETITION FOR APPOINTMENT OF GUARDIAN.¹

1. Statutes relating to spendthrifts exist as follows:

Arizona. — Rev. Stat. (1901), § 1984 *et seq.*

Connecticut. — Gen. Stat. (1888), § 3265 *et seq.*

Iowa. — Code (1897), § 3219 *et seq.*

Maine. — Rev. Stat. (1883), c. 67, § 4 *et seq.*

Massachusetts. — Rev. Laws (1902), c. 145, § 7 *et seq.*

Michigan. — Comp. Laws (1897), § 8712 *et seq.*

Minnesota. — Stat. (1894), § 4549.

Nebraska. — Comp. Stat. (1899), §§ 3228, 3229.

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 179, § 3 *et seq.*

Rhode Island. — Gen. Laws (1896), c. 196, § 7.

Vermont. — Stat. (1894), § 2750 *et seq.*

Wisconsin. — Stat. (1898), § 3978.

Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 16, p. 887.

Must be in Writing. — The petition must be in writing. Me. Rev. Stat. (1883), c. 67, § 4; N. H. Pub. Stat. & Sess. L. (1901), c. 179, § 4.

Facts and Circumstances must be Stated. — The facts and circumstances upon which the application is based must be stated. Iowa Code (1897), § 3220; Mass. Rev. Laws (1902), c. 145, § 7; Mich. Comp. Laws (1897), § 8712; Minn.

Stat. (1894), § 4549; Neb. Comp. Stat. (1899), § 3228; Vt. Stat. (1894), § 2752; Wis. Stat. (1898), § 3978.

In *Iowa*, the statute provides that the petition shall set forth as particularly as may be the facts upon which the application is based. Code (1897), § 3220.

Prayer. — The petition must pray for the appointment of a guardian. Mass. Rev. Laws (1902), c. 145, § 7; Mich. Comp. Laws (1897), § 8712; Minn. Stat. (1894), § 4549; Neb. Comp. Stat. (1899), § 3228; Vt. Stat. (1894), § 2752; Wis. Stat. (1898), § 3978.

Verification. — The petition must be verified. Ariz. Rev. Stat. (1901), § 1984; Minn. Stat. (1894), § 4549; Wis. Stat. (1898), § 3978.

In *Minnesota*, the petition must be verified by the affidavit of the petitioner to the effect that he believes the facts as so stated are true. Stat. (1894), § 4549.

Precedent. — In *Young v. Young*, 87 Me. 44, the following petition is set out:

"To the Honorable Judge of the Probate Court next to be held at Belfast, within and for the county of Waldo, on the second Tuesday of March, A. D. 1889.

George W. Young and Harrison Leadbetter, selectmen of the town of Lincolnville, respectfully represent, that Stephen E. Young of Lincolnville, in said county,

Form No. 18802.¹

To the Honorable the Judge of the *Probate* Court in and for the County of *Berkshire*:

Respectfully complain *Samuel Short*, *William West* and *Richard White*, selectmen of the town of *Great Barrington*, in said county, that in their judgment *John Doe*, an inhabitant or resident of said *Great Barrington*, does, by excessive drinking, gaming and idleness, so spend, waste and lessen his estate as to expose himself and family to want or suffering; and does also thereby expose said town of *Great Barrington* to charge or expense for his and their support.

Wherefore they pray that *Samuel Ireland*, or some other suitable person, may be appointed guardian of the person and estate of said *John Doe*, agreeably to the law in such case made and provided.

Dated this *tenth* day of *May*, A. D. 1902.

Samuel Short,
William West,
Richard White,

Selectmen of the Town of *Great Barrington*.

Form No. 18803.¹

State of *Minnesota*, }
County of *Ramsey*. } ss. In *Probate* Court.

To the *Probate* Court in and for said County:

The petition of *Samuel Doe*, of the county of *Ramsey* and state of *Minnesota*, respectfully shows that your petitioner is the brother of *John Doe*, hereinafter mentioned.

That *John Doe*, who is a resident of said *Ramsey* county, by excessive drinking, gaming, idleness and debauchery, so spends, wastes and lessens his estate as to be likely to expose himself and his family to want and suffering. That said *John Doe* is possessed of personal property to the value of about the sum of *one thousand* dollars, as your petitioner is informed and believes; and that said *John Doe* is seised of certain real estate situate in said county of *Ramsey*, the annual rents and profits whereof do not exceed the sum of *five hundred* dollars; and that to protect and preserve the legal

is an indolent and intemperate man, and who spends and wastes his estate so much that he exposes himself and family to want and suffering, and his said town to expense; by reason of said indolence and intemperate habits he is incompetent to manage his own estate or to protect his rights, and pray that *Benjamin F. Young* may be appointed guardian to said person.

Dated this *second* day of *February*, A. D. 1889. *George W. Young,*
Harrison Leadbetter,
Selectmen of *Lincolnville*."

The court said of this petition, "the petition of the selectmen contains all the allegations required by the stat-

ute to authorize the appointment of a guardian, to a person falling within the description of the second class, mentioned in clause two of section four. It also contains other allegations and inferences, not necessary to be alleged or proved, but which cannot vitiate the important and necessary allegation, which is properly alleged."

1. *Massachusetts*. — Rev. Laws (1902), c. 145, § 7.

See also, generally, *supra*, note 1, p. 399.

2. *Minnesota*. — Stat. (1894), § 4549.

See also, generally, *supra*, note 1, p. 399.

rights of said *John Doe* it is necessary that some proper person should be appointed guardian of his person and estate.

Your petitioner therefore prays that you will appoint *William West* guardian of the person and estate of said *John Doe*, pursuant to the statute in such case made and provided.

Dated at *St. Paul*, the *tenth* day of *May*, A. D. 1902.

Samuel Doe.

State of *Minnesota*, }
County of *Ramsey*. } ss.

Samuel Doe, the person who made the foregoing petition, being duly sworn, says that the same is true, to his own knowledge, except as to those matters stated on his information and belief, and as to those matters that he believes them to be true.

Samuel Doe.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1902.

John Marshall, Judge of Probate.

II. CITATION.¹

Form No. 18804.²

Commonwealth of *Massachusetts*.

Berkshire, ss.

Probate Court.

To *John Doe*, of *Great Barrington*, in said County.

Whereas, complaint has been made to said court by the selectmen of the town of *Great Barrington*, in said county, that in their judgment you do, by drinking, gaming and idleness, so spend, waste and lessen your estate as to expose yourself and family to want or suffering; and do thereby expose said town of *Great Barrington* to charge or expense for your and their support; and praying that *Samuel Ireland*, of *Great Barrington*, in said county, or some other suitable person, may be appointed your guardian, agreeably to the law in such case made and provided.

1. Requisites of Citation, Generally.—For the formal parts of a citation in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

Place of Hearing.—The place of the hearing of the petition must be stated. *Ariz. Rev. Stat. (1901), § 1984; Mass. Rev. Laws (1902), c. 145, § 7; Mich. Comp. Laws (1897), § 8713; Minn. Stat. (1894), § 4550; Neb. Comp. Stat. (1899), § 3229; Vt. Stat. (1894), § 2753; Wis. Stat. (1898), § 3978.*

Time of Hearing.—The time of the hearing of the petition must be stated. *Ariz. Rev. Stat. (1901), § 1984; Mass. Rev. Laws (1902), c. 145, § 7; Mich. Comp. Laws (1897), § 8713; Minn. Stat. (1894), § 4550; Neb. Comp. Stat. (1899), § 3229; Vt. Stat. (1894), § 2753; Wis. Stat. (1898), § 3978.*

Precedent.—In *Young v. Young*, 87 Me. 44, the citation was as follows:

17 E. of F. P. — 26.

"*Waldo*, ss. — On the foregoing petition, you, the said *Stephen E. Young*, are hereby cited to appear at the *Probate* Court to be held at *Belfast*, within and for said county, on the *second Tuesday of March*, A. D. 1839, at ten o'clock in the forenoon, and show cause, if any you have, why the prayer of said petitioners should not be granted.

George W. Young,
Harrison Leadbetter,
Selectmen of *Lincolnville*."

The sufficiency of this citation was not objected to.

2. Massachusetts.—*Rev. Laws (1902), c. 145, § 7.*

See also list of statutes cited *supra*, note 1, p. 399; and, generally, *supra*, note 1, this page.

You are hereby cited to appear at a *Probate Court* to be held at *Pittsfield*, in said county of *Berkshire*, on the *twenty-seventh* day of *May*, A. D. 1902, at *nine* o'clock in the *forenoon*, to show cause, if any you have, why a guardian should not be appointed as aforesaid.

And said complainants are hereby directed to cause you to be notified of the time and place appointed for the hearing of said complaint, by serving you with a copy of this order, *fourteen* days at least before said court.

Witness, *John Jones*, Esquire, judge of said court, this *tenth* day of *May*, in the year one thousand nine hundred and *two*.

Calvin Clark, Register.

III. SERVICE OF CITATION.¹

Form No. 18805.²

(Attach to Form No. 18804.)

I have served the above citation as therein ordered.

Charles Hatch, Constable of the Town
of *Great Barrington*.

Berkshire, ss. *May 11*, A. D. 1902. Personally appeared *Charles Hatch* and made oath that the above return by him subscribed is true.

Before me,

Abraham Kent, Justice of the Peace.

IV. DECREE APPOINTING GUARDIAN.³

Form No. 18806.⁴

Commonwealth of *Massachusetts*.

Berkshire, ss.

At a *Probate Court* holden at *Pittsfield*, in and for said county of

1. Requisites of Service, Generally.— For the formal parts of a service in a particular jurisdiction see the title SERVICE OF WRITS AND PAPERS, *post*.

Precedent.— In *Young v. Young*, 87 Me. 44, the service of the citation was as follows:

"*Waldo*, ss. *February 4*, A. D. 1889. I this day give in hand to the within named *Stephen E. Young* a true and attested copy of the within petition and order thereon. *Benjamin F. Young*, Deputy Sheriff."

No objection was made to the sufficiency of this service.

2. Massachusetts.— Rev. Laws (1902), c. 145, § 7.

See also list of statutes cited *supra*, note 1, p. 399; and, generally, *supra*, note 1, this page.

3. Requisites of Decree, Generally.— For the formal parts of a decree in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

Precedent.— In *Young v. Young*, 87 Me. 44, the decree was as follows:

"*State of Maine, Probate Court, Waldo County, second Tuesday of March*, A. D. 1889.

On the foregoing petition, personal notice of the time and place of hearing having been given according to law, it is decreed that *Stephen Young* is an indolent and intemperate man, who wastes and spends his estate so much that he exposes himself and family to want and suffering and said town to expense; and it is also decreed that *Benjamin F. Young*, of *Lincolnville*, in said county, be appointed guardian to said *Stephen E. Young*, and that letters of guardianship issue to him, he first giving bonds in the sum of *three hundred* dollars.

George E. Johnson, Judge."

The court said, "the decree contains all the elements required by statute as a basis for the appointment of a guardian to a person of this class."

4. Massachusetts.— Rev. Laws (1902), c. 145, § 7.

Berkshire, on the *twenty-seventh* day of *May*, in the year of our Lord one thousand nine hundred and *two*, on the complaint of the selectmen of the town of *Great Barrington*, in said county, praying for the appointment of a guardian of *John Doe*, an inhabitant or resident of said town of *Great Barrington*, as a spendthrift; said *John Doe* having been notified, according to law, to appear and show cause why such guardian should not be appointed, does not appear or object thereto (*or as the case may be, stating the facts*):

After a hearing upon the matter of said complaint, it appears to the court that said *John Doe* does, by excessive drinking, gaming and idleness, so spend, waste and lessen his estate as to expose himself and family to want and suffering; and does also thereby expose said town of *Great Barrington* to charge or expense for his and their support;

It is therefore decreed that a guardian be appointed of the person and estate of said *John Doe*, and that *Samuel Ireland*, of *Great Barrington*, in the county of *Berkshire*, be appointed such guardian, he first giving bond, with sufficient sureties, for the due performance of said trust.

John Jones, Judge of Probate Court.

V. BOND OF GUARDIAN.

Form No. 18807.¹

Know all men by these presents, that we, *Samuel Ireland*, of *Great Barrington*, in the county of *Berkshire*, as principal, and *David H. Mudgett*, of *Great Barrington*, in the county of *Berkshire*, and *James Kirby*, of *Great Barrington*, in the county of *Berkshire*, as sureties, and all within the commonwealth of *Massachusetts*, are holden and stand firmly bound and obliged unto *John Jones*, Esquire, judge of the Probate Court in and for the county of *Berkshire*, in the full and just sum of *one thousand* dollars, to be paid to said judge and his successors in said office; to the true payment whereof we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated the *tenth* day of *June*, in the year of our Lord one thousand nine hundred and *two*. The condition of this obligation is such, that if the above-bounden *Samuel Ireland*, guardian of *John Doe*, of *Great Barrington*, in said county of *Berkshire*, a spendthrift, shall —

First, make and return to said Probate Court, at such time as it may order, a true inventory of all the real and personal estate of said ward that at the time of the making of such inventory shall have come to the possession or knowledge of said guardian;

Second, manage and dispose of all such estate according to law and for the best interests of said ward, and faithfully discharge his trust in relation to such estate, and to the custody and maintenance of said ward;

1. *Massachusetts*. — Rev. Laws (1902), c. 145, § 7. See also list of statutes cited *supra*, note 1, p. 399.

STATUTE OF FRAUDS (PLEA OF).

BY HAROLD N. ELDRIDGE.

- I. AGREEMENT MADE IN CONSIDERATION OF MARRIAGE, 405.
- II. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR FROM THE MAKING THEREOF, 406.
- III. CONTRACT FOR THE SALE OF LANDS, TENEMENTS AND HEREDITAMENTS OR OF ANY INTEREST IN OR CONCERNING THEM, 407.
- IV. CONTRACT FOR THE SALE OF GOODS, WARES AND MERCHANDISE FOR THE PRICE OF FIFTY DOLLARS OR MORE, 408.
- V. PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY, 408.
- VI. PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISDOINGS OF ANOTHER, 409.
- VII. PROMISE BY EXECUTOR OR ADMINISTRATOR TO ANSWER DAMAGES OUT OF HIS OWN ESTATE, 409.
- VIII. REPRESENTATIONS CONCERNING THE CHARACTER, CONDUCT, CREDIT, ABILITY, TRADE OR DEALINGS OF SOME OTHER PERSON, 409.

I. AGREEMENT MADE IN CONSIDERATION OF MARRIAGE.¹

1. Statutes of frauds exist in the following jurisdictions, to wit:

Alabama. — Civ. Code (1896), § 2152.

Arizona. — Rev. Stat. (1901), § 2696 *et seq.*

Arkansas. — Sand. & H. Dig. (1894), § 3469 *et seq.*

California. — Civ. Code (1901), § 1624.

Colorado. — Mills' Anno. Stat. (1891), § 2025.

Connecticut. — Gen. Stat. (1888), §§ 1366, 1367.

Delaware. — Rev. Stat. (1893), p. 526, § 4 *et seq.*

Florida. — Rev. Stat. (1892), §§ 1950 *et seq.*, 1995 *et seq.*

Georgia. — 2 Code (1895), § 2693 *et seq.*

Idaho. — Civ. Code (1901), §§ 2394, 2739, 2740.

Illinois. — Starr & C. Anno. Stat. (1896), c. 59, par. I.

Indiana. — Horner's Stat. (1901), § 4904.

Iowa. — Code (1897), § 4625.

Kansas. — Gen. Stat. (1897), c. 112, § 6.

Maine. — Rev. Stat. (1882), c. 111, § 1 *et seq.*

Massachusetts. — Rev. Laws (1902), c. 74, § 1 *et seq.*; c. 173, § 27.

Michigan. — Comp. Laws (1897), § 9515 *et seq.*

Minnesota. — Stat. (1894), § 4209 *et seq.*

Mississippi. — Anno. Code (1892), § 4225 *et seq.*

Missouri. — Rev. Stat. (1899), § 3414 *et seq.*

Montana. — Civ. Code (1895), § 2184 *et seq.*

Nebraska. — Comp. Stat. (1899), §§ 3182, 3183.

Nevada. — Comp. Laws (1900), § 2694 *et seq.*

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 215, § 1 *et seq.*

New Jersey. — Gen. Stat. (1895), p. 1602, § 1 *et seq.*

New York. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3903, c. 47, § 20 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 4198 *et seq.*

Oklahoma. — Stat. (1893), §§ 821, 1404, 1608, 2920, 3556, 3759.

Oregon. — Bellinger & C. Codes & Stat. (1902), § 797.

Form No. 18808.¹

(Commencing as in Form No. 12440, and continuing down to *) that the agreement upon which this action was brought was made in consideration of marriage, and that neither the said agreement nor any note or memorandum thereof has ever been made in writing and subscribed by the said defendant, who is the party sought to be charged therewith, or by his lawful agent.

(Signature, address and verification as in Form No. 12440.)

II. AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR FROM THE MAKING THEREOF.²

Pennsylvania. — Bright. Pur. Dig. (1894), p. 941, § 1 *et seq.*

South Carolina. — Civ. Code (1902), § 2650 *et seq.*

South Dakota. — Stat. (1891), §§ 4731 *et seq.*, 4804, 4806.

Tennessee. — Code (1896), § 3142.

Texas. — Rev. Stat. (1895), art. 2543.

Utah. — Rev. Stat. (1898), §§ 1974, 1977, 2461 *et seq.*

Vermont. — Stat. (1894), § 1224 *et seq.*

Virginia. — Code (1887), § 2462 *et seq.*

Washington. — Ballinger's Ann'o. Codes & Stat. (1897), § 4575 *et seq.*

West Virginia. — Code (1899), c. 98, § 1.

Wisconsin. — Stat. (1898), §§ 2187, 2302 *et seq.*, 2321, 2327.

Wyoming. — Rev. Stat. (1887), §§ 1249, 1250.

Requisites of Answer or Plea, Generally. — For the formal parts of an answer in a particular jurisdiction see the title ANSWERS IN CODE PLEADING, vol. 1, p. 799; PLEAS, vol. 13, p. 918.

Contract Not in Writing. — That the contract sued on was not in writing must be expressly averred. *Hunt v. Johnson*, 96 Ala. 130; *Vaupell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143; *Bean v. Valle*, 2 Mo. 126.

Facts must be Stated. — The facts relied upon as a defense under the statute of frauds must be set out, and a mere allegation that the contract is barred by the statute of frauds is insufficient. *Dinkel v. Gundelfinger*, 35 Mo. 172.

Reference to Statute — Generally. — Express reference to the statute of frauds, by its title or otherwise, is not necessary: it is sufficient to set forth the facts which render its provisions applicable. *Goelz v. Cowdrey*, 1 Duer (N. Y.) 132.

Of Another State. — But it has been held that where the statute relied upon is the statute of another state it must

be referred to. *Miller v. Wilson*, 146 Ill. 523.

1. *New York.* — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3903, c. 47, § 21.

See also, generally, *supra*, note 1, p. 405.

2. **Requisites of Answer, Generally.** — See *supra*, note 1, p. 405.

Precedents. — In *Wilson v. Ray*, 13 Ind. 1, the defendant answered, among other things, as follows:

"That the said supposed agreement upon which this suit is brought was made and entered into on the 15th day of June, 1852; and that said contract between *The Indianapolis and Cincinnati Railroad Company* and said plaintiff and said *Vance*, under which the said bonds named in the complaint were to be issued and paid to said plaintiff and *Vance*, was entered into on the 31st day of January, 1852, whereby they, the said plaintiff and said *Vance*, were to complete the work embraced in their said contract, and fully comply with their part of said contract by the first of October, 1853, and that according to the terms and stipulations of the last-named contract, as well as by the terms and stipulations and recitals of the first-named agreement, the said plaintiff and the said *Vance* bound and obliged themselves to hold the said bonds, and to keep them out of the money market, and not to sell or finally dispose of them for the whole period of and until the expiration of sixteen months from the first day of April, 1852, and that the said railroad company should have the right, and could, by giving thirty days' notice to the said *Vance* and *Wilson*, receive back from them the whole or any part of said bonds, by paying in money therefor eighty-five cents on the dollar at the city of *New York*; provided, however, that such demand to redeem

Form No. 18809.¹

(Commencing as in Form No. 12440, and continuing down to*) that the agreement upon which this action was brought was not, by its terms, to be performed within one year from the making thereof, and that neither said agreement nor any note or memorandum thereof was or has ever been made in writing and subscribed by the said defendant, who is the party sought to be charged therewith, or by his lawful agent.

(Signature, address and verification as in Form No. 12440.)

III. CONTRACT FOR THE SALE OF LANDS, TENEMENTS AND HEREDITAMENTS OR OF ANY INTEREST IN OR CONCERNING THEM.²

said bonds should be made within sixteen months from the first day of April, 1852, and provided also that said Vance and Wilson should have the right, when such demand was made, to take and receive stock in said company, at par, for the full amount and face of said bonds, which bonds were to be paid to said Vance and said plaintiff by the Indianapolis and Cincinnati Railroad Company, within ten days after notice in writing from the engineer in charge of the line that the work contemplated in said contract had been fully completed; and the said plaintiff and said Vance, in and by the agreement first herein above mentioned, further agreed with the said Bates and said defendant that there should be a mutual and equal dividend between the said plaintiff, said Vance, said Bates, and said defendant, either of advance or loss on said bonds so to be received of said company under their said contract with said company, in the final disposal of said bonds, which disposal should be only made under the concurrent disposal of each of said parties. And the defendant says that the supposed agreement and promise of said defendant upon which this suit is brought was not by its terms to be performed within one year from the time of making the same, and could not be performed within one year; and the defendant avers that the said supposed agreement was not in writing signed by the defendant, nor by any person by him lawfully authorized, and so the defendant says that said agreement was and is void."

A demurrer to this paragraph on the ground that it did not contain facts sufficient to constitute a defense, and

that it appeared from the paragraph that the contract might have been performed within a year from the making thereof, was overruled.

In *Larimer v. Kelley*, 10 Kan. 298, it was held on demurrer that an answer alleging that the supposed contract set forth in the petition was not to be performed within one year from the making thereof, and was not in writing, nor evidenced by any note or memorandum signed by the defendants, or any person thereunto authorized, was sufficient, and a demurrer thereto should be overruled.

1. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3903, c. 47, § 21. See also, generally, *supra*, note 2, p. 406.

2. *Requisites of Answer, Generally*. — See *supra*, note 1, p. 405.

Another Form. — In 2 Rev. Swift's Dig. 780, is set out the following form:

"The respondent, as to so much of the said bill as seeks to compel the respondent to execute a lease in writing of the several lands and tenements in the bill mentioned, and as to any relief thereby prayed touching such lease or agreement, doth plead in bar, and for plea says that, by a certain statute law of this state, entitled An Act for the prevention of Frauds and Perjuries, it is enacted (*recite the first paragraph*), as by the said act may appear; and this respondent avers that neither he, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing for making or executing any lease to the complainant of the same premises as by the said bill is suggested, or any memorandum or note in writing of any agreement whatever for making and executing a lease of the premises to

Form No. 18810.¹*(Title of court and cause as in Form No. 9710.)*

And now comes the defendant and for answer says that the contract upon which the said action of the plaintiff was brought is a contract for the sale of lands, tenements and hereditaments and of some interest in and concerning the same, and that said contract is not in writing, and there is no memorandum or note thereof in writing, signed by the defendant or by any person thereunto by him lawfully authorized, as is made necessary by section 1 of chapter 74 of the Revised Laws of this commonwealth.

(Signature as in Form No. 9710.)

IV. CONTRACT FOR THE SALE OF GOODS, WARES AND MERCHANDISE FOR THE PRICE OF FIFTY DOLLARS OR MORE.

Form No. 18811.²*(Title of court and cause as in Form No. 9710.)*

And now comes the defendant and for answer says that the contract upon which the said action of the plaintiff was brought is a contract for the sale of goods, wares and merchandise for the price of fifty dollars or more, and that the said defendant has not accepted or received any part of the said goods, and has not given anything in earnest to bind the bargain, and has not given anything in part payment, and that there is no note or memorandum in writing of the said bargain made and signed by the defendant or by any person thereunto by him lawfully authorized, as required by section 5 of chapter 74 of the Revised Laws of this commonwealth.

(Signature as in Form No. 9710.)

V. PROMISE TO PAY A DEBT DISCHARGED IN BANKRUPTCY.

Form No. 18812.³

*(Commencing as in Form No. 12440, and continuing down to *)* that the said promise upon which this action was brought is a subsequent or a new promise to pay a debt discharged in bankruptcy, and that neither the said promise nor any note or memorandum thereof has ever been made in writing and subscribed by the said defendant or by his lawful agent.

(Signature and verification as in Form No. 12440.)

the complainant, and therefore this respondent doth plead the said statute in bar to so much of the said bill as seeks to compel this respondent to execute a lease to the complainant of the several lands and tenements in the said bill mentioned, pursuant to the said pretended agreement, and as to any relief thereby prayed touching said lease and agreement, and humbly prays the judgment of this honorable court whether he shall be compelled to make any further or other answer."

1. *Massachusetts*. — Rev. Laws (1902), c. 74, §§ 1, 2.

See also, generally, *supra*, note 2, p. 407.

2. *Massachusetts*. — Rev. Laws (1902), c. 74, § 5.

See also, generally, *supra*, note 1, p. 405.

3. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3903, c. 47, § 21. See also, generally, *supra*, note 1, p. 405.

VI. PROMISE TO ANSWER FOR THE DEBT, DEFAULT OR MISDOINGS OF ANOTHER.¹

Form No. 18813.²

(Title of court and cause as in Form No. 9710.)

And now comes the defendant and for answer says that the special promise declared upon in the declaration of the plaintiff is a special promise to answer for the debt, default and misdoings of a person other than the defendant, to wit, the said *William West*, in said declaration mentioned, and that the said promise is not in writing, and there is no memorandum or note thereof in writing signed by the defendant or by any person thereunto by him lawfully authorized, as is required by section 1 of chapter 74 of the Revised Laws of this commonwealth.

(Signature as in Form No. 9710.)

VII. PROMISE BY EXECUTOR OR ADMINISTRATOR TO ANSWER DAMAGES OUT OF HIS OWN ESTATE.

Form No. 18814.³

(Commencing as in Form No. 12440, and continuing down to *) that at the time of the special promise upon which this action is brought was made the defendant was the executor of the last will and testament of (or the administrator of the estate of) *William West*; that said promise was a special promise made by the defendant as such executor (or as such administrator) to answer damages out of defendant's own estate (or to pay the debts of the said testator or intestate) out of defendant's own estate, and that neither said special promise nor any memorandum or note thereof was or ever has been made in writing and signed by said defendant, or by any other person by him thereunto specially authorized.

(Signature, address and verification as in Form No. 12440.)

VIII. REPRESENTATIONS CONCERNING THE CHARACTER, CONDUCT, CREDIT, ABILITY, TRADE OR DEALINGS OF SOME OTHER PERSON.

1. **Requisites of Answer, Generally.** — See *supra*, note 1, p. 405.

Precedent. — In *Millikin v. Jones*, 77 Ill. 372, is set out the following plea:

"And for further plea in this behalf, the defendant says, that the plaintiff ought not to have or maintain his aforesaid action against him, the defendant, because, he says, that each and every one of the said several supposed promises, in said declaration mentioned, was a special promise to answer for the debt of another person, to-wit: one *Frank Calhoun*, and was not, nor is any memorandum or note thereof, in writing, signed by the defendant, or

any person thereunto by him lawfully authorized, according to the form of the statute, etc., and this the defendant is ready to verify, etc."

This plea was stricken from the files because it was filed at an improper time and without leave of the court or notice to plaintiff.

2. *Massachusetts.* — Rev. Laws (1902), c. 74, §§ 1, 2.

See also, generally, *supra*, note 1, this page.

3. *New York.* — Heydecker's Gen. L. & Rev. Stat. (1901), p. 5000, title 5, § 2.

See also, generally, *supra*, note 1, p. 405.

Form No. 18815.¹*(Title of court and cause as in Form No. 9710.)*

And now comes the defendant and for answer says that the said action of the plaintiff was brought to charge the defendant upon or by reason of representations and assurances made concerning the character, conduct, credit, ability, trade and dealings of a person other than the defendant, to wit, the said *William West*, in said declaration mentioned, and that said representations and assurances were oral and were not made in writing and signed by the said defendant, the party to be charged thereby, or by any person thereunto by him lawfully authorized, as required by section 4 of chapter 74 of the Revised Laws of this commonwealth.

(Signature as in Form No. 9710.)

1. *Massachusetts*.—Rev. Laws (1902), See also, generally, *supra*, note 1,
c. 74, § 4. p. 405.

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BY HAROLD N. ELDRIDGE.

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I. PLEA OR ANSWER.¹

1. At Common Law.

a. In Assumpsit.

(1) IN GENERAL.

(a) *Actio Non Accrevit Infra Sex Annos*.

1. Requisites of Plea or Answer, Generally. — For the formal parts of a plea or answer in a particular jurisdiction see the titles PLEAS, vol. 13, p. 918; ANSWERS IN CODE PLEADING, vol. 1, p. 799.

In Confession and Avoidance. — The defense of the statute of limitations is in confession and avoidance. The cause of action of the plaintiff is confessed, but the statute is interposed as a bar to recovery. *Adams v. Tucker*, 6 Colo. App. 393; *Fish v. Farwell*, 160 Ill. 236; *Bartalott v. International Bank*, 14 Ill. App. 158; *Conger v. Johnston*, 2 Den. (N. Y.) 96; *Marchant v. Valley Falls Baptist Church*, 6 R. I. 24.

A plea which avers that the said several supposed causes of action, if any such there be, or still are, did not accrue within six years is bad in that it does not confess the plaintiff's cause of action. *Conger v. Johnston*, 2 Den. (N. Y.) 96; *Marchant v. Valley Falls Baptist Church*, 6 R. I. 24. But see *Fish v. Farwell*, 160 Ill. 236, where a plea that the supposed causes of

action accrued to said plaintiffs, if at all, more than five years, etc., was held sufficient. The court said, "the words 'if at all' do not traverse the cause of action; and in a special plea that which is not traversed is admitted."

Facts must be Stated — Generally. — In the absence of statutes, the facts which constitute the bar of the statute of limitation must be averred. *Winston v. University of Alabama*, 1 Ala. 124; *Adams v. Patterson*, 35 Cal. 122; *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387; *Schroeder v. Jahns*, 27 Cal. 274; *Caulfield v. Sanders*, 17 Cal. 569; *Jenks v. Lansing Lumber Co.*, 97 Iowa 342; *Tredway v. McDonald*, 51 Iowa 663; *Harlin v. Stevenson*, 30 Iowa 371; *Wallace v. Schaub*, 81 Md. 594; *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Barnes v. McMurtry*, 29 Neb. 178; *Lassiter v. Roper*, 114 N. Car. 17; *Pope v. Andrews*, 90 Car. 401; *Walker v. Laney*, 27 S. Car. 150; *Portis v. Hill*, 3 Tex. 273; *Spanish Fork City v. Hopper*, 7 Utah 235; *Hudson v. Hudson*, 6 Munf.

(Va.) 352; *Humphrey v. Spencer*, 36 W. Va. 11; *Smith v. Dragert*, 60 Wis. 139; *Paine v. Comstock*, 57 Wis. 159; *Morgan v. Bishop*, 56 Wis. 284; *Howell v. Howell*, 15 Wis. 55; *Whitney v. Marshall*, 17 Wis. 174.

Under Statute.—Statutes have been passed in *California* and *Utah* which provide that in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section and subdivision thereof, if it is so divided, relied upon) of the Code of Civil Procedure. Cal. Code Civ. Proc. (1897), § 458; *Allen v. Allen*, 95 Cal. 184; *Luco v. De Toro*, 91 Cal. 405; *Manning v. Dallas*, 73 Cal. 420; *Biddell v. Brizzolara*, 56 Cal. 374; *Wolters v. Thomas*, (Cal. 1893) 32 Pac. Rep. 565; *Packard v. Johnson*, (Cal. 1884) 4 Pac. Rep. 632; *Utah Rev. Stat.* (1898), § 2992.

Following Statute.—A plea of limitation "need not be set out in the words of the statute; a plain statement of such facts as may be necessary to form the defense being all that is required." *Wallace v. Schaub*, 81 Md. 594.

"Barred by Statute."—An allegation that the plaintiff's cause of action is barred by the statute is insufficient, for the reason that it is not the statement of a fact, but of a conclusion of law. *Table Mountain Tunnel Co. v. Stranahan*, 31 Cal. 387; *Schroeder v. Jahns*, 27 Cal. 274; *Pope v. Andrews*, 90 N. Car. 401; *Walker v. Laney*, 27 S. Car. 150; *Spanish Fork City v. Hopper*, 7 Utah 235.

"Cause of Action."—That the cause of action did not accrue within the statutory time must, as a general rule, be alleged. *Hartson v. Hardin*, 40 Cal. 264; *Indianapolis, etc., R. Co. v. Center Tp.*, 130 Ind. 89; *McCollister v. Willey*, 52 Ind. 382; *Payne v. Smith*, 7 J. J. Marsh. (Ky.) 500; *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564; *Gemmell v. Davis*, 71 Md. 458; *Murdock v. Winter*, 1 Har. & G. (Md.) 471; *Slocumb v. Holmes*, 1 How. (Miss.) 139; *Richman v. Richman*, 8 N. J. L. 55; *Stillwell v. Hasbrouck*, 1 Hill (N. Y.) 561; *Mallory v. Lamphear*, (Supreme Ct.) 8 How. Pr. (N. Y.) 491; *Soulden v. Van Rensselaer*, 3 Wend. (N. Y.) 472; *Davis v. McMullen*, 86 Va. 256.

"Did Not Promise."—An allegation that the defendant did not promise

within the statutory time is sufficient, and is often used, where the cause of action exists contemporaneously with the promise. *Payne v. Smith*, 7 J. J. Marsh. (Ky.) 500; *Banks v. Coyle*, 2 A. K. Marsh. (Ky.) 564; *Gemmell v. Davis*, 71 Md. 458; *Murdock v. Winter*, 1 Har. & G. (Md.) 471; *Swift v. Vaughn*, 6 Hill (N. Y.) 488; *Stillwell v. Hasbrouck*, 1 Hill (N. Y.) 561; *Soulden v. Van Rensselaer*, 3 Wend. (N. Y.) 472; *Davis v. McMullen*, 86 Va. 256.

In *Davis v. McMullen*, 86 Va. 256, the court says:

"In 1st Selwyn's *Nisi Prius* (Wheaton), 142, it is said: 'There are two forms in which this statute is usually pleaded. 1st. That the defendant did not at any time within six years next before the commencement of the plaintiff's action undertake or promise, etc. 2d. That the cause of action mentioned in the declaration did not accrue at any time within six years next before the commencement of the plaintiff's action, etc.' And in respect to these two forms of pleading the statute, the learned author says: 'The second form—viz., that the cause of action did not accrue within six years, may be adopted with safety in all cases, but it is more peculiarly applicable to the cases of actions brought for breach of promise founded on collateral and executory considerations, in which cases the first form would be improper, as will appear from the following case: The declaration stated that in consideration that the plaintiff would receive A. and B. into his house as guests, and diet them, the defendant promised,' etc. Plea *non assumpsit infra sex annos*—to which the plaintiff demurred. Judgment for the plaintiff in the common pleas. On error in B. R., it was agreed by the court that the plea was ill, for this being an executory collateral promise, the plaintiff cannot plead *non assumpsit infra sex annos*, but should have pleaded *causa actionis non accrevit infra sex annos*, for if the cause of action accrued within six years, it was immaterial when the promise was made."

"Did Not Accrue."—An allegation that the cause of action "arose" more than three years before suit brought has been held equivalent, under the liberal system of pleading now in force, to an allegation that such cause of action did not "accrue" within such time. *Stubbs v. Motz*, 113 N. Car. 458.

Form No. 18816.¹

(2 Chit. Pl. (3d. Am. from 2d Lond. ed.) 498.)

(Commencing as in Form No. 15203, and continuing down to *) that the said *John Doe* ought not to have or maintain his aforesaid action thereof against him, because he says that the said several supposed causes of action in the said declaration mentioned did not nor did any or either of them accrue to the said *John Doe* at any time within six years before the exhibiting of the bill of the said *John Doe* against him, the said *Richard Roe*, in this behalf, (or, if in *Common Pleas* or by original, say, "next before the commencement of this suit,") in manner and form as the said *John Doe* hath above thereof complained against him, the said *Richard Roe*. And this (concluding as in Form No. 16213).

(b) *Non Assumpsit Infra Sex Annos.*Form No. 18817.¹

(2 Chit. Pl. (3d. Am. from 2d Lond. ed.) 497.)

(Commencing as in Form No. 15203, and continuing down to *) that the said *John Doe* ought not to have or maintain his aforesaid action thereof against him, because he says that he, the said *Richard Roe*, (or, if by an executor, say, "the said *Samuel Short*, deceased,") did not

Time Which has Elapsed.—The time which has elapsed before the commencement of the action must be alleged. *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Barnes v. McMurtry*, 29 Neb. 178; *Eno v. Diefendorf*, 102 N. Y. 720; *Frosh v. Swett*, 2 Tex. 485. And an allegation "that this suit was not brought within the time required by law, nor until after the so called lien of plaintiff had expired by lapse of time," is insufficient. *Scroggin v. National Lumber Co.*, 41 Neb. 195. But it has been held sufficient to allege the lapse of a greater number of years than the statute prescribes, since the greater time includes the less. *Boyd v. Blankman*, 29 Cal. 19; *Adams Express Co. v. King*, 3 Ill. App. 316; *Waymire v. Waymire*, 144 Ind. 329; *McCray v. Humes*, 116 Ind. 103; *Davis v. Hascall*, 4 Mo. 58; *Camp v. Smith*, 136 N. Y. 187; *Phelps v. Elliott*, 35 Fed. Rep. 455. See *contra*, however, *Smith v. Joyce*, 10 Ark. 460; *Boyd v. Barrenger*, 23 Miss. 269; *Riggs v. Quick*, 16 N. J. L. 160.

"Before Commencement of Action."—That the cause of action accrued within a certain number of years before the commencement of the plaintiff's action or suit must be alleged. *Adams v. Patterson*, 35 Cal. 122; *Indianapolis,*

etc., *R. Co. v. Center Tp.*, 130 Ind. 89; *Wallace v. Schaub*, 81 Md. 594; *Wilcox v. Kassick*, 2 Mich. 165; *Eno v. Diefendorf*, 102 N. Y. 720; *Swift v. Vaughn*, 6 Hill (N. Y.) 488; *Davis v. McMullen*, 86 Va. 256. And an allegation that such cause accrued within a certain number of years before the filing of the amended complaint or declaration is insufficient. *Indianapolis, etc.*, *R. Co. v. Center Tp.*, 130 Ind. 89; *Wilcox v. Kassick*, 2 Mich. 165.

Negating Exceptions.—It is not necessary to negative any exception which takes the case out of the operation of the statute. *McMillan v. Cheeney*, 30 Minn. 519; *Young v. Whittenhall*, 15 Kan. 579; *Zane v. Zane*, 5 Kan. 134.

Plea to Part of Declaration.—Where the plea is intended only to a part of a declaration, it must not cover the whole, but must point out the part to which it is applied. *Crain v. Yates*, 2 Har. & G. (Md.) 332; *Davidson v. Schermerhorn*, 1 Barb. (N. Y.) 480. And a plea purporting in form to answer the whole declaration, but containing matter which legally answers only a part of it, is bad. *Stilwell v. Hasbrouck*, 1 Hill (N. Y.) 561.

1. See, generally, *supra*, note 1, p. 412.

at any time within *six* years next before the exhibiting of the bill of the said *John Doe* in this behalf, (*or, if in Common Pleas or by original, say, "before the commencement of this suit,"*) undertake or promise in manner and form as the said *John Doe* hath above thereof complained against him. And this (*concluding as in Form No. 15213*).

(c) *Where the Defendant is the Personal Representative of a Person Deceased.*¹

Form No. 18818.²

(Precedent in *Snydacker v. Swan Land, etc., Co.*, 154 Ill. 221.)³

1. Requisites of Plea or Answer, Generally.— See *supra*, note 1, p. 412.

Notice of Grant of Letters.— In *Missouri*, it is held that where the administrator pleads the special statute of limitations he must aver the giving of notice of the grant of letters. *Munday v. Leeper*, 120 Mo. 417; *Wiggins v. Lovering*, 9 Mo. 262.

In *Massachusetts*, it has been held that in pleading the statute of limitations respecting suits against executors and administrators it is sufficient for the defendant to allege that he posted up notifications of his appointment in public places in the town, without specifying the places. *Burditt v. Grew*, 8 Pick. (Mass.) 108; *Sewall v. Valentine*, 6 Pick. (Mass.) 276.

Giving of Bond.— It is sufficient to allege generally that the defendant gave a bond to the judge of probate for the faithful administration of the estate of the deceased, according to the form of the law in that behalf provided, without setting out the bond. *Sewall v. Valentine*, 6 Pick. (Mass.) 276. And in *Burditt v. Grew*, 8 Pick. (Mass.) 108, it is held that it is sufficient for the plea to aver that the executors gave "bonds according to law," without saying that they were given to the judge of probate.

Precedent.— In *Sewall v. Valentine*, 6 Pick. (Mass.) 276, the plea was as follows:

"That more than *four* years next before the commencement of this suit, to wit, on the *fourth* day of *March*, 1823, at a *Probate* Court then held at *Cambridge*, etc., he was, by the judge of probate of the county of *Middlesex*, appointed administrator, etc., and then and there accepted that trust, and then and there gave bonds to the said judge, with two sufficient sureties, conditioned for his the said *Lawson's* faithful administration of the said goods and estate of the said *Samuel*, according to the form of the law in that behalf pro-

vided, all which by the records thereof in the said Court of *Probate* remaining appears; that the judge directed him to give public notice of his appointment to and acceptance of the trust by posting notifications, etc., and that afterwards and within *three* months from the time of his said appointment to and acceptance of said trust and also within *three* months from the time of making said order or direction by said judge as aforesaid, he did, in pursuance of the statute, etc., and of such direction, etc., at *Hopkinton*, etc., to wit, on the *fifteenth* day of said *March*, make known his appointment to and acceptance of said trust, and give notice thereof, as the law requires, by posting up *two* notifications in *two* public places in said *Hopkinton* in the form following, etc., and by inserting a notification in the form aforesaid, *three* weeks successively in the newspaper printed at *Boston* by *Benjamin Russell*, to wit, etc., (*specifying the newspapers published on the eighth, fifteenth and twenty-second of March*) and made return thereof on oath to the said probate office within *seven* months from said *fourth* day of *March*, to wit, on the *eighth* day of *April*, etc."

Plaintiffs demurred specially to this plea, assigning for causes of demurrer: 1. That the plea does not aver that when this suit was commenced the term of four years has elapsed from the time when the defendant gave notice of his appointment as administrator; 2. That it does not state in what public places in *Hopkinton* the two notifications were posted up; 3. That it does not set forth the form of the bond given by the defendant as administrator. The demurrer was overruled.

2. Illinois.— *Starr & C. Anno. Stat.* (1896), c. 3, par. 70, sub par. 7.

See also *supra*, note 1, this page.

3. A judgment sustaining a demurrer to this plea was overruled.

[(*Venue and title of court and cause as in Form No. 15219.*)
(*First and second pleas.*)]¹

For a further plea in this behalf the defendant says *actio non*, because he says that he was appointed as administrator of the estate of *Louis Snyder*, deceased, by the *probate* court of *Cook* county, *Illinois*, on the 26th day of *February*, 1885; that he qualified as such administrator and accepted of said trust, and within six months thereafter gave notice, in manner and form provided by law, for all persons having claims on said estate of *Louis Snyder*, deceased, to attend at the term of said *probate* court within named for the purpose of having the same adjusted; that on the second day of *April*, 1885, he duly filed an inventory and appraisement of all the estate of said *Louis Snyder*, deceased, which was duly approved by the said *probate* court; that more than two years had elapsed since the grant of said letters of administration to him as aforesaid, prior to the commencement of this suit, and that the said plaintiff has not, and did not at any time within said two years, present to said *probate* court or exhibit to this defendant its said claim against said estate, or this defendant, as administrator thereof; that the said plaintiff was not and is not under any of the disabilities named, specified and provided by statute in that behalf, and that thereby the said alleged claim of the said plaintiff in the said declaration mentioned became and was absolutely and forever barred against this defendant, as administrator, except as to the estate of the said *Louis Snyder*, deceased, which has not been and was not inventoried and accounted for by this defendant, as aforesaid; and this the defendant is ready to verify, [wherefore, (*concluding as in Form No. 15216.*)]²

(2) ON ACCOUNT.

(a) *In General.*

Form No. 18819.³

(Robinson's F. (Va.) 79, No. 31.)

(*Title of court and cause as in Form No. 15230.*)

And the said defendant, by his attorney, comes and defends the wrong and injury, when, etc., and says, that the said action is upon a store account for goods, wares and merchandise sold and delivered, and the same was not brought within two years next after the cause of the said action accrued. And this he, the said defendant, is ready to verify.

Wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him.

(*Signature as in Form No. 15230.*)

1. The matter to be supplied within [] will not be found in the reported case.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

3. *Virginia*. — Code (1887), § 2920.

See also, generally, *supra*, note 1, p. 412.

(b) *Where the Defendant is the Personal Representative of a Person Deceased.*

Form No. 18820.¹

(Robinson's F. (Va.) 79, No. 32.)

(*Title of court and cause as in Form No. 15230.*)

William West, as executor (or administrator)
of Richard Roe, deceased,
ads.
John Doe.

And the said defendant, by his attorney, comes and defends the wrong and injury, when, etc., and says, that the said action is brought against him as executor (or administrator) as aforesaid, for the recovery of a debt due upon an open account, and the items of the said account appear to have been due *five* years before the death of this defendant's testator (or intestate). And this (*concluding as in Form No. 18819*).

b. In Case.

Form No. 18821.²

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 550.)

(*Commencing as in Form No. 15203, and continuing down to **) that he, the said *Richard Roe*, is not guilty of the said supposed grievances in said declaration mentioned, or of any or either of them, at any time within *six* years before the exhibiting of the bill of the said *John Doe* against him, the said *Richard Roe*, in this behalf, (or, if in *Common Pleas* or by original, say, "next before the commencement of this suit,") in manner and form as the said *John Doe* hath above thereof complained against him, the said *Richard Roe*. And this (*concluding as in Form No. 15213*).

c. In Debt on Judgment of Another State.

(1) WHERE ACTION IS BARRED BY STATUTE OF SUCH OTHER STATE.

Form No. 18822.³

(Robinson's F. (Va.) 79, No. 35.)

(*Commencement as in Form No. 5059*) because he says, that on the *tenth* day of *May*, in the year of our Lord one thousand eight hundred and *ninety*, an act was passed by the general assembly of the said state of (*naming state*), which took effect from and after the passage thereof, and still exists and is in force in that state, whereby it was enacted and declared that all actions brought upon judgments rendered in the said state shall be commenced within *ten* years from

1. *Virginia*. — Code (1887), § 2920.
See also, generally, *supra*, note 1,
p. 412.

2. See, generally, *supra*, note 1, p. 412.

17 E. of F. P. — 27.

3. *Virginia*. — Code (1887), § 2928.
See also, generally, *supra*, note 1,
p. 412.

the date of the last execution which may have issued upon the judgment, and if no execution shall have issued upon the judgment, then within *ten* years next after the date of such judgment, and not after; and upon the judgment on which this action is founded, no execution was ever issued, and the said action was not commenced within *ten* years next after the date of the said judgment; and by the laws of the said state of (*naming state*) the act aforesaid, limiting the recovery on judgments rendered therein, might and could have been pleaded, had this action been brought in any court thereof, and a recovery in this action would have been barred, had the same been instituted in any of the courts of that state. And this (*concluding as in Form No. 18819*).

(2) WHERE THE DEFENDANT HAS RESIDED IN THE STATE IN WHICH ACTION WAS BROUGHT FOR MORE THAN TEN YEARS.

Form No. 18823.¹

(Robinson's F. (Va.) 80, No. 36.)

(*Commencement as in Form No. 5059*) because he says, that upon the judgment on which this action is brought, no execution hath ever issued, and this action was not brought within *ten* years next after the date of the said judgment, and he, the said defendant, has been actually and bona fide resident within this commonwealth for *ten* years after the said judgment was rendered, and before the commencement of this action. And this (*concluding as in Form No. 18819*).

d. In Dower.

Form No. 18824.²

(Precedent in *Berrien v. Conover*, 16 N. J. L. 107.)³

[(*Title of court and cause as in Form No. 15225.*)

(*First plea.*)]⁴

And for further plea in this behalf, the said *Elias Conover*, by leave of the court, here for this purpose first had and obtained, according to the form of the statute in such case made and provided, says, that the said *Mary Berrien* ought not to have or maintain her aforesaid action thereof against him, because he says, that the right and title of the said *Mary Berrien*, if any, to the said dwelling-house, barn, cow-house, stable, garden, orchard, *forty* acres of arable land, *forty* acres of pasture land, *forty* acres of meadow land, *forty* acres of woodland, with the appurtenances, and her cause of action, if any, did not accrue within *twenty* years next before the commencement and institution of this action against him, the said *Elias Conover*, in this behalf, in manner and form as the said *Mary Berrien* has counted against

1. *Virginia*. — Code (1887), § 2928.

See also, generally, *supra*, note 1, p. 412.

2. *New Jersey*. — Gen. Stat. (1895), p. 1977, § 24.

See also, generally, *supra*, note 1, p. 412.

3. This is the second plea in the case. The plea was, on demurrer, held good.

4. The matter to be supplied within [] will not be found in the reported case.

him, and this he is ready to verify, wherefore he prays judgment if the said *Mary Berrien* ought to have or maintain her aforesaid action thereof against him.

[*Jeremiah Mason*,
Attorney for Defendant.]¹

e. In Scire Facias to Revive a Judgment.

(1) IN GENERAL.

(a) Where Execution had not Issued.

Form No. 18825.²

(Robinson's F. (Va.) 266, No. 49.)

(*Title of court and cause as in Form No. 15230.*)

And the said defendant, by his attorney, comes and defends the wrong and injury, when, etc., and says that the judgment in the said writ mentioned ought not to be revived, because he says that execution hath not issued upon the said judgment, and the said writ of scire facias was not issued within *ten* years next after the date of the said judgment, but after more than *ten* years had expired. And this he is ready to verify. Wherefore he prays judgment, if the said judgment ought to be revived, and execution awarded the plaintiff thereupon.

(*Signature as in Form No. 15230.*)

(b) Where Execution had Issued, but No Return was Made.

Form No. 18826.³

(Robinson's F. (Va.) 266, No. 50.)

(*Commencement as in Form No. 18825*) and says that the plaintiff ought not now to have execution of the judgment in the said writ of scire facias mentioned, because he says that since the said judgment was rendered, to wit, on the *29th* day of *June*, 1821, execution hath issued upon the said judgment, and no return is made thereon, and the term of *ten* years from the date of the said judgment had expired before the day on which the said writ of scire facias issued, and more than *ten* years had also elapsed between the return day of the execution so issued as aforesaid and the day on which the said writ of scire facias issued; and between the day on which the said judgment was rendered and the day on which the said writ of scire facias issued, no execution has been obtained upon the said judgment, other than that before mentioned, nor has there been any motion against any sheriff or other officer, or his or their security or securities, for not returning the said execution which so issued as afore-

1. The matter enclosed by [] will not be found in the reported case.

2. *Virginia*. — Code (1887), §§ 3577, 3578.

See also, generally, *supra*, note 1, p. 412.

said. And this he, the said defendant, is ready to verify. Wherefore he prays judgment if the said plaintiff ought now to have execution awarded thereupon.

(Signature as in Form No. 15230.)

(2) WHERE THE DEFENDANT IS THE PERSONAL REPRESENTATIVE OF A PERSON DECEASED.

Form No. 18827.¹

(Robinson's F. (Va.) 267, No. 53.)

(Title of court as in Form No. 15230.)

William West, as executor (or administrator) of }
 Richard Roe, deceased, }
 ads. }
 John Doe.

And the said defendant, by his attorney, comes and defends the wrong and injury, when, etc., and says that the said writ of scire facias ought not to be maintained against him as executor (or administrator) as aforesaid, to revive the said judgment, because he says that the said scire facias was issued against him as executor (or administrator) as aforesaid, to revive the said judgment after the expiration of five years from the qualification of him, the said defendant, as executor (or administrator) as aforesaid. And this he is ready to verify. Wherefore he prays judgment if the said plaintiff ought to maintain his aforesaid scire facias against him, to revive the said judgment.

(Signature as in Form No. 15230.)

f. In Trespass.

Form No. 18828.¹

(2 Chit. Pl. (3d Am. from 2d. Lond. ed.) 572.)

(Title of court and cause as in Form No. 15203.)

(First plea, general issue.)

And for a further plea in this behalf as to the said supposed trespasses in the said declaration mentioned, the said *Richard Roe*, by leave of the court here for this purpose first had and obtained, according to the form of the statute in that case made and provided, saith that the said *John Doe* ought not to have or maintain his aforesaid action thereof against him, because he saith that the said *Richard Roe* was not guilty of the said several supposed trespasses in the said declaration mentioned, or of any or either of them, or of any part thereof, in manner and form as the said *John Doe* hath above thereof complained against him, at any time within six (or, in an action of trespass to the person, "four") years, next before the exhibiting of the bill of the said *John Doe* against the said *Richard Roe* in

1. Virginia. — Code (1887), §§ 3577, 3578.

2. See, generally, *supra*, note 1, p. 412.

See also, generally, *supra*, note 1, p. 412.

this behalf (*or, if in Common Pleas or by original, "next before the commencement of this suit"*). And this (*concluding as in Form No. 15213*).

2. Under the Codes and Practice Acts.

a. In General.

(1) WHERE THE FACTS ARE SET OUT.

Form No. 18829.¹

(Ala. Civ. Code (1896), § 3353.)

(*Venue and title of court and cause as in Form No. 15215.*)

The defendant, for answer to the complaint, saith that the note (*contract, or as the case may be*) is barred by the statute of limitations of (*stating number of*) years.

(*Signature and verification as in Form No. 15215.*)

Form No. 18830.¹

(Sand. & H. Dig. Ark. (1894), p. 1639.)

(*Title of court and cause as in Form No. 1402.*)

The defendant, *John Doe*, answering, says that the cause of action mentioned in the plaintiff's complaint did not accrue within *three* years next before the commencement of this action.

Oliver Ellsworth, Attorney for Defendant.

(*Verification.*)

Form No. 18831.¹

(Conn. Prac. Act, p. 219, No. 408.)

(*Title of court and cause as in Form No. 1367.*)

The right of action for the cause stated in said complaint (*or for the cause stated in the second count of the complaint*) did not accrue within (*six*) years next before the commencement of this action.

Richard Roe,

by *Oliver Ellsworth*, Attorney.

Form No. 18832.¹

(Fla. Rev. Stat. (1892), § 1075, No. 4.)

(*Commencement as in Form No. 15218*) that the alleged cause of action did not accrue within (*stating the number of*) years before this suit.

(*Signature and verification as in Form No. 15218.*)

Form No. 18833.¹

(1 Mo. Rev. Stat. (1899), p. viii, No. 38.)

(*Title of court and cause as in Form No. 5921.*)

The defendant, answering, says that the cause of action mentioned in the plaintiff's petition did not accrue within (*stating number of*) years before the commencement of this action.

Oliver Ellsworth, Attorney for Plaintiff.

1. See, generally, *supra*, note 1, p. 412.

Form No. 18834.¹

(Tenn. Code (1896), § 4661, No. 5.)

(Title of court and cause as in Form No. 15228.)

The defendant for plea says that the plaintiff's action accrued more than *(stating number of)* years before suit brought.

*(Signature and verification as in Form No. 15228.)***(2) WHERE THE STATUTE IS REFERRED TO MERELY.****Form No. 18835.²***(Title of court and cause as in Form No. 8088.)*

The defendant, answering to the complaint of the plaintiff herein, says:

That the cause of action of the said plaintiff is barred by the provisions of section 337 of the Code of Civil Procedure of the State of California.

*(Signature and verification as in Form No. 8088.)***b. Where the Defendant is a Corporation Created in Another State and the Statute of That State is Relied Upon.³****Form No. 18836.¹***(Commencing as in Form No. 12440, and continuing down to *.)*

1. That section *(stating section)* of the Revised Statutes of the state of *(naming state)* provides that *(Here set out the statute or the substance of it)*.

2. That the cause of action mentioned in the complaint did not accrue within *(stating number of)* years next before the commencement of this action.

*(Signature, address and verification as in Form No. 12440.)***c. Where the Defendant is the Personal Representative of a Deceased Person and He is Sued on a Claim Against the Estate which He has Rejected.****Form No. 18837.⁴***(Title of court as in Form No. 12440.)*

John Doe, plaintiff,
against

William West as executor (or administrator) of the last will and testament (or of the estate) of Richard Roe, deceased, defendant. } Answer.

1. See, generally, *supra*, note 1, p. 412.

2. *California*. — Code Civ. Proc. (1897), § 458.

See also, generally, *supra*, note 1, p. 412.

This is substantially the form of answer set out in *Shasta Bank v. Boyd*, 99 Cal. 604.

3. **Foreign Statute.** — The statute of

another state, or the substance of it, must be set forth, or it must be referred to either by the date of its enactment or in some other manner. *Robeson v. Central R. Co.*, 76 Hun (N. Y.) 444.

4. *New York*. — Code Civ. Proc., § 1822.

See also, generally, *supra*, note 1, p. 412.

William West, the above named defendant, for his answer to the complaint of *John Doe*, the above named plaintiff, says:

1. That the plaintiff's cause of action stated in his complaint is an alleged claim against the estate of the above named *Richard Roe*, deceased, and that this claim was exhibited to the defendant as executor (or *administrator*) as aforesaid, on or about the (*Here state the time of the presentation of the claim*).

2. That the defendant, at the time the said claim was exhibited to him as aforesaid, to wit, on (*stating time*), disputed and rejected the same.

3. That since the rejection of the said claim the parties plaintiff and defendant have never filed with the surrogate of said county of *Suffolk* any written consent that said claim might be heard and determined by the said surrogate upon the judicial settlement of the accounts of the said defendant as executor (or *administrator*) as aforesaid, as provided by section twenty-seven hundred and forty-three of the Code of Civil Procedure.

4. That this action was not commenced against the defendant as executor (or *administrator*) as aforesaid within *six* months after the dispute and rejection of the said claim.

(*Signature, address and verification as in Form No. 12440.*)

d. Where the Existence of the Cause of Action Depends Upon the Actual Knowledge of the Plaintiff as to the Facts.

Form No. 18838.¹

(*Commencing as in Form No. 12440, and continuing down to *.*)

1. That the plaintiff had actual knowledge of each and every one of the facts stated in the complaint on (*Here state the time of such knowledge*).

2. That this action was not commenced within (*stating number of*) years from the time when the plaintiff had actual knowledge of such facts as aforesaid.

(*Signature and verification as in Form No. 12440.*)

e. Where the Existence of the Cause of Action Depends Upon a Demand Made.

Form No. 18839.¹

(Precedent in *Jex v. New York*, 111 N. Y. 340.)²

(*Commencement as in Form No. 12440.*)

(*First to sixth paragraphs.*)³

Seventh. Further answering, and, as a further and separate defense, the defendants allege that the cause of action contained in said complaint accrued more than *six* years before the commencement of this action, and that the right to make the demand neces-

1. *New York*.—Code Civ. Proc., § 410. of the answer. A judgment sustaining a demurrer to this paragraph was reversed.

See also, generally, *supra*, note 1,

p. 412.

2. This was the seventh paragraph

3. The matter to be supplied within [] will not be found in the reported case.

sary to maintain said cause of action was complete more than six years before the commencement of this action.

[(Signature and address as in Form No. 12440.)]¹

II. REPLICATION OR REPLY.²

1. In General.

a. In Confession and Avoidance.

(1) WHERE ACTION WAS BROUGHT WITHIN ONE YEAR AFTER JUDGMENT OF NONSUIT AGAINST THE PLAINTIFF.

Form No. 18840.³

(Precedent in *Boyce v. Snow*, 187 Ill. 181.)⁴

[(*Venue and title of court and cause as in Form No. 17820.*)
(*Replication to first plea.*)]¹

And the plaintiff, as to the plea of the defendant by him secondly above pleaded, says that he, the plaintiff, by reason of anything in that plea alleged, ought not to be barred from having his aforesaid action, because, he says, that the causes of action in his said declara-

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Replication or Reply, Generally.** — For the formal parts of a replication or reply in a particular jurisdiction see the title REPLICATIONS AND REPLIES, vol. 16, p. 344.

Must Apprise Defendant of Issue. — The reply must apprise the defendant of the issue to be made upon the defense, whether it is to be one of denial or avoidance. *Jarvis v. Pike*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 398.

Must be Definite and Explicit. — The reply must be definite and explicit. *Jarvis v. Pike*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 398.

Must Tender Material Issue. — The issue tendered by the replication must be material. *Watson v. Brazeal*, 7 Ala. 451.

Must be Responsive. — The replication or reply must be responsive to the plea or answer. *State Bank v. Sherrill*, 12 Ark. 183; *Bottles v. Miller*, 112 Ind. 584.

Must Not be a Departure. — The replication must not be a departure from the declaration. *McConnel v. Kibbe*, 29 Ill. 483; *Gailer v. Grinnel*, 2 Aik. (Vt.) 349.

Must Not be Argumentative. — The reply must not be argumentative. *Niblack v. Goodman*, 67 Ind. 174.

Duplicity or Multifariousness. — The

replication must be free from duplicity or multifariousness. *Nelson v. Lounsbury*, 3 Barb. (N. Y.) 125.

Denying on Information and Belief. — A denial upon information and belief is defective in form. The denial must be upon knowledge and information sufficient to form a belief. *Jarvis v. Pike*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 398.

Negating Exceptions. — The plaintiff need not in his replication negative any exception in a statute which he relies on to avoid the defense set out in the plea. *Newborg v. Freehling*, 43 Ill. App. 463.

Insufficient Reply. — A reply merely denying the allegation of the answer that the action was not brought within six years, etc., is insufficient. *Jarvis v. Pike*, (C. Pl. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 398.

3. *Illinois.* — Starr & C. Anno. Stat. (1896), c. 83, par. 25.

See also, generally, *supra*, note 2, this page.

4. The defendant demurred to this replication and the legal question presented was whether the nonsuit mentioned in the replication was voluntary on the part of the plaintiff or involuntary: if the former, the replication was bad; if the latter, it was good. It was held that the nonsuit was involuntary on the part of the plaintiff and the demurrer was overruled.

tion set up for which he brought suit, accrued to the plaintiff on the 28th of November, 1894, and the plaintiff says that within two years thereafter, to wit, on the 9th day of March, in the year 1896, he, the plaintiff, began suit against the defendant in this suit, and the said suit so begun was general No. 172968, in the superior court of Cook county, Illinois, and the said suit No. 172968 was brought for the same causes of action for which this suit is brought; and the plaintiff says that thereafter, to-wit, on the 8th day of December, A. D. 1897, a judgment of nonsuit was rendered by the said superior court against him, the plaintiff, in the said suit No. 172968, in the words and figures following: (*Here was set out the judgment of nonsuit*).

And the plaintiff says that he was in the said suit No. 172968 thereby nonsuited, and within one year thereafter, to-wit, on the 18th day of January, 1898, he, the plaintiff, began his above entitled suit against this defendant, and the plaintiff says that this his said suit as above entitled is brought for the same causes of action as said suit No. 172968, wherein the said plaintiff was nonsuited, as aforesaid; and this the plaintiff is ready to verify by the record in said suit No. 172968, wherefore he prays judgment and his damages, etc., to be adjudged to him, etc.

[(*Signature as in Form No. 17820.*)]¹

(2) WHERE THE EXISTENCE OF THE CAUSE OF ACTION WAS
CONCEALED FROM THE PLAINTIFF.

Form No. 18841.²

(*Title of court and cause as in Form No. 17874.*)

The plaintiff, for reply to defendant's answer, says that the defendant concealed the fact of the existence of the cause of action stated in the complaint from the knowledge of the plaintiff by (*Here state specifically how the fact was concealed*). That the existence of said cause of action would have been known to the plaintiff at the time it accrued except for such concealment, but that in consequence thereof it was not discovered until within (*stating number of*) years before the commencement of this action.

(*Signature and verification as in Form No. 17874.*)

(3) WHERE A NEW PROMISE TO PAY WAS MADE.

Form No. 18842.³

(*Title of court and cause as in Form No. 17874.*)

The plaintiff, for reply to defendant's answer, says that the defendant, within (*stating number of*) years before the commencement of this action, made a certain writing, a copy of which is hereto annexed and marked "Exhibit A," and made a part of this answer, in which

1. The matter to be supplied within [] will not be found in the reported case.

2. *Indiana*. — Horner's Stat. (1901), § 300.

See also, generally, *supra*, note 2, p. 424.

3. *Indiana*. — Horner's Stat. (1901), § 301.

See also, generally, *supra*, note 2, p. 424.

he acknowledged the existence of the promissory note sued on in this action and his liability thereon and promised to pay the same.

(Signature and verification as in Form No. 17874.)

(4) WHERE ONE OF THE PARTIES TO THE ACTION WAS ABROAD.

(a) Plaintiff.

Form No. 18843.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 655.)

(Commencing as in Form No. 17803, and continuing down to *) because he saith that he, the said *John Doe*, at the time when the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to him, the said *John Doe* was in parts beyond the seas, to wit, at (*stating place*), and that he, the said *John Doe*, afterwards, to wit, on (*stating time*), returned from the said parts beyond the seas into this kingdom, and which said return of the said *John Doe* was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said causes of action, and every of them, to the said *John Doe*, and that the said *John Doe* exhibited his said bill against the said *Richard Roe* within six years next after his, the said *John Doe's*, first return into this kingdom from beyond the seas, after the accruing of the said several causes of action aforesaid, or any of them, unto the said *John Doe*. And this (*concluding as in Form No. 17809*).

(b) Defendant.

Form No. 18844.¹

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 656.)

(Commencing as in Form No. 17803, and continuing down to *) because he saith that the said *Richard Roe*, before and at the time when the said several causes of action in the said declaration mentioned accrued to the said *John Doe*, was in parts beyond the seas, to wit, at (*stating place*), and that he, the said *Richard Roe*, afterwards, to wit, on (*stating time*), returned from the said parts beyond the seas into this kingdom; which said return of the said *Richard Roe* was his first return into this kingdom from the said parts beyond the seas, after the accruing of the said several causes of action, to wit, at (*stating place*) aforesaid. And the said *John Doe* further saith, that the said *John Doe* exhibited his bill in this cause, and brought his said action thereupon against the said *Richard Roe*, within six years after the said *Richard Roe's* first return into this kingdom, after the accruing of the said several causes of action, to wit, at (*stating place*) aforesaid. And this (*concluding as in Form No. 17809*).

(5) WHERE THE PLAINTIFF WAS UNDER THE LEGAL DISABILITY OF INFANCY.

1. See, generally, *supra*, note 2, p. 424.

Form No. 18845.¹

(*Venue and title of court and cause as in Form No. 17874.*)

The plaintiff, for reply to the answer of the defendant, says:

That when the cause of action stated in the complaint accrued the plaintiff was an infant under the age of *twenty-one* years. And the plaintiff further says that this action was commenced within *two* years after the said disability of infancy was removed.

(*Signature and verification as in Form No. 17874.*)

b. Traversing, Plea of.

(1) ACTIO NON ACCREVIT INFRA SEX ANNOS.

Form No. 18846.²

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 654.)

(*Commencing as in Form No. 17803, and continuing down to **) because he saith that the said several causes of action in the said declaration mentioned, and each and every of them, did accrue to him, the said *John Doe*, within *six* years before the exhibiting of the said bill of him, the said *John Doe*, (or "*next before the commencement of this suit*," following the language of the plea) in manner and form as he, the said *John Doe*, hath above complained against the said *Richard Roe*, to wit, at (*stating place*) aforesaid, and this he, the said *John Doe*, prays may be inquired of by the country, etc.

(2) NON ASSUMPSIT INFRA SEX ANNOS.

Form No. 18847.³

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 654.)

(*Commencing as in Form No. 17803, and continuing down to **) because he saith that the said *Richard Roe* did, within *six* years next before the exhibiting of the bill of him, the said *John Doe*, in this behalf, undertake and promise in manner and form as he, the said *John Doe*, hath above thereof complained against him, to wit, at (*stating place*) aforesaid, and this he, the said *John Doe*, prays may be inquired of by the country, etc.

2. To Plea of Set-off that the Cause of Action There Set Up Did Not Accrue Within Six Years.

Form No. 18848.³

(2 Chit. Pl. (3d Am. from 2d Lond. ed.) 653.)

(*Commencing as in Form No. 17803, and continuing down to **) because he saith that the said several supposed debts or causes of set-off in the said last plea mentioned did not, nor did any or either of them, arise or accrue to the said *Richard Roe* at any time within *six* years next before the exhibiting of the bill of him, the said *John Doe*, in this suit (or *the suing out of the original writ aforesaid*), in manner and form as the said *Richard Roe* hath above in his said last plea in that behalf alleged. And this (*concluding as in Form No. 17809*).

1. *Indiana*. — Horner's Stat. (1901), § 296. 2. See, generally, *supra*, note 2, p. 424.

See also, generally, *supra*, note 2, p. 424.

STATUTORY OFFENSES.

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I. SCOPE OF THIS ARTICLE.

The scope of this article is limited to those offenses defined by the statute which it has been impossible to treat under specific titles throughout this work.

II. INDICTMENT, INFORMATION OR CRIMINAL COMPLAINT.¹

1. Requisites of Indictment, Information or Criminal Complaint, Generally.—For the formal parts of an indictment, information or criminal complaint see the titles *INDICTMENTS*, vol. 9, p. 615; *INFORMATIONS IN CRIMINAL CASES*, vol. 9, p. 768; *CRIMINAL COMPLAINTS*, vol. 5, p. 930.

The indictment must set forth all the ingredients of the crime as defined by the statute. *Byran v. State*, 45 Ala. 86; *Skains v. State*, 21 Ala. 218; *Pettibone v. State*, 19 Ala. 586; *Eubanks v. State*, 17 Ala. 181; *Johnson v. People*, 113 Ill. 99; *Hunter v. People*, 52 Ill. App. 367; *State v. Collins*, 48 Me. 217; *Territory v. Carland*, 6 Mont. 14; *Territory v. Burns*, 6 Mont. 72; *Tenorio v. Territory*, 1 N. Mex. 279; *People v. Dumar*, 106 N. Y. 502.

In charging a statutory offense, the language must be as specific as the statute, and need not be more specific unless the statute is deficient in describing the offense. *Blair v. State*, 32 Tex. 474; *Banks v. State*, 28 Tex. 644; *Gray v. State*, 7 Tex. App. 10.

The indictment must not only be framed upon the statute, but must show upon its face a violation of the statute. *Hunter v. People*, 52 Ill. App. 367; *Johnson v. People*, 113 Ill. 99.

Where the offense charged is unknown to the common law, the circumstances and the intent mentioned in the statute must be stated. *Leschi v. Territory*, 1 Wash. Ter. 13.

In the Language of the Statute, Generally.—Where the statute states the elements of the offense, it is, as a general rule, sufficient to charge the offense in the language of the statute. *Smith v. State*, 63 Ala. 55; *Mason v. State*, 42 Ala. 543; *Johnson v. State*, 32 Ala. 583; *Lodano v. State*, 25 Ala. 64; *Smith v. State*, 22 Ala. 54; *Clark v. State*, 19 Ala. 552; *Bush v. State*, 18 Ala. 415; *Beasley v. State*, 18 Ala. 535; *Batre v. v. State*, 18 Ala. 119; *Eubanks v. State*, 17 Ala. 181; *State v. Mahan*, 2 Ala. 340; *State v. Click*, 2 Ala. 26; *State v. Duncan*, 9 Port. (Ala.) 260; *State v. Briley*, 8 Port. (Ala.) 472; *State v. Sted-*

man, 7 Port. (Ala.) 495; *State v. Raiford*, 7 Port. (Ala.) 101; *State v. Plunket*, 2 Stew. (Ala.) 11; *Bodenhamer v. State*, 60 Ark. 10; *Putman v. State*, 49 Ark. 449; *Moose v. State*, 49 Ark. 499; *Fortenbury v. State*, 47 Ark. 188; *Scales v. State*, 47 Ark. 476; *Farmer v. State*, 45 Ark. 95; *Glass v. State*, 45 Ark. 173; *State v. Pierson*, 44 Ark. 265; *State v. Tidwell*, 43 Ark. 71; *State v. Snyder*, 41 Ark. 226; *State v. Hutson*, 40 Ark. 361; *State v. Witt*, 39 Ark. 216; *State v. Graham*, 38 Ark. 519; *State v. Moser*, 33 Ark. 140; *Portis v. State*, 27 Ark. 360; *State v. Hazle*, 20 Ark. 156; *Lemon v. State*, 19 Ark. 171; *State v. Collins*, 19 Ark. 587; *Medlock v. State*, 18 Ark. 363; *Oliver v. State*, 17 Ark. 508; *State v. Minyard*, 12 Ark. 156; *Anderson v. State*, 5 Ark. 444; *People v. Gordon*, 133 Cal. 328; *People v. Knowlton*, 122 Cal. 357; *People v. De La Cour Soto*, 63 Cal. 165; *People v. Lewis*, 61 Cal. 366; *People v. Burke*, 34 Cal. 661; *People v. Martin*, 32 Cal. 91; *People v. Cronin*, 34 Cal. 191; *People v. White*, 34 Cal. 183; *People v. Maguire*, 26 Cal. 635; *People v. Murray*, 10 Cal. 309; *People v. Dolan*, 9 Cal. 576; *People v. Parsons*, 6 Cal. 487; *People v. Thompson*, 4 Cal. 238; *Cohen v. People*, 7 Colo. 274; *Dougherty v. People*, 1 Colo. 514; *Garvey's Case*, 7 Colo. 384; *Packer v. People*, 8 Colo. 361; *State v. Cady*, 47 Conn. 44; *State v. Bierce*, 27 Conn. 319; *Whiting v. State*, 14 Conn. 487; *King v. State*, 42 Fla. 260; *Cook v. State*, 25 Fla. 698; *Tilly v. State*, 21 Fla. 242; *Stevens v. State*, 18 Fla. 903; *Humphreys v. State*, 17 Fla. 381; *Snowden v. State*, 17 Fla. 386; *Groner v. State*, 6 Fla. 39; *Johnson v. State*, 90 Ga. 441; *Lampkin v. State*, 87 Ga. 516; *State v. Ellington*, (Idaho, 1895) 43 Pac. Rep. 60; *Bohen v. People*, 184 Ill. 338; *Williams v. People*, 67 Ill. App. 344; *Mohler v. People*, 24 Ill. 26; *Plummer v. People*, 74 Ill. 361; *Johnson v. People*, 113 Ill. 99; *Semon v. State*, (Ind. 1902) 62 N. E. Rep. 625; *State v. Beebe*, (Iowa, 1901) 88 N. W. Rep. 358; *State v. Reilly*, 108 Iowa 735; *State v. Whalen*, 98 Iowa 662; *State v.*

Shaw, 35 Iowa 575; State *v.* Davis, 41 Iowa 311; State *v.* Seamons, 1 Greene (Iowa) 418; State *v.* Chambers, 2 Greene (Iowa) 308; Romp *v.* State, 3 Greene (Iowa) 276; State *v.* Brewer, 53 Iowa 735; State *v.* Toombs, 79 Iowa 741; State *v.* Curran, 51 Iowa 112; Buckley *v.* State, 2 Greene (Iowa) 162; Munson *v.* State, 4 Greene (Iowa) 483; State *v.* Bair, 92 Iowa 28; State *v.* Snow, 81 Iowa 642; Fouts *v.* State, 4 Greene (Iowa) 500; Paynter *v.* Com., (Ky. 1900) 55 S. W. Rep. 687; Knoxville Nursery Co. *v.* Com., (Ky. 1900) 55 S. W. Rep. 691; Com. *v.* Grinstead, (Ky. 1900) 55 S. W. Rep. 720; Com. *v.* Chesapeake, etc., R. Co., 101 Ky. 159; Com. *v.* Harvey, 16 B. Mon. (Ky.) 1; Tyra *v.* Com., 2 Met. (Ky.) 1; Com. *v.* Branham, 3 Bush (Ky.) 1; Com. *v.* Tanner, 5 Bush (Ky.) 316; Com. *v.* Pointer, 5 Bush (Ky.) 301; Waddell *v.* Com., 84 Ky. 276; Com. *v.* Smith, 6 Bush (Ky.) 263; Sellers *v.* Com., 13 Bush (Ky.) 331; Com. *v.* Riley, 14 Bush (Ky.) 44; Duncan *v.* Com., 85 Ky. 614; Mitchell *v.* Com., 88 Ky. 349; Cundiff *v.* Com., 86 Ky. 196; Com. *v.* Turner, 8 Bush (Ky.) 1; Com. *v.* Hadcraft, 6 Bush (Ky.) 91; Com. *v.* Ewing, 7 Bush (Ky.) 105; Kennedy *v.* Com., 2 Met. (Ky.) 36; Wilder *v.* Com., 81 Ky. 591; Tully *v.* Com., 11 Bush (Ky.) 154; Conner *v.* Com., 13 Bush (Ky.) 714; State *v.* Guiton, 51 La. Ann. 155; State *v.* Taylor, 44 La. Ann. 967; State *v.* Osgood, 85 Me. 288; State *v.* Dunning, 83 Me. 178; State *v.* Hussey, 60 Me. 410; Stevens *v.* State, 89 Md. 669; People *v.* Kent, 1 Dougl. (Mich.) 42; Shannon *v.* People, 5 Mich. 71; Koster *v.* People, 8 Mich. 431; Rice *v.* People, 15 Mich. 9; Napman *v.* People, 19 Mich. 352; Enders *v.* People, 20 Mich. 233; Wilson *v.* People, 24 Mich. 410; People *v.* ChapPELL, 27 Mich. 486; People *v.* Jacobs, 35 Mich. 36; Byrnes *v.* People, 37 Mich. 515; Meister *v.* People, 31 Mich. 99; State *v.* Garvey, 11 Minn. 154; State *v.* Kesslering, 12 Mo. 565; State *v.* Adams, 108 Mo. 208; State *v.* Davis, 106 Mo. 230; State *v.* Johnson, 93 Mo. 317; State *v.* Madden, 81 Mo. 421; State *v.* Mohr, 68 Mo. 303; State *v.* Stogsdale, 67 Mo. 630; State *v.* Addcock, 65 Mo. 590; State *v.* Schieneman, 64 Mo. 386; State *v.* James, 63 Mo. 570; State *v.* Roehm, 61 Mo. 82; State *v.* Coulter, 46 Mo. 564; State *v.* Mitchell, 6 Mo. 147; State *v.* Stocker, 80 Mo. App. 354; State *v.* Haley, 52 Mo. App. 520; State *v.* Murphy, 49 Mo. App. 270; Chapman *v.* State, 61 Neb.

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Language Equivalent to That of the Statute.—The exact language of the statute need not be followed: words of equivalent import or more extensive signification which necessarily include the words of the statute are sufficient. *Smith v. State*, 63 Ala. 55; *Mason v. State*, 42 Ala. 543; *Johnson v. State*, 32 Ala. 583; *Lodano v. State*, 25 Ala. 64; *Smith v. State*, 22 Ala. 54; *Clark v. State*, 19 Ala. 552; *Bush v. State*, 18 Ala. 415; *Beasley v. State*, 18 Ala. 535; *Batre v. State*, 18 Ala. 119; *Eubanks v. State*, 17 Ala. 181; *State v. Mahan*, 2 Ala. 340; *State v. Click*, 2 Ala. 26; *State v. Duncan*, 9 Port. (Ala.) 260; *State v. Briley*, 8 Port. (Ala.) 472; *State v. Stedman*, 7 Port. (Ala.) 495; *State v. Raiford*, 7 Port. (Ala.) 101; *State v. Plunket*, 2 Stew. (Ala.) 11; *Wood v. State*, 47 Ark. 488; *People v. Phipps*, 39 Cal. 326; *People v. Potter*, 35 Cal. 110; *Roberts v. State*, 26 Fla. 360; *Cook v. State*, 25 Fla. 698; *Tilly v. State*, 21 Fla. 242; *Stevens v. State*, 18 Fla. 903; *Humphreys v. State*, 17 Fla. 381; *Snowden v. State*, 17 Fla. 386; *Groner v. State*, 6 Fla. 39; *Reddan v. State*, 4 Greene (Iowa) 137; *U. S. v. Lapoint*, *Morr. (Iowa)* 146; *U. S. v. Dickey*, *Morr. (Iowa)* 412; *State v. Allen*, 32 Iowa 491; *State v. Baldwin*, 36 Kan. 1; *State v. McGaffin*, 36 Kan. 315; *State v. Beverlin*, 30 Kan. 611; *Burns v. Com.*, 3 Met. (Ky.) 13; *Taylor v. Com.*, 3 Bush (Ky.) 508; *Young v. Com.*, 12 Bush (Ky.) 243; *Flint v. Com.*, 81 Ky. 186; *Toler v. Com.*, 94 Ky. 529; *Green v. Com.*, 5 Bush (Ky.) 327; *Vowells v. Com.*, 84 Ky. 52; *Johnson v. Com.*, 90 Ky. 488; *Moore v. Com.*, 92 Ky. 630; *State v. Hayes*, 105 La. 352; *State v. Stelly*, 48 La. Ann. 1478; *State v. Eames*, 39 La. Ann. 986; *People v. McLean*, 68 Mich. 480; *Dee v. State*, 68 Miss. 601; *Roberts v. State*, 55 Miss. 421; *Harrington v. State*, 54 Miss. 490; *Lewis v. State*, 49 Miss. 354; *State v. Van Wye*, 136 Mo. 227; *State v. Ross*, 25 Mo. 426; *Vaughn v. State*, 4 Mo. 530; *State v. Stephens*, 62 Mo. App. 232; *State v. Clawson*, 30 Mo. App. 139; *State v. De Lay*, 30 Mo. App. 357; *State v. Barr*, 30 Mo. App. 498; *State v. West*, 21 Mo. App. 309; *State v. Dengolsky*, 82 Mo. 44; *State v. Watson*, 65 Mo. 115; *State v. Ware*, 62 Mo. 597; *State v. Miller*, 132 Mo. 297; *State v. Emerich*, 87 Mo. 110; *State v. Deffenbacher*, 51 Mo. 26; *State v. Seward*, 42 Mo. 206; *State v. Kirby*, 115 Mo. 440; *Territory v. Ashby*, 2 Mont.

89; *Territory v. Corbett*, 3 Mont. 50; *Territory v. Layne*, 7 Mont. 225; *Territory v. Godas*, 8 Mont. 347; *Territory v. Burgess*, 8 Mont. 57; *Hodgkins v. State*, 36 Neb. 160; *People v. Whedon*, (Supreme Ct. Gen. T.) 2 N. Y. Crim. 318; *Frazer v. People*, 54 Barb. (N. Y.) 306; *People v. Jaehne*, 103 N. Y. 182; *People v. Dimick*, (Super. Ct. Gen. T.) 5 N. Y. Crim. 185; *People v. Buddensieck*, (Supreme Ct. Gen. T.) 4 N. Y. Crim. 230; *Matter of Gray*, (Oyer & T. Ct.) 2 N. Y. Crim. 302; *Tully v. People*, 67 N. Y. 15; *Spencer v. State*, 13 Ohio 401; *Poage v. State*, 3 Ohio St. 229; *Stoughton v. State*, 2 Ohio St. 562; *Hagar v. State*, 35 Ohio St. 268; *Williams v. State*, 35 Ohio St. 175. *Compare*, however, *Vanvalkenburg v. State*, 11 Ohio 404; *Peck v. State*, 2 Humph. (Tenn.) 78; *Harris v. State*, 3 Lea (Tenn.) 324; *State v. Ferriss*, 3 Lea (Tenn.) 700; *Harris v. State*, 14 Lea (Tenn.) 485; *Drummond v. Republic*, 2 Tex. 156; *Fowler v. State*, 38 Tex. 559; *Mathews v. State*, 36 Tex. 675; *People v. Colton*, 2 Utah 457; *Leschi v. Territory*, 1 Wash. Ter. 13; *State v. Riffe*, 10 W. Va. 794. Although it has been held that it is safer to use the words of the statute. *Juaraqui v. State*, 28 Tex. 625; *State v. Moreland*, 27 Tex. 726; *Barthelow v. State*, 26 Tex. 175; *White v. State*, 3 Tex. App. 605; *Hart v. State*, 2 Tex. App. 39.

Where Statute Fails to Define Offense.—

Where the statute designates the offense, but does not sufficiently define the particular acts constituting the offense so as to notify the defendant of the charge he is required to meet, an indictment following the language of the statute is not sufficient: the indictment must in such a case state all the particulars constituting the offense referred to. *Anthony v. State*, 29 Ala. 27; *Beasley v. State*, 18 Ala. 535; *Turnipseed v. State*, 6 Ala. 664; *Bell v. State*, 10 Ark. 536; *Gabe v. State*, 6 Ark. 519; *State v. Jackson*, 39 Conn. 229; *State v. Bierce*, 27 Conn. 319; *Johnson v. People*, 113 Ill. 99; *Hunter v. People*, 52 Ill. App. 367; *State v. Brandt*, 41 Iowa 593; *State v. Patterson*, 6 Kan. App. 677; *Com. v. Dudley*, 3 Met. (Ky.) 221; *Mount v. Com.*, 1 Duv. (Ky.) 90; *Com. v. Monarch*, 6 Bush (Ky.) 298; *Davis v. Com.*, 13 Bush (Ky.) 318; *Foster v. Com.*, 12 Bush (Ky.) 373; *Ward v. Com.*, 14 Bush (Ky.) 233; *Com. v. Green*, 80 Ky. 178; *Com. v. White*, 18

B. Mon. (Ky.) 492; *Stowers v. Com.*, 12 Bush (Ky.) 342; *Com. v. Williams*, 13 Bush (Ky.) 267; *Johnson v. Com.*, 90 Ky. 488; *Mitchell v. Com.*, 88 Ky. 349; *Harrington v. State*, 54 Miss. 490. See also *State v. Bardwell*, 72 Miss. 535; *Rawls v. State*, 70 Miss. 739; *Sullivan v. State*, 67 Miss. 346; *State v. Van Wye*, 136 Mo. 227; *State v. Krueger*, 134 Mo. 262; *State v. Smith*, 66 Mo. App. 403; *State v. Morrison*, 64 Mo. App. 507; *State v. Sayman*, 61 Mo. App. 244; *State v. Kain*, 118 Mo. 5; *State v. Cameron*, 117 Mo. 371; *State v. Fleming*, 117 Mo. 377; *State v. Morgan*, 112 Mo. 202; *State v. Jackson*, 112 Mo. 585; *State v. Terry*, 109 Mo. 601; *Titus v. State*, 49 N. J. L. 36; *People v. Kane*, 43 N. Y. App. Div. 472; *Dillingham v. State*, 5 Ohio St. 280; *State v. Shaw*, 22 Oregon 287; *State v. Lee*, 17 Oregon 488; *State v. Doty*, 5 Oregon 491; *Bradford v. State*, 3 Humph. (Tenn.) 370; *Hall v. State*, 3 Coldw. (Tenn.) 125; *State v. Ladd*, 2 Swan (Tenn.) 226; *Cornell v. State*, 7 Baxt. (Tenn.) 520; *State v. Mitchell*, 47 W. Va. 789; *U. S. v. Simmons*, 96 U. S. 360.

Technical words in a statute defining an offense should be used in an indictment charging the same. *State v. Delue*, 1 Chand. (Wis.) 166.

Specifying Statute—*Generally*.—The indictment need not specify the statute under which it is drawn. *Crabb v. State*, 88 Ga. 584; *Knight v. State*, 88 Ga. 590; *State v. Cobb*, 1 Dev. & B. L. (18 N. Car.) 115; *Butler v. State*, 3 McCord L. (S. Car.) 383.

Private Statute.—Where the indictment charges an offense under a private statute, such statute must be set out in full. *Com. v. Huntzinger*, 35 Pa. L. J. 364.

Negating Exceptions.—Where the statute defining the offense contains an exception in the same clause which creates the offense, or if the exception be closely connected with the enacting clause, it is necessary to show by negative averment that the defendant is not within the exception, but if the exception be contained in a subsequent clause or statute it is a matter of defense and need not be negated in the indictment. *Grattan v. State*, 71 Ala. 344; *Carson v. State*, 69 Ala. 235; *Clark v. State*, 19 Ala. 552; *State v. Kansas City, etc.*, R. Co., 54 Ark. 546; *State v. Bailey*, 43 Ark. 150; *Thompson v. State*, 37 Ark. 408; *Wilson v. State*, 35 Ark. 414; *Wilson v. State*, 33

Ark. 557; *Matthews v. State*, 24 Ark. 484; *Hopper v. State*, 19 Ark. 143; *Bone v. State*, 18 Ark. 109; *Brittin v. State*, 10 Ark. 299; *Harding v. People*, 10 Colo. 387; *Foster v. People*, 1 Colo. 293; *State v. Miller*, 24 Conn. 522; *Crandall v. State*, 10 Conn. 339; *Morse v. State*, 6 Conn. 9; *Elkins v. State*, 13 Ga. 435; *Hester v. State*, 17 Ga. 130; *Jordan v. State*, 22 Ga. 545; *Cook v. State*, 26 Ga. 593; *John v. State*, 16 Ga. 200; *Hines v. State*, 93 Ga. 187; *Williams v. State*, 89 Ga. 483; *Beasley v. People*, 89 Ill. 571; *Williams v. People*, 20 Ill. App. 92; *Metzker v. People*, 14 Ill. 101; *Russell v. State*, 50 Ind. 174; *State v. Bencke*, 9 Iowa 203; *State v. Mahan*, 81 Iowa 121; *State v. Conable*, 81 Iowa 60; *Romp v. State*, 3 Greene (Iowa) 276. See also *State v. Stapp*, 29 Iowa 551; *State v. Curley*, 33 Iowa 359; *State v. Miller*, 53 Iowa 84; *State v. Roth*, 17 Iowa 336; *State v. Williams*, 20 Iowa 98; *Sayre v. Wheeler*, 31 Iowa 112; *State v. Waite*, 101 Iowa 377; *Kansas City v. Garnier*, 57 Kan. 412; *Com. v. Hildreth*, (Ky. 1896) 33 S. W. Rep. 838; *Conner v. Com.*, 13 Bush (Ky.) 714; *Com. v. McClanahan*, 2 Met. (Ky.) 8; *Com. v. Bierman*, 13 Bush (Ky.) 345; *State v. Godfrey*, 24 Me. 232; *State v. Keen*, 34 Me. 500; *State v. Gurney*, 37 Me. 149; *Hinckley v. Penobscot*, 42 Me. 89; *State v. Knowles*, 90 Md. 646; *State v. Bockstruck*, 136 Mo. 335; *State v. O'Brien*, 74 Mo. 549; *State v. Raymond*, 54 Mo. App. 425; *State v. Sparrow*, 52 Mo. App. 374; *State v. Smith*, 60 Mo. App. 283; *State v. Crenshaw*, 41 Mo. App. 24; *State v. Finn*, 38 Mo. App. 504; *State v. Barr*, 30 Mo. App. 498; *State v. Cox*, 32 Mo. 566; *State v. Shiflett*, 20 Mo. 415; *Territory v. Burns*, 6 Mont. 72; *Sofield v. State*, 61 Neb. 600; *O'Connor v. State*, 46 Neb. 157; *Gee Wo v. State*, 36 Neb. 241; *State v. Ah Chew*, 16 Nev. 50; *State v. Adams*, 6 N. H. 532; *State v. Abbott*, 31 N. H. 434; *State v. Fuller*, 33 N. H. 259; *State v. Wade*, 34 N. H. 495; *State v. Savage*, 48 N. H. 484; *State v. Cassady*, 52 N. H. 500; *State v. Marks*, 65 N. J. L. 84; *Mayer v. State*, 64 N. J. L. 323; *Mayer v. State*, 63 N. J. L. 35; *State v. Startup*, 39 N. J. L. 423; *State v. Turner*, 106 N. Car. 691; *Hale v. State*, 58 Ohio St. 676. See also *Stanglein v. State*, 17 Ohio St. 453; *Howard v. State*, 11 Ohio St. 328; *Becker v. State*, 8 Ohio St. 391; *Cheadle v. State*, 4 Ohio St. 477; *Woodworth v.*

1. Acting as Private Detective Without a License.

Form No. 18849.

(Precedent in *State v. Bennett*, 102 Mo. 358.)¹

State of *Missouri*, }
City of *St. Louis*. } ss.

In the *St. Louis* court of criminal correction, *St. Louis*, March 26, 1886.

State of Missouri, Plaintiff, } Charged with acting as a private
v. } detective without a license.
Charles Bennett, Defendant. }

Bernard Dierkes, assistant prosecuting attorney of the *St. Louis* court of criminal correction, now here in court, on behalf of the state of *Missouri*, by leave of court first had and obtained, amended information makes as follows: That *Charles Bennett*, in the city of *St. Louis* and state of *Missouri*, on the *twenty-sixth* day of *February*, 1886, and on divers other days and times prior thereto between said date and the *twenty-sixth* day of *March*, A. D. 1885, did then and there wilfully and unlawfully act as a private detective without having a license so to do from the president or acting president of the board of police commissioners of the city of *St. Louis*, and did at the place aforesaid and on the days and times aforesaid between the dates aforesaid hold himself out to the public as a private detective and did enter upon and exercise and continue the exercise and practice of the business, avocation or profession of a private detective, and did for others at the instance, request and employment of *J. A. Gilliam, J. A. Dittrick, Sarah Dittrick, Gisela Noland, Charles Napton, Thos. Furlong* and divers others whose names are unknown act as a private detective in various instances within the said city of *St. Louis* without having a license therefor from the president or acting president of the board of police commissioners of the city of *St. Louis*, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Bernard Dierkes, Assistant Prosecuting Attorney
of *St. Louis Court of Criminal Correction.*

State of *Missouri*, }
City of *St. Louis*. } ss.

Chas. T. Noland, being duly sworn, upon his oath says that the

State, 4 Ohio St. 487; *Hirn v. State*, 1 Ohio St. 15; *Kowenstrot v. State*, 6 Ohio Dec. 467; *Krowenstrot v. State*, 8 Ohio Cir. Dec. 119; *Parker v. Territory*, 9 Okla. 109; *Garver v. Territory*, 5 Okla. 342; *Com. v. Shelly*, 2 Kulp (Pa.) 300; *State v. Gallagher*, 20 R. I. 266; *State v. Rush*, 13 R. I. 198; *Matthews v. State*, 2 Yerg. (Tenn.) 233; *Martin v. State*, 6 *Humph.* (Tenn.) 204; *State v. Jackson*, 1 *Lea* (Tenn.) 680; *State v. Clayton*, 43 *Tex.* 410; *McFain v. State*, 41 *Tex.* 385; *Blasdel v. State*, 5 *Tex. App.* 263; *Logan v. State*, 5 *Tex. App.* 306; *State v. Williamson*, 22 *Utah* 248. See *State v. Freeman*, 27 *Vt.* 523; *State v. Butler*, 17 *Vt.* 145; *State v. Barker*, 18 *Vt.* 195; *State v. Abbey*, 29 *Vt.* 60; *Com. v. Hill*, 5 *Gratt. (Va.)* 682; *State v. Dry Fork R. Co.*, 50 *W. Va.* 235; *Byrne v. State*, 12 *Wis.* 519; *Lacy v. State*, 15 *Wis.* 13.

1. This complaint was held sufficient. See also, generally, *supra*, note 1, p. 429.

facts stated in the above information are true, according to his best knowledge and belief.

Chas. T. Noland.

Sworn to and subscribed before me, this *twenty-sixth* day of *March*, 1886.

Phillipp H. Zepf,

Clerk of the *St. Louis* Court of *Criminal Correction*.

W. L. Fitzgerald, Deputy Clerk.

2. Aiding and Abetting Bank Officer to Make False Entries in Reports.

Form No. 18850.¹

(Commencing as in Form No. 14322, and continuing down to *.) That *John Doe*, of said *eastern* division in said *eastern* district of *Missouri*, heretofore, to wit, on the *eighteenth* day of *July*, A. D. 1894, at the city of *St. Louis*, in the district and circuit aforesaid, was the cashier of the *Traders' National Bank of St. Louis, Missouri*, a banking association theretofore established and then existing and doing business at said city of *St. Louis*, in said district and circuit, under and by virtue of the laws of the United States, concerning National Banks; that said association, on the said *eighteenth* day of *July*, A. D. 1894, made to the comptroller of the currency of the said United States a certain report of the condition of the said association at the close of business of said association on the said *eighteenth* day of *July*, A. D. 1894, according to a certain form theretofore prescribed by the comptroller of the currency of the said United States for the time being, the said report being a report which it was then and there, to wit, on the day and year last aforesaid, by law the duty of the said association to make to the said comptroller; said report being then and there duly verified and attested as required by law.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said *John Doe*, as such cashier of the said association as aforesaid, heretofore, to wit, on the *eighteenth* day of *July*, A. D. 1894, at said city of *St. Louis*, and within the district and circuit aforesaid, unlawfully and feloniously did make a certain false entry in said report so made by said association as aforesaid, that is to say, a certain false entry on page *three* of said report, under the head of "Checks and other cash items," in substance and to the effect that at the close of business of the said association on the day and year last aforesaid the said association then and there held and had in its possession "Checks and drafts on banks, etc.," in said city of *St. Louis* in the sum of *twenty-seven thousand three hundred and one* dollars and *ninety-eight* cents, and that the amount due to said association from said bank or banks in said city of *St. Louis* was in the sum last aforesaid, which entry was and is false, in this, that in truth the checks and drafts on banks in said city of *St. Louis* held by said association were not of the sum of *twenty-seven thousand three*

1. *United States*. — Rev. Stat. (1878). See also, generally, *supra*, note 1, § 5209, 16 Stat. at L. (1870), c. 226. p. 429.

hundred and one dollars and ninety-eight cents as aforesaid, but of a different and much greater sum, to wit, the sum of thirty thousand nine hundred dollars, and the said John Doe, as such cashier of the said association as aforesaid, did at the said city of St. Louis, on said eighteenth day of July, unlawfully and feloniously make another false entry, on page one of said report, under the head of "Resources," in substance and to the effect that the amount of cash moneys then on hand and in the possession of said association, consisting of bills of national banks, fractional paper currency, nickels, gold coin, gold treasury certificates, silver treasury certificates, fractional silver coin, and legal tender notes, was in the sum of nine thousand nine hundred and nineteen dollars and twelve cents, which was and is false in this, that in truth the amount of said cash moneys was of a different and much smaller sum, to wit, the sum of three thousand nine hundred and nineteen dollars and twelve cents, he, the said John Doe, being then and there cashier as aforesaid, and then and there at the time and place of so making the said false entries in said report as aforesaid, well knowing the said entries to be then and there false as aforesaid, and thereby then and there intending to injure and defraud the said association and certain persons to the grand jurors aforesaid unknown, and to deceive any officer or officers of the said association and any agent appointed by the comptroller of the currency of the said United States to examine the affairs of said association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the said United States.

Second count. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that *Richard Roe*, late of said *eastern* division of said *eastern* district of *Missouri*, heretofore, to wit, on the said *eighteenth* day of *July*, A. D. 1894, at the city of *St. Louis*, in the district and circuit aforesaid, on the day and year last aforesaid, at said city of *St. Louis*, and within the jurisdiction of this court, unlawfully and feloniously did aid, abet, incite, counsel and procure the said *John Doe*, cashier of the said association as aforesaid, the false entries aforesaid in manner and form as aforesaid to do and commit, with intent to injure and defraud the said association and certain persons to the grand jurors aforesaid unknown, and to deceive any officer or officers of the said association and any agent appointed by the comptroller of currency of the said United States to examine the affairs of said association; contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the said United States.

(Concluding as in Form No. 14322.)

3. Being an Habitual Criminal.¹

1. **Precedent.** — In *McDonald v. Com.*, 173 Mass. 322, the indictment, after the counts in which the plaintiff in error was charged with forging and uttering the checks therein described, was as follows:

"And the jurors aforesaid for the Commonwealth of *Massachusetts*, on their oath aforesaid, do further present that said *John A. McDonald*, otherwise called *John McDonald*, has been, before the commission of the felonies

Form No. 18851.

(Precedent in *Blackburn v. State*, 50 Ohio St. 429.)¹

State of *Ohio*, *Montgomery* county: The court of *common pleas*, *May* term, in the year eighteen hundred and *ninety*. *Montgomery* county, ss.:

The grand jurors of the county of *Montgomery*, in the name and by authority of the state of *Ohio*, on their oaths do present and find that *David Blackburn*, about the hour of *twelve* o'clock in the *night* season of the *fourth* day of *April*, in the year one thousand eight hundred and *ninety*, in the county of *Montgomery* aforesaid, into a certain stable of *Amos B. Miller* and *Eva W. Miller* there situate and being, wilfully, maliciously, forcibly and burglariously did break and enter, with intent thereby then and there the personal goods, chattels, property and money of said *Amos B. Miller* and *Eva W. Miller* in said stable then and there being, feloniously to steal, take, and carry away; and *thirty-seven* chickens, each of the value of *forty* cents, and of the aggregate value of *fourteen* dollars and *eighty* cents of the personal property of said *Amos B. Miller*, then and there being found, then and there unlawfully and burglariously did steal, take and carry away.

And the grand jurors aforesaid, on their oaths aforesaid, do further present that said *David Blackburn* heretofore, to-wit, at the *June* term, A. D. 1881, of the *common pleas* court of *Miami* county, *Ohio*, was duly convicted of an assault with intent to rob, and was by said court sentenced to a penal institution for felony, to-wit: The *Ohio* Penitentiary, for the term and period of *five* years, and that said *Blackburn* was soon thereafter committed to said peniten-

hereinbefore charged, twice convicted of crime, sentenced and committed to prison, once in this Commonwealth and once in the State of *New Hampshire*, for terms of imprisonment of not less than *three* years each; that is to say, said *McDonald* was once convicted at a term of the *Superior* Court of this Commonwealth duly begun and holden at *Boston* aforesaid for the transaction of criminal business, on the *first Monday* of *April*, in the year of our Lord eighteen hundred and *ninety*, of the crime of perjury, upon an indictment therefor; and on the *sixteenth* day of said *April* said *McDonald* was duly sentenced upon said conviction by said court to imprisonment in the state prison in this Commonwealth for the term of *three* years; and in pursuance of said sentence said *McDonald* was, on the *seventeenth* day of *April*, duly committed to said state prison; and again, said *McDonald* was convicted at a term of the *Supreme* Court holden at *Manchester* within and for the county of *Hillsborough* in the State of *New Hampshire*, on the *first Tuesday*

of *January*, in the year of our Lord eighteen hundred and *ninety-four*, of the crime of obtaining property by means of false pretenses with intent to defraud, upon an indictment therefor; and thereupon said *McDonald* was duly sentenced upon said last named conviction by said court last named to imprisonment in the state prison in said State of *New Hampshire* for the term of *four* years; and in pursuance of said sentence last mentioned said *McDonald* was, on the *twelfth* day of *February*, in the year last mentioned, duly committed to the state prison last above mentioned."

The defendant was convicted and it was held that the words in the indictment importing the beginning of a new count might be rejected as surplusage.

1. Under this indictment the defendant was found guilty and sentenced to prison for life. A motion for leave to file a petition in error was refused.

See also, generally, *supra*, note 1, p. 429.

tiary by the sheriff of said county, and was imprisoned in a penal institution for felony, to-wit: The *Ohio* Penitentiary, for the period of *five* years, or until he was discharged by due course of law. And further that said *David Blackburn*, heretofore, to-wit, at the *October* term, 1886, of the court of *common pleas* of *Montgomery* county, *Ohio*, was duly convicted of the crime of unlawfully receiving a stolen mare, knowing the same to have been stolen and with intent to defraud, and was by said court sentenced to a penal institution for felony, to-wit: The *Ohio* Penitentiary, for the term and period of *one* year, and that said *Blackburn* was soon thereafter committed to said penitentiary by the sheriff of said county of *Montgomery*, and was imprisoned in a penal institution, to-wit: The *Ohio* Penitentiary, for said period of *one* year, or until he was discharged by due course of law, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of *Ohio*.

(Signature and indorsement as in Form No. 10713.)

4. Belonging to and Parading with an Unauthorized Body of Men with Arms.

Form No. 18852.¹

(Precedent in *Presser v. People*, 98 Ill. 406.)

[(Commencing as in Form No. 10691, and continuing down to *)]² did unlawfully belong to and parade with an unauthorized body of men with arms, who had associated themselves together as a military company and organization without having any license from the Governor of the State of *Illinois*, and not then and there being a part of nor belonging to the regular organized volunteer militia of this State or the troops of the United States [contrary (concluding as in Form No. 10691).]³

5. Circulating Change Bills.

Form No. 18853.⁴

(Ala. Crim. Code (1896), § 4923, No. 41.)

(Commencement as in Form No. 10680) *John Doe* passed (or circulated) a certain paper, the substance or tenor of which is as follows: (setting it out in substance); the said paper having been issued without the authority of law, to answer the purposes of money, against (concluding as in Form No. 10680).

6. Concealing, Removing or Selling Personal Property Covered by Lien or Claim.

1. *Illinois*. — Starr & C. Anno. Stat. (Jones & Addington's Supp. 1902), c. 129, pars. 80, 81.

See also, generally, *supra*, note 1, p. 429.

2. The matter to be supplied within [] will not be found in the reported case.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

4. *Alabama*. — Crim. Code (1896), §§ 5546, 5547.

See also, generally, *supra*, note 1, p. 429.

Form No. 18854.¹

(Ala. Crim. Code (1896), § 4923, No. 78.)

(Commencement as in Form No. 10630) *John Doe*, with the purpose to hinder, delay and defraud *Richard Roe*, who had a lawful and valid claim thereto, under a written instrument (or *lien created by law for rent or advances*, or other lawful and valid claim, verbal or written), did sell (or *remove*) personal property, consisting of *one bale of cotton (or other property, as the case may be)*, of the value of *ten dollars*, the said *John Doe* having at the time a knowledge of the existence of such claim, against (*concluding as in Form No. 10680*).

7. Defacing and Falsifying Public Record.

Form No. 18855.

(Precedent in *Loehr v. People*, 132 Ill. 507.)²

[(Commencing as in Form No. 10691, and continuing down to *)]³ a record, to-wit, collector's book of *Bloomington* township, *McLean* county, and state of *Illinois*, for the taxes of 1888, belonging to the office of the county treasurer, to-wit, *Lewis Ijams*, county treasurer of *McLean* county, and state of *Illinois*, then and there unlawfully, feloniously and maliciously did corrupt, falsify and alter, contrary [to the form of the statute in such case made and provided and against the peace and dignity of the same people of the state of *Illinois*.

Second count. And the grand jurors aforesaid, chosen, selected and sworn in and for the county of *McLean* aforesaid, in the name and by the authority of the people of the state aforesaid, upon their oaths aforesaid, do further present that the said *Harry Loehr*, on the *fifth* day of *February*, in the year of our Lord one thousand eight hundred and *eighty-nine*, in said county of *McLean*,]⁴ a certain book, to-wit, the collector's book of *Bloomington* township, *McLean* county, state of *Illinois*, then and there feloniously, wilfully and maliciously, did deface and falsify, contrary [to the form of the statute in such case made and provided and against the peace and dignity of the same people of the state of *Illinois*.

Third count. And the grand jurors aforesaid, chosen, selected and sworn in and for the county of *McLean* aforesaid, in the name and by the authority of the people of the state aforesaid, upon their oaths aforesaid, do further present that the said *Harry Loehr*, on the *fifth* day of *February*, in the year of our Lord one thousand eight hundred and *eighty-nine*, in said county,]⁴ a certain document, to-wit, the collector's book of *Bloomington* township, *McLean* county, *Illinois*, for the taxes of the year 1888, belonging in the office of the county treasurer of *McLean* county, and state aforesaid, then and there, unlawfully, feloniously and maliciously, did alter, deface and falsify,

1. *Alabama*. — Crim. Code (1896), § 4757.

See also, generally, *supra*, note 1, p. 429.

2. This indictment was held to be sufficient.

See also, generally, *supra*, note 1, p. 429.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter enclosed by [] will not be found in the reported case.

contrary [to the form of the statute in such case made and provided and against the peace and dignity of the same people of the state of *Illinois*.

Fourth count. And the grand jurors aforesaid, chosen, selected and sworn in and for the county of *McLean* aforesaid, in the name and by the authority of the people of the state aforesaid, upon their oaths aforesaid, do further present that said *Harry Lochr*, on the *fifth* day of *February*, in the year of our Lord one thousand eight hundred and *eighty-nine*, in said county,]¹ a certain record, to-wit, the collector's book of *Bloomington* township, *McLean* county, *Illinois*, for the taxes of the year 1888, in the office of the county treasurer, and state aforesaid, then and there, unlawfully and feloniously, did alter, corrupt and falsify, contrary [to the form of the statute in such case made and provided and against the peace and dignity of the same people of the state of *Illinois*.

E. H. Miner, State's Attorney.]¹

8. Disclosing Indictment by Officer of Court or Grand Juror.

Form No. 18856.²

(Ala. Crim. Code (1896), § 4923, No. 36.)

(*Commencement as in Form No. 10680*) *John Doe*, an officer of the court, to wit, a deputy-sheriff (or a *grand juror*, as the case may be), disclosed the fact that an indictment had been found by the grand jury of said county against one *Richard Roe* before the defendant had been arrested, or had given bail for his appearance to answer thereto, against (*concluding as in Form No. 10680*).

9. Emitting Change Bills.

Form No. 18857.³

(Ala. Crim. Code (1896), § 4923, No. 41.)

(*Commencement as in Form No. 10680*) *John Doe*, without authority of law, signed (or made, emitted, or countersigned, or caused or procured to be made, emitted, signed, or countersigned), a certain paper to answer the purpose of money, or for general circulation, in substance as follows: (*Here set out substantially the paper*), against (*concluding as in Form No. 10680*).

10. Endangering Life by Bursting Boiler.

1. The matter enclosed by [] will not be found in the reported case.

2. *Alabama*. — Crim. Code (1896), § 5047.

See also, generally, *supra*, note 1, p. 429.

3. *Alabama*. — Crim. Code (1896), §§ 5546, 5547.

See also, generally, *supra*, note 1, p. 429.

Form No. 18858.¹

(Ala. Crim. Code (1896), § 4923, No. 42.)

(Commencement as in Form No. 10680) *John Doe*, being the engineer of a steamboat used for the conveyance of passengers and freight, and in charge of the machinery thereof or of some of the apparatus for the generation of steam, from gross negligence, or from ignorance, created, or allowed to be created, such an undue quantity of steam as to burst the boiler, or other apparatus in which steam was generated, or some apparatus or machinery therewith connected, and thereby endangered human life, against (concluding as in Form No. 10680).

11. Endangering Life by Overloading Steamboat.

Form No. 18859.²

(Ala. Crim. Code (1896), § 4923, No. 43.)

(Commencement as in Form No. 10680) *John Doe*, while navigating a steamboat for gain, wilfully received on board thereof so many passengers (or such a quantity of freight) that by means thereof such steamboat sunk (or overturned), and thereby endangered the life of a human being, against (concluding as in Form No. 10680).

12. Exhibiting False Sample.

Form No. 18860.³

(Ala. Crim. Code (1896), § 4923, No. 39.)

(Commencement as in Form No. 10680) *John Doe* fraudulently exhibited a false sample of sugar, by means whereof one *Richard Roe* was injured, against (concluding as in Form No. 10680).

13. Failing to Pay Highway Tax or to Perform Labor on Highway.

Form No. 18861.

(Precedent in *In re Dassler*, 35 Kan. 679.)⁴

The State of Kansas, City and County of Leavenworth. — Police Court, sct. — The City of Leavenworth v. *C. F. W. Dassler*.

W. D. Shallcross, being duly sworn, deposes and says: That *C. F. W. Dassler* is now and has been ever since January 1, 1884, a male resident and citizen of said city of Leavenworth, and is now and was during all of said time between the ages of twenty-one and forty-five years, a registered voter of said city, and that said *Dassler* unlaw-

1. Alabama. — Crim. Code (1896), § 5379.

See also, generally, *supra*, note 1, p. 429.

2. Alabama. — Crim. Code (1896), § 5381.

See also, generally, *supra*, note 1, p. 429.

3. Alabama. — Crim. Code (1896), § 4772.

See also, generally, *supra*, note 1, p. 429.

4. On this complaint the defendant was convicted and a writ of habeas corpus was refused.

fully neglects and refuses to perform *two* days' labor, or any part thereof, upon the streets, alleys and avenues of said city, and also unlawfully neglects and refuses to pay to the street commissioner of said city the sum of *three* dollars, or any part thereof, in lieu of said labor, and has during all of the time since *January 1, 1884*, so neglected and refused to perform said labor or pay said money in lieu thereof, although duly notified in writing so to do by the street commissioner of said city; and further saith not.

W. D. Shallcross.

Sworn to before me, and subscribed in my presence, this *30th* day of *December, 1884*.

M. L. Hacker, Police Judge.

14. Fraudulently Obtaining Merchandise to be Paid For Upon Delivery.

Form No. 18862.¹

(Precedent in *State v. Wilson*, 143 Mo. 340.)³

[(Commencement as in Form No. 10703.)]³

The grand jurors of the state of *Missouri* in and for the body of the county of *Jackson* upon their oath present that *Emmet H. Wilson* and *E. E. Wilson*, whose Christian names in full are to these grand jurors unknown, late of the county aforesaid, on the *13th* day of *May, 1896*, at the county of *Jackson*, State of *Missouri*, with felonious intent to cheat and defraud one *Stanton B. Willock*, fraudulently, unlawfully and feloniously did agree and contract with the said *Stanton B. Willock* (under the name of *S. B. Willock*) for the purchase of certain goods, wares and merchandise, to wit: *three thousand* dozen of eggs, of the value of *two hundred and fifty-five* dollars, at and for the price of *two hundred and fifty-five* dollars, to be paid for by the said *Emmet H. Wilson* and *E. E. Wilson*, in cash upon delivery of the said goods, wares and merchandise, before described, by the said *Stanton B. Willock*, to them, the said *Emmet H. Wilson*, and *E. E. Wilson*, in the city of *Kansas City*, in *Jackson* county, *Missouri*; and that the said *Emmet H. Wilson* and *E. E. Wilson*, in pursuance of said fraudulent and felonious intent of them, the said *Emmet H. Wilson* and *E. E. Wilson*, to fraudulently and feloniously cheat and defraud the said *Stanton B. Willock* of the said goods, wares and merchandise, before described, the personal property of him, the said *Stanton B. Willock*, of the value of *two hundred and fifty-five* dollars, did then and there fraudulently, unlawfully and feloniously obtain possession of the said goods, wares and merchandise, before described, under

1. *Missouri*. — Rev. Stat. (1899), § 1927. *loniously did steal, take and carry away, against," etc.* It was held that the use

See also, generally, *supra*, note 1, p. 429.

2. This indictment concluded with the words "And so the grand jurors," etc., "do say that the said *Emmet H. Wilson* and *E. E. Wilson* the goods," etc., "fraudulently, unlawfully and fe-

of these words did not join in one count two separate and distinct offenses; that at most they were mere surplusage. The indictment was held sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

the said contract and agreement aforesaid, and in further pursuance of the said fraudulent and felonious intent of them, the said *Emmet H. Wilson* and *E. E. Wilson*, to fraudulently and feloniously cheat and defraud the said *Stanton B. Willock*, of the said goods, wares and merchandise, before described, the said *Emmet H. Wilson* and *E. E. Wilson*, after obtaining the possession of the said goods, wares and merchandise, before described, under the said contract and agreement, fraudulently, unlawfully and feloniously did then and there sell, transfer and dispose of all said goods, wares and merchandise, before described, to certain other persons, whose names are to these grand jurors unknown, at and for a price and sum, which is to these grand jurors unknown, before paying or satisfying the said *Stanton B. Willock*, the owner of said goods, wares and merchandise, before described, or his agent, a clerk or servant, therefor; and the said *Emmet H. Wilson* and *E. E. Wilson* have failed and refused, and still fail and refuse, to pay to the said *Stanton B. Willock* the purchase price thereof by payment in cash, as agreed upon, or by payment in any other manner whatever, with felonious intent to cheat and defraud the said *Stanton B. Willock*, against [(concluding as in Form No. 10703)].¹

15. Interfering with Control of Water.

Form No. 18863.²

(Commencing as in Form No. 10683, and continuing down to *)
The said *John Doe*, on the first day of January, A. D. 1899, at the said county of *Alameda*, did wilfully and unlawfully, without the authority of the owner or the managing agent thereof, take water from a certain ditch, the property of the *Pacific Water Company*, a corporation, the same being a ditch used for the purpose of conveying water for agricultural and domestic purposes, and the said taking being then and there with intent to defraud one *Richard Roe* and the said *Pacific Water Company*, who were then and there the owners of said water, contrary (concluding as in Form No. 10683.)

16. Keeping Swine to be Fed on Swill Brought from Another Town in a Place Not Designated by the Town Council.

Form No. 18864.³

(Precedent in *State v. McMahon*, 14 R. I. 285.)⁴

Newport, Sc. At the Court of Common Pleas of the State of *Rhode Island* and *Providence Plantations* holden at *Newport*, within and for the county of *Newport*, on the third Monday of May, in the year of our Lord one thousand eight hundred and eighty-three.

1. The matter to be supplied within [] will not be found in the reported case.

2. *California*.—Pen. Code (1901), § 592. See also, generally, *supra*, note 1, p. 429.

3. *Rhode Island*.—Gen. Laws (1896), c. 91, § 14.

See also, generally, *supra*, note 1, p. 429.

4. It was held that this indictment was sufficient.

The grand jurors of the state of *Rhode Island and Providence Plantations*, and in and for the county of *Newport*, upon their oaths present:

That *John McMahon*, of *Newport*, in said county, *yeoman*, on the *sixth* day of *May*, in the year of our Lord one thousand eight hundred and *eighty-three*, with force and arms at *Middletown*, in the aforesaid county of *Newport*, did then and there keep divers large numbers of swine, to wit, *thirty* swine, at a place within said *Middletown*, a town within said state, to wit, on the land of *Thomas B. Buffum* within said town of *Middletown*, said swine then and there to be fed on swill, offal, and other decaying substances brought from another town than said *Middletown*, to wit, from the city of *Newport*, a town within said state, said place where said swine were then and there kept and fed as aforesaid not having been then and there designated by the town council of said town of *Middletown* as a place for such keeping and feeding of swine, against the form of the statute in such case made and provided, and against the peace and dignity of the state.

[(*Signature and indorsement as in Form No. 10717.*)]¹

17. Killing Immature Calf with Intent to Sell the Meat Thereof.

Form No. 18865.³

(Precedent in *Com. v. Raymond*, 97 Mass. 567.)³

[(*Commencing as in Form No. 10699, and continuing down to **)]¹ knowingly, wilfully and maliciously did kill a certain calf, the said calf being then and there less than *four* weeks old, with intent then and there the meat of said calf to sell, the defendant then and there well knowing that said calf he as aforesaid killed was then and there less than *four* weeks old, [against (*concluding as in Form No. 10699.*)]⁴

18. Making False Entry in Bank Ledger with Intent to Deceive Bank Examiner.

Form No. 18866.⁵

(Precedent in *U. S. v. Britton*, 107 U. S. 656.)⁶

[(*Commencing as in Form No. 14322, and continuing down to **.)]¹

1. The matter to be supplied within [] will not be found in the reported case.

2. *Massachusetts*. — Rev. Laws (1902), c. 56, § 74.

See also, generally, *supra*, note 1, p. 429.

3. This indictment was held sufficient.

4. The matter enclosed by and to be supplied within [] will not be found in the reported case.

5. *United States*. — Rev. Stat. (1878), § 5209.

See also, generally, *supra*, note 1, p. 429.

6. This was the first count in the indictment, which contained one hundred and nineteen counts. It was held that this count imported the language of the statute, charging every element of the offense created by the statute with sufficient certainty, and gave the defendant clear notice of the charge which he was called on to defend.

That *James H. Britton*, late of said district, on the *thirtieth* day of *June*, in the year of our Lord one thousand eight hundred and *seventy-six*, at said district, being then and there president of a certain national banking association then and there known and designated as the *National Bank of the State of Missouri*, in *St. Louis*, which said association had been theretofore created and organized under and by virtue of an act of Congress, entitled "An Act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, in the year of our Lord one thousand eight hundred and sixty-four, and which said association was then and there acting and carrying on a banking business in the city of *St. Louis*, in said district, under the said act of Congress and the acts amendatory thereof, did make in a certain book then and there belonging to and in use by the said association in transacting its said banking business, and then there designated and known as "profit and loss, number *six*," a certain entry to the credit of a certain account known as profit and loss, which said entry was then and there in the words and figures following, that is to say:—

"*Richard L. Dickson*:

182 days' int., 8 per cent., 132,673.49, to July 1, '76. 5,365.88"
and which said entry, so as aforesaid made in said book, then and there purported to show, and did, in substance and effect, indicate and declare, that the sum of *five thousand three hundred and sixty-five* dollars and *eighty-eight* cents was then and there received by said association, on account of interest then and there due and payable to said association by one *Richard L. Dickson*.

And the jurors aforesaid, on their oaths aforesaid, do further present that the said entry so made as aforesaid was then and there false in this, that the said sum of *five thousand three hundred and sixty-five* dollars and *eighty-eight* cents was not then and there received by said association on account of interest then and there due and payable to said association from the said *Richard L. Dickson*, as he, the said *James H. Britton*, then and there well knew; and that the said entry, so made as aforesaid, was then and there false in this, that the said sum of *five thousand three hundred and sixty-five* dollars and *eighty-eight* cents was not then and there received by said association upon any account from any source, as he, the said *James H. Britton*, then and there well knew; and that the said false entry was then and there made as aforesaid with the intent then and there on the part of him, the said *James H. Britton*, to deceive any agent who might be thereafter appointed by the Comptroller of the Currency to examine the affairs of said association, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

[(*Concluding as in Form No. 14322.*)]¹

19. Making Fraudulent Conveyance of Property.

1. The matter to be supplied within [] will not be found in the reported case.

Form No. 18867.¹

(Ala. Crim. Code (1896), § 4923, No. 51.)

(Commencement as in Form No. 10680) *John Doe*, with the intent to hinder, delay, and defraud his creditors, did make a conveyance of property to *Richard Roe* (or *John Doe* did accept from *Richard Roe* a conveyance of property with the intent to hinder, delay or defraud the creditors of the said *Richard Roe*), against (concluding as in Form No. 10680).

Form No. 18868.²

(Commencement as in Form No. 10719.)

John Doe, late of said county, yeoman, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-nine, at the county of *Hughes*, state of *South Dakota* aforesaid, was lawfully indebted to one *Richard Roe* in a large sum of money, to wit, the sum of one thousand dollars, and was lawfully indebted to divers other persons in other large sums of money amounting in the whole to the sum of four thousand dollars; that the said *John Doe* was then and there in said county and state, on said first day of January, insolvent and unable to pay his debts in full; that the said *John Doe* was then and there in said county and state, on said first day of January, the owner of the following real estate in said county of *Hughes*, and state of *South Dakota*, described as follows, to wit: (describing the premises); that with the exception of the aforesaid described premises the said *John Doe* was then and there not the owner of any other property; that on said first day of January the said *John Doe*, then and there in said county of *Hughes* and state of *South Dakota*, unlawfully and corruptly and with the intent to hinder, delay and defraud his aforesaid creditors, and without any consideration whatever to be paid to him therefor, conveyed by a certain instrument in writing under his hand and seal all of the property hereinbefore described to one *William West*, which said instrument in writing is dated the first day of January aforesaid, and is in words and figures as follows, to wit: (Here set out a copy of the instrument); that said instrument was executed by the said *John Doe* and by him delivered to the said *William West*, upon the secret understanding and agreement by and between the said *John Doe* and the said *William West* (Here state the agreement made between the parties), contrary (concluding as in Form No. 10719).

20. Maliciously Injuring Animal.

Form No. 18869.³

(Ala. Crim. Code (1896), § 4923, No. 59.)

(Commencement as in Form No. 10680) *John Doe* unlawfully and maliciously disabled and injured a cow, the property of *Richard Roe*, against (concluding as in Form No. 10680).

1. *Alabama*.—Crim. Code (1896), § 4756.

See also, generally, *supra*, note 1, p. 429.

2. *South Dakota*.—Stat. (1901), § 8101.

See also, generally, *supra*, note 1, p. 429.

3. *Alabama*.—Crim. Code (1896), §§ 4910, 5090.

See also, generally, *supra*, note 1, p. 429.

21. Omitting to Keep a Lawful Fence.¹Form No. 18870.¹

(Commencing as in Form No. 10711, and continuing down to *) was, and continually from that time to the taking of this inquisition hath been, a planter in said county, and during all that time did cultivate crops in said county; and that the said *John Doe* then and during all that time, and there, about his cleared ground under cultivation and in crop time, a sufficient fence, *five* feet high, did unlawfully, wilfully and negligently omit to make and keep; there being then and there about his cleared ground under cultivation as aforesaid, during crop time as aforesaid, no navigable stream or deep water-course which was sufficient instead of such fence as aforesaid; and the said cleared ground under cultivation as aforesaid not then and there being situated within the limits of a county, township or district wherein the stock law was in force; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Daniel Webster, Solicitor.

(Indorsements.)

22. Parent Omitting to Provide Child with Necessaries.

Form No. 18871.¹

(Commencing as in Form No. 10683, and continuing down to *.) The said *John Doe*, on the first day of January, A. D. 1899, at the said city and county of *San Francisco*, did wilfully and unlawfully omit, without lawful excuse, to furnish the necessary food, clothing, shelter, medicine and medical attendance for *William Doe* and *Sarah Doe*, minor children of said *John Doe* and *Mary Doe*, his wife, the furnishing of said food, clothing, shelter, medicine and medical attendance being then and there a duty imposed by law upon the said *John Doe*, contrary (concluding as in Form No. 10683.)

1. Precedent. — In *State v. Bell*, 3 Ired. L. (25 N. Car.) 506, the following indictment was held sufficient:

"Superior Court of Law, Fall Term, 1842.

State of North Carolina, } ss.
Edgecombe County.

The jurors for the State upon their oath present, that *Noah Bell*, late of the county of *Edgecombe* and State aforesaid, on the first day of July, in the year of our Lord one thousand eight hundred and forty-two (1842), and continually before and after that time, during the crop season of the year, then and there being the occupier and cultivator of a farm as owner of the same, and being bound during the said crop season to keep up the fences around his cultivated fields *five* feet high, unlawfully, wilfully and negli-

gently did permit his said fences around his said fields to be and remain during the crop season of the year aforesaid less than *five* feet high, there being no navigable stream or deep water-course around the same, to the common nuisance of the good people of the county and of the State then and there being, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

2. North Carolina. — Code (1883), § 2799.

See also, generally, *supra*, note 1, p. 429.

3. California. — Pen. Code (1901), § 270.

See also, generally, *supra*, note 1, p. 429.

23. Playing on Musical Instrument in Public Street Without a License.

Form No. 18872.

(Precedent in *Com. v. Plaisted*, 148 Mass. 375.)¹

[(Commencement as in Form No. 6681.)

Richard Roe, of *Boston*, in the county of *Suffolk*, on behalf of the Commonwealth of *Massachusetts*, on oath complains that *George Plaisted*, of *Boston*, in the county of *Suffolk*, on the *sixth* day of *October* in the year of our Lord one thousand eight hundred and *eighty-seven*,]² at *Boston* aforesaid, and within the judicial district of said court, in a public street of said city within said district, and called *Washington Street*, did then and there perform on a certain musical instrument, to wit, a cornet; he, the said *Plaisted*, not being licensed by the board of police for said city so then and there to do, against the peace of said Commonwealth and the form of the statute of said Commonwealth, and the rules and regulations of said board of police for said city, in such case made and provided.

[(Signature and verification as in Form No. 6681).]³

24. Poisoning Spring of Water.

Form No. 18873.⁴

(Ala. Crim. Code (1896), § 4923, No. 69.)

(Commencement as in Form No. 10680) *John Doe* wilfully and wantonly poisoned a spring of water in the yard of *Richard Roe* (or a reservoir of water in the public square in the town of *Tuskegee*), in said county, against (concluding as in Form No. 10680).

25. Racing Horses on Public Road.

Form No. 18874.⁵

(Ala. Crim. Code (1896), § 4923, No. 53.)

(Commencement as in Form No. 10680) *John Doe* unlawfully engaged in a horse-race on a public road, against (concluding as in Form No. 10680).

Form No. 18875.

(Precedent in *Phillips v. State*, 35 Ark. 384.)⁶

State of <i>Arkansas</i>	}	In the <i>Phillips Circuit Court</i> , <i>November Term</i> , 1879. Indictment.
against <i>Enoch T. Brown, T. J. Phillips.</i>		

1. This complaint was held sufficient.
See also, generally, *supra*, note 1, p. 429.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Alabama*.—Crim. Code (1896), § 5329.

See also, generally, *supra*, note 1, p. 429.

5. *Alabama*.—Crim. Code (1896), § 5356.

See also, generally, *supra*, note 1, p. 429.

6. This indictment was held sufficient, although there was a mistake in the name of one of the defendants.

The grand jurors of *Phillips* county, in the name and by the authority of the state of *Arkansas*, accuse *Enoch T. Brown* and *T. J. [Phillips]* of the crime of horse-racing, committed as follows, viz.:

The said *Enoch T. Brown* and *T. J. Phillips*, on the *twelfth* day of *August*, 1879, in the county aforesaid, then and there unlawfully did run a horse-race on a public highway, to-wit: on the lower *Little Rock* road, a public road of said county, against [(concluding as in *Form No. 10682*).]¹

26. Removing Dead Body from Grave for the Purpose of Dissection or Sale.²

Form No. 18876.³

(*Ala. Crim. Code* (1896), § 4923, No. 72.)

(*Commencement as in Form No. 10680*) *John Doe* removed from the grave the dead body of *Richard Roe* from wantonness (or for the purpose of dissection or sale), against (concluding as in *Form No. 10680*).

27. Road Apportioner Neglecting Duty.

Form No. 18877.⁴

(*Ala. Crim. Code* (1896), § 4923, No. 76.)

(*Commencement as in Form No. 10680*) *John Doe*, a road apportioner of an election precinct, failed to discharge his duties as such apportioner, against (concluding as in *Form No. 10680*).

28. Road Overseer Neglecting Duty.

1. The matter to be supplied within [] will not be found in the reported case.

2. **Precedent.** — In *State v. Baker*, 144 Mo. 323, the indictment was as follows:

"First count. That one *Ira Baker*, on the — day of *April*, A. D. 1895, at the said county of *Putnam*, State of *Missouri*, did then and there unlawfully, wilfully and feloniously dig up, disinter and remove the dead body and the remains of a human being, to wit, the dead body and remains of one *Mary J. Williamson*, deceased, from the grave in which the said body and remains had then before been interred and then and there was, for the purpose of selling the dead body and remains, against the peace and dignity of the State.

Second count. That one *Ira Baker*, on the — day of *April*, 1895, at the county of *Putnam*, State of *Missouri*, did then and there wilfully and feloniously dig up, disinter and remove the dead body and remains of one *Mary J. Williamson*, deceased, from the grave in which the said body and

remains had then before been interred and then and there was, for the purpose of dissecting the said body and remains, against," etc.

"Third count. That one *Ira Baker*, on the — day of *April*, 1895, at the county of *Putnam*, State of *Missouri*, did then and there wilfully, unlawfully and feloniously dig up, disinter and remove the dead body and remains of one *Mary J. Williamson*, deceased, from the grave in which the said body and remains had then before been interred and then and there was, for the purpose of surgical and anatomical experiment and preparation of the said body and remains, against."

A judgment for conviction was reversed on the ground that the evidence did not support the indictment.

3. *Alabama*. — *Crim. Code* (1896), § 4644.

See also, generally, *supra*, note 1, p. 429.

4. *Alabama*. — *Crim. Code* (1896), § 5395.

See also, generally, *supra*, note 1, p. 429.

Form No. 18878.¹

(Ala. Crim. Code (1896), § 4923, No. 75.)

(Commencement as in Form No. 10680) *John Doe*, an overseer of a road precinct, failed to discharge his duties as such overseer, against (concluding as in Form No. 10680).

29. Selling, Giving or Lending Pistol or Bowie-knife to Boy Under Eighteen.

Form No. 18879.²

(Ala. Crim. Code (1896), § 4923, No. 82.)

(Commencement as in Form No. 10680) *John Doe* did unlawfully sell, (or give or lend) a pistol (or bowie-knife, or other knife of like kind or description) to *Richard Roe*, a boy under eighteen years of age, against (concluding as in Form No. 10680).

30. Tramp Entering Dwelling-house, etc., or Threatening.

Form No. 18880.³

(Ala. Crim. Code (1896), § 4923, No. 88.)

(Commencement as in Form No. 10680) *John Doe*, being a tramp, did enter the dwelling-house (or other building) of *Richard Roe*, without the consent of the occupant thereof (or did wilfully or maliciously injure, or threaten to injure, a person therein; or *John Doe*, being a tramp, did injure, or threaten to injure, the real or personal property of *Richard Roe*, or did demand of or order *Richard Roe* to deliver or surrender to him an article of value, as the case may be), against (concluding as in Form No. 10680).

31. Unlawfully Pulling Down Fence of Another.

Form No. 18881.⁴(Precedent in *State v. Hoover*, 31 Ark. 676.)⁵

[(Commencing as in Form No. 10682, and continuing down to *.)]⁶

The said *Bernard Hoover*, on or about the 15th day of July, A. D. 1876, in the county aforesaid, did wilfully and unlawfully pull down the fence of certain inclosed grounds belonging to one *Kasanah*

1. *Alabama*.—Crim. Code (1896), § 5395.

See also, generally, *supra*, note 1, p. 429.

2. *Alabama*.—Crim. Code (1896), § 5355.

See also, generally, *supra*, note 1, p. 429.

3. *Alabama*.—Crim. Code (1896), § 5630.

See also, generally, *supra*, note 1, p. 429.

4. *Arkansas*.—Sand. & H. Dig. (1894), § 1784.

See also, generally, *supra*, note 1, p. 429.

5. It was held that this indictment was sufficient, although it would have been better to allege definitely the day on which the offense was committed.

6. The matter to be supplied within [] will not be found in the reported case.

Owens, without the consent of the said *Kasanah Owens*, contrary to the statute in such case made and provided, and against [(concluding as in Form No. 10682).]¹

32. Using Firearms While Fighting in Public Place.

Form No. 18882,²

(Ala. Crim. Code (1896), § 4923, No. 89.)

(Commencement as in Form No. 10680) *John Doe*, while fighting at a militia muster (or in a street of the city of *Mobile* or at a public place), used (or attempted to use) a pistol (or gun, as the case may be), not in self-defense, against (concluding as in Form No. 10680).

1. The matter to be supplied within [] will not be found in the reported case.

2. *Alabama*. — Crim. Code (1896), § 5353.

See also, generally, *supra*, note 1, p. 429.

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I. THE STIPULATION.¹

1. In General.

a. To Admit Facts.

(1) IN GENERAL.

1. **Statutes and rules of court** relating to stipulations by parties or their attorneys exist as follows, to wit:

Alabama.—Supreme Ct. Rules, No. 25; Cir. Ct. Rules, No. 14.

California.—Code Civ. Proc. (1897), § 283.

Colorado.—Mills' Anno. Code (1896), §§ 173, 178, 357, 382, 429, 437; Co. Ct. Rules (Arapahoe Co.), No. 5; Dist. Ct. Rules (2d Jud. Dist.), No. 23.

District of Columbia.—Ct. of App. Rules, No. 5, § 2.

Florida.—Cir. Ct. Rules, No. 11, § 43.

Georgia.—2 Code (1895), § 5651; Super. Ct. Rules, No. 20.

Idaho.—Code Civ. Proc. (1901), § 3005.

Indiana.—Horner's Stat. (1901), § 968.

Iowa.—Code (1897), § 319.

Massachusetts.—Rev. Laws (1902), c. 173, § 70.

Michigan.—Supreme Ct. Rules, No. 33; Cir. Ct. Rules, No. 39; Ch. Ct. Rules, No. 15(a).

Minnesota.—Stat. (1894), § 6184.

Montana.—Code Civ. Proc. (1895), § 398; Dist. Ct. Rules (4th Jud. Dist.), No. 19.

Nebraska.—Comp. Stat. (1899), § 594; Dist. Ct. Rules (11th Jud. Dist.), No. 17.

Nevada.—Dist. Ct. Rules, No. 27.

New Jersey.—Gen. Stat. (1895), p. 2535, § 14.

New York.—Code Civ. Proc., §§ 37, 190, 313, 3062, 3337; Hun's Ct. Rules, No. 11.

North Carolina.—Supreme Ct. Rules, No. 39.

North Dakota.—Rev. Codes (1895), § 429.

South Carolina.—Supreme Ct. Rules, No. 18.

South Dakota.—Stat. (1901), § 736; Cir. Ct. Rules (6th Jud. Cir.), No. 37.

Texas.—Dist. & County Ct. Rules, No. 47.

Utah.—Rev. Stat. (1898), § 115; Supreme Ct. Rules, No. 15.

Washington.—Ballinger's Ann o. Codes & Stat. (1897), § 4766.

Wisconsin.—Cir. Ct. Rules, No. 5, § 3.

Must be in Writing.—A stipulation must be in writing and filed with the clerk or must have been entered upon the minutes of the court at the time it was made. Verbal stipulations with reference to proceedings in pending actions cannot be regarded, except so far as they are admitted by the parties against whom they are sought to be enforced or have been wholly or in part executed. And if a party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute. *McLaughlin v. Clausen*, 116 Cal. 487; *Sacramento County v. Hamilton*, 112 Cal. 603; *Johnson v. Sweeney*, 95 Cal. 304; *Smith v. Whittier*, 95 Cal. 279; *Stonesifer v. Kilburn*, 94 Cal. 33; *Borkheim v. North British, etc., Ins. Co.*, 38 Cal. 623; *Morse v. Budlong*, 5 Colo. App. 147; *Strong v. District of Columbia*, 3 MacArthur (D. C.) 499; *Palatka, etc., R. Co. v. State*, 23 Fla. 546; *Lee v. Atlanta St. R. Co.*, 91 Ga. 215; *Blair v. Curry*, 150 Ind. 99; *Goben v. Goldsberry*, 72 Ind. 44; *Louisville, etc., R. Co. v. Boland*, 70 Ind. 595; *Barnes v. Smith*, 34 Ind. 516; *Leek v. Chesley*, 98 Iowa 593; *Hardin v. Iowa R., etc., Co.*, 78 Iowa 726; *State v. Stewart*, 74 Iowa 336; *Preston v. Hale*, 65 Iowa 409; *Barnes v. Ennenga*, 53 Iowa 497; *Smith v. Wadleigh*, 17 Me. 353; *Nye v. Old Colony R. Co.*, 124 Mass. 241; *Saunders v. McCarthy*, 8 Allen (Mass.) 42; *Wells v. Penfield*, 70 Minn. 66; *Beach v. Spokane Ranch, etc., Co.*, 21 Mont. 184; *Martin v. De Loge*, 15 Mont. 343; *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135; *Union Locomotive, etc., Co. v. Erie R. Co.*, 37 N. J. L. 23; *Mutual L. Ins. Co. v. O'Donnell*, 146 N. Y. 275; *People v. Stephens*, 52 N. Y. 306; *Moore v. Metropolitan El. R. Co.*, 74 Hun (N. Y.) 639; *People v. Haggerty*, 5 Daly (N. Y.) 532; *State v. McArtan*, 122 N. Car. 194; *Reamer's Appeal*, 18 Pa. St. 510; *Evans v. State Nat. Bank*, 19 Fed. Rep. 676.

Form No. 18883.¹(Precedent in *Nelson v. Brush*, 22 Fla. 375.)[(*Title of court and cause as in Form No. 15218.*)]²

It is agreed by and between the attorneys for the plaintiff and the defendants, in the above entitled cause, that the record of a certain deed, made by the said *Louis J. Brush* to one *George F. Drew*, for the premises in question, shall be admitted in evidence on the trial of the above cause without proof of the execution of the original, if either party desires so to introduce the same. Counsel for plaintiff and defendants further admit that plaintiff did not enter upon the land and deliver said deed thereon; that at the time, and before the execution of said deed, and the delivery of the same to the said *George F. Drew*, the said *Louis J. Brush* was not in the possession of said land, nor was he before, nor has he been since the execution thereof. And that the defendants, at the time of the execution and delivery of said deed, were in the actual possession of said land, claiming the same adversely to the said plaintiff, and all other persons, and that they have ever since been in the adverse possession of the same. It is agreed that the above admitted facts be admitted and used in evidence upon the trial of said cause in the behalf of either party desiring to use the same.

S. M. & G. B. Sparkman, Attorneys for Plaintiff.
Wall & Truman, Defendants' Attorneys.

Form No. 18884.¹(Precedent in *Bingham v. Browning*, 97 Ill. App. 452.)[(*Title of court and cause as in Form No. 15219.*)]²

It is stipulated by and between the parties to the above entitled cause, by their respective attorneys, that for the purposes of this trial it may be considered as proved that of the *two thousand (2,000)* dollars which was charged to *James A. Bingham* on the books of *Henry W. King & Company*, on *July 7, 1898*, *one hundred and twenty-five (125)* dollars was drawn by the said *Bingham* from the moneys of the said copartnership of *Henry W. King & Company*, on *July 1, 1898*, and that *eighteen hundred and seventy-five (1,875)* dollars, to make up the said aggregate sum of *two thousand (2,000)* dollars, was drawn out by the said *Bingham* from the moneys of the copartnership of *Henry W. King & Company*, on divers days after *July 1, 1898*, and prior to *July 8, 1898*.

Peck, Miller & Starr, Attorneys for Plaintiff.
Bentley & Burling, Attorneys for Defendant.

Form No. 18885.¹(Precedent in *Cleveland, etc., R. Co. v. Prewitt*, 134 Ind. 560.)[(*Title of court and cause as in Form No. 17874.*)]²

It is agreed by the parties in the above entitled cause, that the

1. See, generally, *supra*, note 1, p. 454. 2. The matter to be supplied within [] will not be found in the reported case.

proof of the following facts shall be waived by the defendant on the trial, and the facts conceded to be as follows: That at the time the injury complained of was committed, *August 8th, 1888*, the *Fairland, Franklin and Martinsville Railroad* was operated by and was a part of the system of what was then known as the *Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company*, in the name of the *C., I., St. L. & C. R. R. Co.* since *August 8th, 1888*, the date of the injury, and at the time of bringing this suit, the said *C., I., St. L. & C. R. R. Co.*, including the *Fairland, Franklin and Martinsville Branch*, has been and is now consolidated with the *Cleveland, Cincinnati, Chicago and St. Louis Railway Company*, and is now operated in the name of said last named company. These facts are agreed to for the purpose of avoiding the necessity of bringing the record proof upon these points.

Dye & Harrison, for defendant.
Shirley & Hickam, for plaintiff.

Also —

It is admitted by the defendant in the above cause, that, on the *8th of August, 1888*, while the plaintiff was a passenger on the regular passenger car for carrying passengers on the railroad mentioned in the complaint in the above cause, between *Martinsville and Franklin, Indiana*, having purchased a ticket, and the same having been taken from her by the conductor, at a point beyond *Morgantown* on the track of said railroad, said passenger car in which the plaintiff was sitting ran off and left the track of said road, ran down an embankment, and turned over and injured plaintiff; that at the point on said railroad track where said car so left the track, and said injury occurred, the railroad track was out of repair, and that the company operating the said railroad, at the time of said injury, did not use the degree of care that the law requires of a carrier of passengers, in maintaining said track in good condition, and that said injury happened by reason of the failure of said company, operating said road, to keep the track in such repair as the law requires; that said injury was caused without any fault or negligence of the plaintiff, and solely because of the fault and negligence of the said railroad company operating said road at the time of the injury, on which said injury occurred.

Dye, Pickens & Harrison, for defendant.

Form No. 18886.¹

(Precedent in *Chilvers v. People*, 11 Mich. 44.)

The People v. Thomas Chilvers.

It is hereby stipulated, to be used in evidence on the trial of this case, that at the time mentioned in the complaint, the defendant was captain of the *Gem*, a steamboat used and employed in the business of carrying passengers and property from *Detroit to Windsor in Canada*, a village opposite to said city, and sometimes engaged in carrying passengers and property to *Fort Wayne*, in *Wayne county*,

1. See, generally, *supra*, note 1, p. 454.

Michigan, in towing vessels, and in going to any part of the river where she may be hired to run.

That the *Gem* is a *United States* vessel, owned by the *United States*, and above the burden of *twenty* tons, enrolled and licensed for the coasting and foreign trade under and by virtue of the laws of the *United States*.

That the boundary between the *United States* and *Canada* is midway through the *Detroit* river.

That the *Gem* and her officers are subject to all the laws regulating customs, both in *Canada* and the *United States*; that by said laws they are obliged to report all goods transported at once to the custom house department, and only to discharge at such times and such places as said officers permit.

That a custom house officer is on each dock, in *Canada* and *Detroit*, to see that the laws are enforced.

That the owners of said *Gem* pay \$100 for the privilege of landing at a private wharf in said city, from now until the *first of April* next.

That said *Gem* carries the light required by the act of Congress, and that no license has been paid to said city since said ordinance was passed.

Nov. 8, 1861.

Wm. J. Speed, City Attorney.

John S. Newberry, Att'y for Def't.

Form No. 18887.¹

(Title of court and cause as in Form No. 17883.)

It is hereby stipulated and agreed that the following facts are, and shall be, admitted by both parties for the purposes of, and on, the trial of this action (*Here state the facts*).

Dated this *first* day of *June*, A. D. 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendant.

Form No. 18888.¹

(Precedent in *Ayers v. Watson*, 132 U. S. 395.)

A. E. Watson
v.
Frank Ayers et al. }

It is agreed and admitted by the defendants, for the purpose of this trial at this term of the court, that *A. E. Watson*, plaintiff in this cause, is entitled to all the right, title and interest granted by the state of *Texas* to the heirs of *Walter W. Daws* on *September 16*, A. D. 1850, said land patented being *one-third* of a league, described in said patent No. 542, vol. 8, and which said land is described in plaintiff's petition; but defendants say that said *one-third* of a league of land so patented as aforesaid to the heirs of *Walter W. Daws* is covered by the grant of the government of *Coahuila* and *Texas* to *Maximo Moreno* of *eleven* leagues of land, as set forth more fully in defendant's petition; which said *eleven* league grant is an older and

1. See, generally, *supra*, note 1, p. 454.

superior title to that of plaintiff, and the title to which is in the defendants in this cause.

X. B. Saunders,
W. T. Rucker,
F. H. Sleeper, and
A. M. Monteith,
 Att's for defendants.

(2) AND THAT ALLEGATIONS IN COMPLAINT ARE TRUE.

Form No. 18889.¹

(Precedent in *Draghicevich v. Vulicevich*, 76 Cal. 379.)

[(*Title of court and cause as in Form No. 5910.*)]²

It is hereby stipulated that this action was commenced in *May*, 1883.

That *John Draghicevich*, the plaintiff, died on the *twenty-second* day of *August*, 1883, while he and defendant were still copartners, as alleged in plaintiff's complaint herein.

That no receiver was or ever has been appointed in this action.

That after the death of the said plaintiff, the defendant, as he was advised and believed it to be his duty, took as surviving partner of said copartnership into his business all the personal property of said partnership belonging thereto at the date of the death of said decedent, for the purpose of winding up the business of said copartnership, and ever since has been engaged in winding up the affairs of said copartnership.

That on the *eighteenth* day of *June*, 1883, the plaintiff and defendant entered into the submission attached to the defendant's answer, and marked "*Exhibit A.*" And all the allegations of said answer in reference to the arbitration in pursuance of said submission, and the acts of the parties thereunder subsequent to said arbitration agreement, and to the date of the death of decedent, are true, as in said answer alleged.

It is further stipulated that this action shall be submitted for decision of the court upon the foregoing facts, and upon the further stipulation that all the allegations contained in said complaint are true, and upon the answer of defendant as the pleading in said action.

Dated *San Jose*, *February 19*, 1884.

Wm. L. Gill, Plaintiff's Attorney.

Burt & Pfister, Attorneys for Defendant.

(3) AND SAVING ALL LEGAL OBJECTIONS TO THE COMPETENCY OF SUCH FACTS TO PROVE THE ISSUE.

Form No. 18890.¹

(Precedent in *Young v. Kansas Mfg. Co.*, 23 Fla. 395.)

[(*Title of court and cause as in Form No. 15218.*)]²

It is agreed by and between Messrs. *Randall, Walkers & Foster*, counsel for the defendant in this suit, and *Fletcher & Wurts*, counsel

1. See, generally, *supra*, note 1. [] will not be found in the reported case.
 p. 454.

2. The matter to be supplied within

for plaintiff, to require no evidence in support of the following facts, but to admit the truth of the same and to allow the facts to be read in evidence to the jury, saving all legal objections to the competency of the facts to prove the issues.

It is agreed that the goods taken by the Sheriff under plaintiff's writ in this suit are the goods mentioned in the declaration. That they were manufactured by the *Kansas Manufacturing Company*, the plaintiff in this suit and a corporation organized and doing business under the laws of the State of *Kansas*; that the said goods were manufactured by the plaintiff upon the accompanying order of *M. A. Dzialynski*, of *Jacksonville, Florida*, as modified by the accompanying letters marked Exhibit A, Exhibit B, Exhibit C, Exhibit D, and made a part of this agreement; that said goods were shipped by plaintiff to the said *Dzialynski*, *September 22d*, 1885, and arrived in *Jacksonville, Florida*, *October 3d*, 1885, and were delivered by the *Savannah, Florida and Western Railway Company* to the defendant herein *October 7th* and *8th*, 1885, and were in his possession when this suit was commenced; that said *Dzialynski* never executed any note or notes to the plaintiff for said goods, and that they have never been paid for; that demand was made on the defendant for said goods by the plaintiff and he refused to surrender possession of the same; that the plaintiff's place of business is *Leavenworth*, in the State of *Kansas*.

It is also agreed that *S. F. Taylor*, a witness for the plaintiff, and an officer of said company, would swear, if present, on the trial of this cause, and said statement may be read to the jury as his testimony, subject to all legal objections as to competency; that this was the only transaction the plaintiff ever had with said *Dzialynski*, except the sale to him of *two* wagons or buggies shortly before the order for said goods was given; that as soon as the news of *Dzialynski's* failure reached the plaintiff, its agent, *S. F. Taylor*, came without delay to *Jacksonville, Florida*, and demanded the goods of the defendant, who refused to surrender them, whereupon this suit was brought; that when the plaintiff's agent left *Leavenworth* for *Jacksonville* it was not supposed by the managers of the plaintiff that sufficient time had elapsed for the goods to have reached *Jacksonville*, and the agent expected to reach *Jacksonville* before the goods; that the value of the goods described in the declaration is \$2,500, and that *one* of the wagons (complete) mentioned in the declaration could not be found by the Sheriff, and that its value was \$100.

May 21st, 1886.

Randall, Walkers & Foster, for Defendant.
Fletcher & Wurts, for Plaintiff.

It is further agreed that the goods in question are claimed by defendant under a voluntary assignment in insolvency from said *Dzialynski* to said *Young*, made and filed in the clerk's office of *Duval* county, on the *5th* day of *October*, 1886, for the benefit of preferred creditors, of whom the plaintiff is not one, and, after they are paid, for the benefit of creditors at large.

Randall, Walkers & Foster, for Defendant.
Fletcher & Wurts, for Plaintiff.

(4) AND THAT EVIDENCE OTHER THAN THAT ADMITTED MAY BE OFFERED UPON THE TRIAL.

Form No. 18891.¹(Precedent in *Bingham v. Browning*, 97 Ill. App. 443.)[(Title of court and cause as in Form No. 15219.)]²

It is stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, that on the trial of said cause the following facts shall be taken as being true for the purposes of this case, without any evidence being produced thereof, to wit:

That on and prior to *July 12, 1898*, the firm of *Henry W. King & Company* was doing business in the city of *Chicago*, consisting of *eight or nine* partners; that the plaintiff and defendant were members of the said firm; that *E. W. Dewey* came to *Chicago* in *June, 1898*, as the agent of the defendant; that, as the agent of the defendant, the said *Dewey* asked the plaintiff to submit to the defendant a proposition upon which the plaintiff would sell out to the defendant all his interest in said copartnership; that thereupon, about the middle of *June, 1898*, the said *Bingham* submitted to said *Dewey* a proposition which was unsigned, and was as follows:

“*Chicago, June 11, 1898.*”

Mr. *Dewey*:

Dear Sir: In compliance with your suggestion, I submit the following proposition:

Will settle *July 1st* for \$75,000 — my original capital — and waive all interest in good will and fixtures of *Browning, King & Company*, and *Henry W. King & Company* also, in the interest and profits for this year. Will stay until *January 1st*, if wanted at a salary of \$1,000 per month.

\$75,000. Original capital.
28,410. My note *January 1st, 1898*.

\$46,590. Due me then.
11,250. Good will.
5,000. Fixtures.

\$16,250.
1,634. Interest due *July 1st*.

\$17,834.
\$34,474. Total.

Due me without profits for this year:

\$16,250. Good will. And fixtures in *Browning, King & Company*, and *Henry W. King & Company*, as per our article of agreement.

1,634. Interest to *July 1st*.
10,526. Balance on my note, after credit for good will, interest and fixtures accounts, as above.

\$28,410.

1. See, generally, *supra*, note 1. 2. The matter to be supplied within [] will not be found in the reported case.

In lieu of the credit for balance on my note—good will and fixtures. Interest on capital (as above) with the balance of capital to my credit of \$46,590, would reinstate my original capital of \$75,000. And in consideration of my long connection with this business, and poor prospect of being able to continue in the business longer, also for the past few years not having enough profit from it to pay my living expenses, I feel that it would not be unfair to ask that the original amount I put in the business be returned; therefore I propose that if you pay me \$75,000 July 1, 1898, or within sixty days of that time, I will relinquish all my interest in the business of *Browning, King & Company*, and *Henry W. King & Company*, and waive all interest in the good will, fixtures and profits of the business for the year 1898, and retire from the concern—or, if wanted, will remain until January 1, 1899, at a salary of \$1,000 per month."

That upon receiving the same the said *Dewey*, without any action thereon, took the same to *New York* to submit the matters to said defendant. That afterward, on July 12, 1898, on said *Dewey's* return to *Chicago* from *New York*, after seeing said defendant, the said *Dewey*, acting for and on behalf of said defendant, presented to the plaintiff at *Chicago*, in said county, a paper in writing, which is below herein set forth, and on behalf of defendant proposed to plaintiff that the plaintiff and defendant make and enter into that agreement, to which the plaintiff thereupon assented; and the said plaintiff, and the defendant, by said *Dewey*, his attorney in fact, on the day and year last mentioned, at *Chicago* aforesaid, executed and delivered the said agreement in duplicate, in form, as so proposed by said *Dewey*, which agreement was in the words and figures following, that is to say:

"Agreement made the first day of July, A. D. 1898, between *James A. Bingham*, of *Chicago*, party of the first part, and *William C. Browning*, of *New York*, party of the second part.

The parties hereto, each in consideration of the covenants and agreements of the other hereinafter expressed, do mutually covenant and agree to and with one another as follows, that is to say:

First. The first party in consideration of the sum of seventy-five thousand dollars (\$75,000), payable as hereinafter stated, and of the release, cancellation and discharge of all indebtedness of the first party to the copartnership of *Browning, King & Company*, whether in the shape of promissory notes, or other obligations, or open book accounts, hereby sells, assigns, transfers and conveys unto the said second party all right, title and interest of the first party in and to the capital stock of said copartnership of *Browning, King & Company*, and *Henry W. King & Company*, and all interest in the fixtures, furniture, good will and any and all assets and property of every description whatever, belonging to and owned by said copartnership, and all the interest of the first party in and under the certain articles of copartnership between the members of said copartnership of date January 1, 1895, and in and to any and all assets and property therein mentioned.

Second. Said second party agrees to pay said first party the sum of seventy-five thousand dollars in the manner following, to wit: Ten thousand dollars (\$10,000) in cash, the receipt whereof is hereby

acknowledged; and *sixty-five thousand* dollars (\$65,000), *thirty (30)* days after demand therefor by *first* party, with interest thereon from *July 1, 1898*, at the rate of *five* per centum (5%) per annum, said *sixty-five thousand* dollars (\$65,000) to be payable at all events on or before *July 1, 1899*. Said second party also undertakes and agrees to procure, cancel and deliver to the said first party any promissory note or other written obligation of said first party to said copartnership of *Browning, King & Company*, and *Henry W. King & Company*, and also to deliver to said first party a receipt and release in full for any and all obligations or any amount on open book account due from said first party to the said copartnership.

Third. The first party agrees that he will not for a period of *three (3)* years from *July 1, 1898*, engage in the business of selling at retail clothing, furnishing goods, hats and caps in competition with the business of said copartnership of *Browning, King & Company*, and *Henry W. King & Company*, at any place where the business of said copartnership was established on the *first* day of *July, 1898*, to wit, at either or any of the following cities: *Chicago, Milwaukee, St. Paul, Minneapolis, Omaha, Kansas City, St. Louis, Cincinnati, Cleveland, Philadelphia, New York, Brooklyn, Providence, Boston*.

Fourth. Said *James A. Bingham* hereby expressly agrees that the business of said copartnership of *Browning, King & Company*, and *Henry W. King & Company*, may be continued under said names in accordance with the articles of copartnership of date *January 1, 1895*, until *December 31, 1898*, to the same extent as though the first party had not hereby sold his interest therein (except, as between the parties to said articles), and that no publication of dissolution of said copartnership shall be had prior to *January 1, 1899*, provided, however, and the second party expressly undertakes and agrees that he will indemnify and save the first party harmless from any and all obligations of said copartnership of *Browning, King & Company*, and *Henry W. King & Company*, whether incurred prior or subsequent to *July 1, 1898*.

Fifth. The first party further agrees that at any time hereafter and from time to time upon request of the second party he will execute such further contracts, instruments or conveyances as second party may require for more effectually transferring or conveying any portion or all of the copartnership property herein referred to.

In witness whereof the parties hereto have hereunto, and to a duplicate hereof, set their hands and seals the day and year first above written.

James A. Bingham, (SEAL)

Wm. C. Browning, (SEAL)

By *E. W. Dewey*, Attorney in Fact."

And at the same time with the execution of said agreement, the said *Dewey* on behalf of defendant on said *July 12, 1898*, paid to plaintiff the sum of \$10,000, the receipt of which by the plaintiff is acknowledged in said agreement.

That on *July 7, 1898*, and on divers days theretofore, and after the time when said *Bingham* presented said statement to said *Dewey*

about the middle of *June*, 1898, the said *Bingham* drew from the moneys of the copartnership divers sums of money, amounting in the aggregate to the sum of *two thousand* dollars, which sums were at first carried by the bookkeeper on tickets, and the said aggregate amount of which, viz., \$2,000, was on said *July 7*, 1898, charged to plaintiff upon the books of account of said firm, and which amount was never repaid the plaintiff, and that the same stood and remained to his debit on open book account upon the books of said firm thence until and on the *12th* day of *July*, 1898, when the said written agreement was signed and delivered as aforesaid. There is no admission in this stipulation (other than is herein contained) as to the exact days upon which all the sums making up the said total of \$2,000 were drawn out by the plaintiff. Each party is left to offer such proof upon that point as he may see fit.

That said plaintiff was indebted to said firm at the time he submitted said proposition to said *Dewey* and thence until and at the time of making and delivering said agreement on *July 12*, 1898, upon certain promissory note or notes theretofore given by him to said firm.

That after the execution of said contract sued upon in this action, and before *December 1*, 1898, the said defendant became the owner of all the assets of the said copartnership of *Henry W. King & Company*, and so remained up to the time of the institution of this suit.

That the said plaintiff has never repaid to the copartnership of *Henry W. King & Company*, or the defendant, or any one else, the said sum of *two thousand* dollars (\$2,000) obtained by him on *July 7*, 1898.

The foregoing stipulation is upon the condition and agreement that either party may offer in evidence the foregoing stipulation or any part thereof, and that upon its being so offered that the foregoing evidence and each and every part thereof shall remain and be and is subject to objections by the other party to its competency, materiality or relevancy precisely as if proof of such respective facts, instead of the stipulation, were so offered upon the trial; and that either party is at liberty upon the trial to introduce other evidence as he may be advised.

Peck, Miller & Starr, Attorneys for Plaintiff.
Bentley & Burling, Attorneys for Defendant.

Form No. 18892.¹

(Precedent in *Littler v. Lincoln*, 106 Ill. 357.)

[(*Title of court and cause as in Form No. 15219.*)]²

It is stipulated by and between the parties to this suit that the facts are as follows:

1st. That *D. T. Littler*, defendant, in *May*, 1881, through his agents, constructed a board fence so as to inclose the following described real estate: All the lots and blocks in *Knapf, Bird &*

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

454.
 2. The matter to be supplied within

Tinsley's addition to the town of *Postville* (now city of *Lincoln*), county of *Logan*, and State of *Illinois*, that lie north of *Eleventh* street and west of *Adams* street, in what is claimed to be streets and alleys inside of the boundaries above mentioned; that none of the streets outside of said inclosure, to wit, *Adams* street and *Seventeenth* street, in said city of *Lincoln*, are inclosed by said fence.

2d. That notice in writing was served upon said *Littler* to remove said fence as an obstruction to the public streets claimed to exist inside of the boundaries of said inclosure, in *May*, 1881, by the marshal of said city, under authority from said city.

3d. That the fence never has been removed, but still remains as originally constructed.

4th. All ordinances of the city of *Lincoln* referring to or bearing upon the controversy are to be read in evidence, by consent, together with all papers in this case.

5th. Petition of *D. T. Littler* to the city council of the city of *Lincoln*, dated ———, and plat accompanying the same, together with all resolutions and ordinances passed by the city council in connection with said petition, are to be read in evidence, by consent.

6th. The deed of vacation, of date *April 21*, 1881, of *David T. Littler*, together with all other papers, plats and records made and recorded in connection with such vacation; also, all papers showing a replatting of said real estate are to be read in evidence.

7th. All deeds vacating plats inclosed by fence above mentioned, together with all other papers, records, etc., by which said *Littler* vacated or attempted to vacate that part of said plat embraced by the fence above mentioned, filed in spring of 1881, it being agreed as to all papers above mentioned, if the originals are not present the records or certified copies may be read in evidence.

9th. That no part of said fence is outside the boundary lines of the corners fixed by *Thomas G. Gardner* in the survey accompanying said plat filed in the recorder's office of *Logan* county, *Illinois*, and any map of the city of *Lincoln*, published by authority of the city of *Lincoln*, may be presented to the court, by consent, and is to be put in evidence by consent.

10th. It is agreed that defendant *Littler* owned the fee title to all lots and blocks embraced in that part of above plat vacated or attempted to be vacated by said *Littler* in the spring of 1881, before vacation, and that since the vacation he has conveyed the land embraced within the limits aforesaid to one *Wm. Kurtz*, the record of which deed shall also be read in evidence; that all of the streets shown to exist on the plats above referred to never were worked or improved in any way, nor were they ever used or traveled by the public, said entire tract of land being now covered with a blue-grass sod, and from its general appearance it is impossible to locate any of the streets or alleys attempted to be vacated, and it has been in that condition for at least *twenty* years, last past; that there are on all sides of tract inclosed, public streets, none less than *sixty-six* feet wide.

11th. That all of the lots and blocks embraced and enclosed by the fence were vacant and unoccupied at the time of building fence.

It is agreed that either party may call witnesses, or offer proof, upon any issue not covered by this stipulation.

[(*Date and signatures as in Form No. 18889.*)]¹

Form No. 18893.²

(Precedent in *Adams Express Co. v. Stettaners*, 61 Ill. 185.)

[(*Title of court and cause as in Form No. 15219.*)]¹

It is hereby stipulated and agreed that the merchandise in controversy was ordered by plaintiffs, merchants in *Chicago, Illinois*, of *Kutter, Kuckemeyer & Co.*, merchants in the city of *New York*, in the usual course of trade, and that plaintiffs ordered said *New York* merchants to ship said merchandise to them at *Chicago* by the defendant, which is an express company and common carrier. The value of the goods at the time of loss, *September 13th*, A. D. 1870, was \$415.50. The consignors, said *New York* merchants, shipped said goods by defendant's company, and received from defendant the paper hereto annexed. The goods were not delivered to plaintiffs, but were lost in transit. No statement of the value of the goods was made at time of shipment. The same consignors, a short time before this shipment, shipped a package by same company, of greater value than \$50, to other parties (not plaintiffs). Those goods were also lost. A receipt similar to one above was given to consignors at time of shipment. The consignors claimed the full value of goods lost, which was at first refused on the ground that company claimed not to be liable for more than \$50, but was finally paid by the company. At the time of payment, which was before the goods in controversy were shipped, the company informed the consignors that in all shipments thereafter, if they wished to hold the company liable for more than \$50, they must, at time of shipment, state the real value of package shipped; that plaintiffs did not know, at the time of the shipment to them, of the foregoing information by defendant to consignors. Both parties may introduce other legal testimony on hearing.

[(*Date and signatures as in Form No. 18889.*)]¹

Form No. 18894.²

(Precedent in *Walker v. Wood*, 69 Ill. App. 543.)

State of *Illinois*, } ss. In the *Superior Court of Cook County*.
Cook County. }

William Wood et al.

v.

James H. Walker, Wm. B. Howard } ss. Gen. No. 154,320.
and *Columbus R. Cummings*, as }
James H. Walker & Co. }

It is hereby stipulated and agreed by and between the parties to the above entitled cause, by their respective attorneys, for the pur-

1. The matter to be supplied within [] will not be found in the reported case.
2. See, generally, *supra*, note 1, p. 454.

pose of the trial of said cause in said court, that upon the trial of the said cause the following facts are admitted and agreed by the respective parties, provided, however, that other proofs as to any fact or matter involved in said suit, not inconsistent with the statements contained in this stipulation, may be introduced by either of the parties upon the trial of said cause.

Said defendants, on the 27th day of *December*, 1892, were engaged in the dry goods business under the firm name of *James H. Walker & Co.*, and said firm was indebted to plaintiffs for goods sold and delivered to the said firm in the amount of *one thousand two hundred and thirty-nine* dollars and *ninety-eight* cents (\$1,239.98). This amount does not include amount of the payment of *June 17*, 1893.

On or about said *December 27*, 1892, the corporation, which had previously been organized under the laws of the State of *Illinois*, under the name of *James H. Walker Company*, purchased the business and assets of said firm, and assumed the payment of the outstanding liabilities of said firm, including the amount of the plaintiffs' claim herein.

Said corporation proceeded to carry on the said dry goods business, and on or about *January 20*, 1893, caused a notice to be sent to the plaintiffs, which was received by the plaintiffs at that time, and which was to the effect that the assets and business of said firm had been acquired by said corporation and that said corporation had assumed the outstanding liabilities of said firm. Among these liabilities was the present claim of the plaintiffs herein.

On or about the 4th of *August*, 1893, said corporation became insolvent, and the *Chicago Title and Trust Company* was appointed receiver of the assets of said corporation by the *Circuit Court of Cook* county. The amount of the plaintiffs' claim was proved as a claim against said corporation before said receiver, on the ground that the amount of said claim has been assumed by said corporation, and dividends to the aggregate amount of *eight hundred ninety-two seventy-nine one-hundredths* dollars (\$892.79) were thereafter paid on said claim by the receiver to the plaintiffs.

It is agreed that this stipulation is for the purposes of the trial of the above entitled cause alone, and that the matters and things therein contained are not admitted for the purpose of any other trial or litigation whatsoever.

Dated this 23d day of *October*, A. D. 1896.

Partridge & Partridge, Attorneys for Plaintiff.

Willits, Case & Odell, Attorneys for Defendants.

Form No. 18895.¹

(Precedent in *Poplin v. Mundell*, 27 Kan. 139.)

[(*Title of court and cause as in Form No. 17876.*)]²

The parties to the above-entitled action agree upon the following statement of a portion of the facts in the above-entitled action, and submit the same to the court as true:

1. See, generally, *supra*, note 1, [] will not be found in the reported case.
p. 454.
2. The matter to be supplied within

1. That on the 9th day of July, 1874, *F. P. Trautwein* was the owner in fee simple of the lands described in plaintiff's petition, except the claim of *A. G. Barber*, under a tax sale mentioned in No. 2.

2. That on July 9, 1874, the deed recorded in book 18, page 382, in the office of the register of deeds of *Anderson county, Kansas*, was executed to *A. G. Barber*, of S. 1-2 of S. W. 1-4 sec. 9, T. 20, R. 21.

3. That on February 13, 1875, said *A. G. Barber* and wife made and delivered to *F. P. Trautwein*, in the deed to said S. 1-2 of S. W. 1-4 sec. 9, T. 20, R. 21, recorded in book 24, p. 326, in said register's office, of S. 1-2 of S. W. 1-4 of S. W. 1-4, 9-20-21.

4. That on June 30, 1876, *F. P. Trautwein* and wife sold and conveyed to *M. B. V. Wisker*, and made and delivered to *M. B. V. Wisker* a deed of the lands described in plaintiff's petition, recorded in said register's office, book 24, page 327.

5. That on March 30, 1877, *M. B. V. Wisker* and wife sold and conveyed all of said lands to *J. W. Dowler*, by deed recorded in book 24, page 328, in said register's office.

6. That said defendant claims said lands by and under the deed of date December 26, 1879, from said *J. W. Dowler* and wife to *Robert Mundell*, the defendant, recorded in book 24, page 117, in said register's office.

7. That said plaintiff claims title to said land under the following: That on April 10, 1880, said *F. P. Trautwein* and wife sold and conveyed said lands to the plaintiff, *E. F. Poplin*, by deed recorded in book 24, p. 271, in said register's office; that *A. G. Barber* and wife, on April 24, 1880, sold and conveyed the said S. 1-2 of S. W. 1-4 of sec. 9, T. 20, R. 21, to *E. F. Poplin*, plaintiff, by deed recorded in book 24, p. 254, in said register's office.

All questions as to time of filing said deeds for record, or any of them, as to the time of recording said deeds, or any of them, and as to the time of presenting said deeds, or any of them, to the county clerk for transfer, and as to the transferring of the same by the county clerk, and all questions as to notice or lack of notice, and of good faith or want of good faith, and all questions of fraud, and all questions not herein expressly agreed upon, are not to be affected by this stipulation; and said parties reserve the right to offer any further legal evidence to the court upon the trial of this action as to all facts not hereinbefore expressly agreed upon.

October 7, 1880.

A. Bergen, for Defendant.

H. L. Poplin, for Plaintiff.

Form No. 18896.¹

(Precedent in London, etc., Bank v. Oakland, 61 U. S. App. 227.)

[(Title of court and cause as in Form No. 17895.)]²

It is hereby stipulated in the above-entitled action that the following facts are admitted to be true, and proof of the same is hereby

1. See, generally, *supra*, note 1, [] will not be found in the reported case. p. 454.

2. The matter to be supplied within

waived: That complainant was incorporated as averred in its bill; that the map mentioned in respondents' answer was filed and recorded by the persons from whom complainant derails title, and who were the owners in common of a tract of land embracing the land in controversy and the other lands shown on said map on September 2, 1853, and that the copy attached to the answer and marked "Exhibit A" is a full, true, and correct copy of said map; that the *Rancho de San Antonio* was granted by the Spanish governor of California in 1820 to one *Luis Peralta*, who divided it among his sons, to one of whom, *Vicente Peralta*, he allotted the land bounded on the west by the *Bay of San Francisco*, on the south and east by the *Estuary of San Antonio* (designated on the *Kellersberger* map as "*Bay of Contra Costo*" and "*Bayou*"), and on the north by line extending from the *Bay of San Francisco* to said estuary, and lying north of the most northern tier of blocks shown on said *Kellersberger* map; that the claim of *Vicente Peralta* to said land was confirmed in 1854 by the board of commissioners appointed by act of Congress to inquire into California land grants of Spanish or Mexican origin, and on appeal to the *United States District Court* said confirmation was affirmed in 1855, and the *Supreme Court of the United States* in *The United States v. Peralta*, 19 How. 343, affirmed said decision, and patent accordingly has issued from the *United States* conveying and confirming said lands to the successors in interest of *Vicente Peralta*; that the date of filing said *Kellersberger* map, the owners signing the same (who had succeeded to all the rights of *Vicente Peralta* in all said lands so allotted to him), owned a tract of land embracing all the lands laid off in blocks by the *Kellersberger* map, and all the lands surrounding the portion so subdivided into blocks and extending therefrom to said exterior boundaries of the *Vicente Peralta* allotment; that said exterior strip or margin was not partitioned by said partition deed, but remained in undivided and common ownership for upward of ten years thereafter, unless the court shall hold that the premises in controversy were dedicated by said map to the public as a portion of *Fallon Street*; that said map was made by said owners for the purpose of a partition and allotment of the blocks thereon laid down among themselves, and on the said 15th day of August, 1853, simultaneously with the filing of said map for record, said owners made partition of said blocks, allotting the same amongst themselves by the numbers and designations of the various blocks thereof as laid down, numbered and designated upon said map, and executed amongst themselves reciprocally a deed of partition, whereby block 166 (but not the lands in controversy) was allotted and conveyed in severalty to *John C. Hays* and *John Caperton*, two of said owners, and the title of the complainant in this suit to the land in controversy is derived from said tenants in common by conveyances executed by them subsequently to said partition deed; that the title to said block 166 is vested in other persons, not parties to this action, who hold the same under conveyances executed by said *Hays* and *Caperton*; that after said partition was made the respective parties thereto sold and conveyed the lands in their respective allotments to various persons, and from time to time describing the parcels in

the conveyances executed by them by the numbers and description thereof as shown upon said map, and referring to said map by its title of "*Kellersberger's map of Oakland*" for particularity of description; that about the year 1855, and at all times since, the land in controversy in this action was and is enclosed by a substantial fence, and since 1858 it has been occupied as a residence; that the land claimed by respondents' answer to be a portion of *Fallon Street* adjacent to complainant's property has never been actually opened or used as a street; but that other portions of *Fallon Street*, to wit, from *Sixth Street* to *Eighth Street*, inclusive, have been for many years so opened and used by the public under the dedication made by the deed of partition and the said map; that the premises are now improved as stated in complainant's complaint, and are of the value therein stated; that the board of trustees of the town of *Oakland* on the 27th day of *August*, 1853, passed and adopted an ordinance, of which a copy is hereto annexed, marked "*Exhibit B*"; that the streets running north and south as laid down on said map, including *Fallon Street*, are 80 feet wide; but the complainant does not admit the respondents' contention that by the facts hereinbefore set forth, or by any other facts, *Fallon Street* extends further north than *Tenth Street*. It is further stipulated that evidence may be introduced at the trial by either party as to matters not covered by the facts hereinbefore recited, and that such evidence may be taken orally instead of by deposition.

[(*Date and signatures as in Form No. 18889.*)]¹

(5) AND THAT CAUSE BE TRIED BY THE COURT WITHOUT A JURY ON THE STIPULATION AND ON THE DOCUMENTARY EVIDENCE.

Form No. 18897.²

(Precedent in *Helmer v. Castle*, 109 Ill. 665.)

[(*Title of court and cause as in Form No. 15219.*)]¹

It is hereby stipulated that defendant took possession of the premises described in the declaration, during the year 1882, and before the commencement of this suit; that if the north boundary line of the premises described in a deed dated *January 24*, 1860, from *Philander Hickox* and wife of *Martha J. Park*, and recorded in the recorder's office of *Cook county* on the 28th day of *January*, 1860, in book 189 of deeds, page 31, is the center line of *Lake street*, (*Lake street* being the street referred to in said description as a road,) then the premises described in said deed do not include the premises described in the declaration in this case; but if the south line of *Lake street* is the north boundary line of the premises described in said deed, then the premises described in the declaration are included in the premises described in and purported to be conveyed by said deed to *Martha J. Park*; and it is further admitted that section 11, town 39 north, range 13, was not in the city of *Chicago* in the year

1. The matter to be supplied within [] will not be found in the reported case.
2. See, generally, *supra*, note 1, p. 454.

1860, and was unsubdivided at that date; and it is further stipulated that the above entitled cause shall be tried before Judge *Anthony*, without a jury upon the documentary evidence only, and stipulations signed by the parties or their attorneys.

This stipulation relates only to one trial of the cause, and not to bind the parties at any further trial in the *Superior Court*.

John P. Wilson, Atty. for Deft.
James Frake, Atty. for Plff.

b. To Admit Documents.

Form No. 18898.¹

(Dist. of Col. Supreme Ct., Com. L. Rules No. 31, § 4.)

In the *Supreme Court* of the *District of Columbia*, the *eighth* day of *May*, 1903.

<i>John Doe</i> , plaintiff,	}	At Common Law, No. 10.
against		
<i>Richard Roe</i> , defendant.		

I do hereby, as attorney (or *agent*) for the above named defendant (or *plaintiff*) agree to admit in evidence, on the trial of the cause, the paper writing hereto annexed, marked "*A*," as and to be a true copy of (*state of what, but more fully than in the notice*), and I do also hereby agree, as such attorney, to admit in evidence on such trial the paper hereto annexed and marked "*B*" as and to be a true copy of (*state of what, but more fully than in the notice*).

May 8th, 1903.

Jeremiah Mason, Defendant's (or *Plaintiff's*)
Attorney (or *Agent*).

Form No. 18899.²

(*Title of court and cause as in Form No. 17883.*)

It is hereby stipulated and agreed that the documents hereunder described (and to which we have respectively set our names on the first and last pages thereof) shall and may be admitted and read and used as evidence at the trial of this cause; and that such of the said documents as are described as copies or extracts shall be deemed and taken to be, and shall be used as, true copies or extracts, without further proving the same; and that such copies or extracts shall, and may be, read in evidence as primary and the best evidence, and not as secondary evidence; and that the original documents shall not be required to be produced, or any evidence as to the same, or of the proper custody thereof, or as to the nonproduction of the same; and no objection shall be taken to the reading as evidence the docu-

1. *District of Columbia*.—Either party may call on the other party by notice to admit any document saving all just exceptions. In case of neglect or refusal to admit, the cost of proving the document shall be paid by the party so neglecting or refusing, whatever the result of the cause may be, unless at the trial the justice certify that the refusal to admit was reasonable. *Supreme Ct. Com. L. Rules, No. 31.*

2. See, generally, *supra*, note 1, p. 454.

ments so marked, saving all just exceptions to the admissibility of the originals as evidence.

The following are the documents above referred to (*describing them and referring to a figure or letter indorsed*).

Dated this *first* day of *June*, A. D. 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendant.

Form No. 18900.¹

(*Title of court and cause as in Form No. 17883.*)

For the purposes of the trial of this action, the due execution by the above-named defendant, and the genuineness, of the annexed contract are hereby admitted; and the same may be read in evidence upon the trial of said action, without further proof.

Dated this *first* day of *June*, A. D. 1903.

Oliver Ellsworth, Defendant's Attorney.

e. To Admit Deposition Taken in Another Case.

Form No. 18901.¹

(Precedent in *Rosenbaum v. State*, 33 Ala. 357.)

The State
vs. } In the *Circuit Court of Marengo*.
Louis Rosenbaum.

It is consented and agreed, that the deposition of *Dr. James S. Ruffin*, taken in the civil suit of *Gittleman v. Rosenbaum* in this court, may be used and read in evidence in this case of *State v. Rosenbaum*, and the personal attendance of said *Ruffin* is dispensed with; and also in the *State v. Gittleman*.

Lomax & Prince, for *Rosenbaum*.

McCaa & Clarke, for *Gittleman*.

Y. L. Royston, solicitor.

d. To Admit Testimony Given in Another Case.

Form No. 18902.¹

(Precedent in *Smith v. Whittier*, 95 Cal. 286.)

[(*Title of court and cause as in Form No. 5910.*)]²

Stipulated that the testimony of *D. A. Bangs*, as given and taken down by the phonographic reporter on the trial of the case of *John Treadwell* against said defendants, *W. F. Whittier et al.*, when written out in long-hand and certified as correct by said reporter, may be read and used in the trial, or in any proceedings in the case of *George J. Smith v. W. F. Whittier et al.*, with like force and effect as if said *Bangs* was on the stand and testifying in open court, sub-

1. See, generally, *supra*, note 1, p. 454. [] will not be found in the reported case.

2. The matter to be supplied within

ject only to such objections or exceptions as might be made if said *Bangs* was testifying in open court in said last-named cause, and also subject to the right of defendants' attorneys to contradict or impeach said *Bangs* on any matter testified to by him, without first calling his attention thereto, or making preliminary proof as to such contradictory matter.

San Francisco, November 1, 1884.

McAllister & Bergin, Attorneys for Defendants.

Lloyd & Wood, Attorneys for Plaintiff.

e. To Admit Deed as Prima Facie Title to Land and Specifying Objections that may be Raised Thereto.

Form No. 18903.¹

(Precedent in *Mulligan v. Smith*, 59 Cal. 220.)

[(*Title of court and cause as in Form No. 5910.*)]²

It is hereby stipulated by and between the parties to the above entitled action, as follows: That the deed of *William Mitchell*, Tax Collector, to the said plaintiff, of the land in dispute in said action, offered in evidence by the plaintiff, is *prima facie* proof of title to said land, subject to attack by defendant upon the grounds only:

1. That the statute under which *Montgomery Avenue* is alleged to have been opened, gave no authority to the Board of Public Works, or to the County Court of said City and County, to act in the premises, as in said act provided.

2. That the Board of Public Works, as provided for in said act, never acquired jurisdiction over the matters alleged to have been determined by them under the alleged authority of said act.

3. That the alleged report of said Board to said County Court, as provided for in said act, was unauthorized and void.

4. That said County Court had no jurisdiction to confirm said report, and that the confirmation thereof was unauthorized and void.

5. That no assessment for any tax on the property in said act described is by said act authorized.

6. That by said act no power is given to any Tax Collector to sell any premises for non-payment of any tax nor to deliver any deed under such sale.

All other defenses and objections to the plaintiff's title are hereby expressly waived; in consideration of which, each party agrees to press said case to as speedy adjudication thereof as is possible, and either party may read in evidence on the trial any book, petition, exhibit or evidence used or taken in the trial of *Dutertre v. Ford*, case No. 4,800 in said Court, subject to any legal exceptions that may be taken thereto.

[(*Date and signatures as in Form No. 18889.*)]²

1. See, generally, *supra*, note 1, [] will not be found in the reported case. P. 454.

2. The matter to be supplied within

- f. That Answer and Cross-petition and Evidence be Withdrawn and that Decree be Entered in the Supreme Court Reversing in Part the Decree of the Lower Court.

Form No. 18904.¹

(Precedent in *Bond v. Davenport*, 123 U. S. 620.)

In the *Supreme Court of the United States*.

Henry R. Bond, Trustee, Appellant, }

v.

Sarah G. Davenport, Appellee. }

Appeal from the *Circuit Court of the United States* for the Southern District of *Iowa*.

In the above mentioned suit it is stipulated by and between *Henry R. Bond*, trustee, complainant and appellant, *The Equitable Trust Company* of *New London, Connecticut*, the holder of the bonds secured by the mortgage sought to be enforced, and *Sarah G. Davenport*, appellee, being the sole parties in interest, as follows, to wit:

1. Said *Sarah G. Davenport* hereby withdraws the answer and cross-petition filed by her in said suit, and all evidence offered and introduced by her in said *Circuit* Court, and consents and agrees that the same shall not be considered as part of the record.

2. It is agreed that a decree shall be entered by the *Supreme Court* in said suit, reversing the decision and decree of the said *Circuit* Court in so far as said court found in favor of said *Sarah G. Davenport*, and in so far as said court by its decree denied to complainant the relief by him prayed, as against the undivided half of the south half of block fifty-nine (59), in the city of *Davenport, Iowa*, claimed by *Sarah G. Davenport*, as mother and heir-at-law of *George A. Davenport*, deceased, and in so far as said court, by its said decree, undertook to dismiss complainant's bill as against said property, and tax certain costs to complainant, and that this cause be remanded to said *Circuit* Court, with instructions to enter a decree in complainant's favor, declaring the sums owing upon said bonds, secured by said mortgage, to be a lien upon the premises in said mortgage, described as of the date of said mortgage, and directing sale of sufficient of said premises to pay the same, and further directing that the receiver heretofore appointed in said cause shall turn over to the complainant all the funds in his hands arising from the rentals of said premises, the same to be credited upon the amount found to be owing upon said bonds secured by said mortgage before sale of said premises, and further directing that the complainant be permitted to further plead and bring in new parties if so advised.

3. The complainant and appellant is excused from printing the record in this suit, save and except such portions thereof as to him shall seem material to enable the court to dispose of said suit under this stipulation.

4. The attorney or solicitor who has entered his appearance in this suit is authorized to consent to such demand or requirement of the complainant, or the said court, as shall enable the complainant

1. See, generally, *supra*, note 1, p. 454.

to have the said decree of the *Circuit Court* reversed, said cause remanded, and a final decree entered in the *Circuit Court* in complainant's favor, and for that purpose is hereby authorized to appear in said *Circuit Court* to any pleading filed by the complainant.

5. No personal judgment shall be entered against the said *Sarah G. Davenport* in said suit, or any costs taxed either against her or in her favor.

November 16, 1887.

Henry R. Bond, Trustee,
By *Jane & Hoffman*, Attorneys.

Sarah G. Davenport. (SEAL)
The Equitable Trust Company,
By *Jane & Hoffman*, Attorneys.

W. F. Brannan,
Of Counsel for Complainant.
Geo. E. Hubbell,
Attorney for *Sarah G. Davenport.*

g. That Bill of Exceptions is Correct and that an Appeal has been Perfected.

Form No. 18905.¹

(Precedent in *Pearson v. Ashley*, 5 Wash. 170.)

[(*Title of court and cause as in Form No. 17892.*)]²

It is hereby agreed that the foregoing statement of facts and bill of exceptions contains a full, true and correct copy of all papers necessary and proper to be used on this appeal. That the appeal herein was duly perfected and the requisite undertaking on appeal was given and filed within the time prescribed by law. That the foregoing is a full, true and correct transcript, and that the appeal herein may be heard thereon.

[(*Date and signatures as in Form No. 18889.*)]²

h. That Bill of Exceptions is Correct and that a Motion for a New Trial may be Heard Thereon.

Form No. 18906.¹

(Precedent in *Sarver v. Garcia*, 49 Cal. 218.)

[(*Title of court and cause as in Form No. 5910.*)]²

We hereby agree that the foregoing bill of exceptions, with the exhibits and testimony thereto annexed, is full, true and correct, and we stipulate and agree that a motion for a new trial may be heard thereon. Notice of the hearing of the said motion is hereby waived.

September 10, 1873.

[(*Signatures as in Form No. 18889.*)]²

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

454. 2. The matter to be supplied within

1. That Brief of Plaintiff in One Case may be Considered in Connection with Brief in Another Case.

Form No. 18907.¹

(Precedent in *Morrow v. Smith*, 8 Okla. 263.)

In the *Supreme Court of the Territory of Oklahoma*, *Robert Morrow*, plaintiff in error, v. *Mary E. Smith*, defendant in error. Stipulation.

It is conceded that the question raised in the brief of the plaintiff in error in this case concerning the necessity of a warrant from the county clerk to the county treasurer, is exactly the same question that is pending at this time before this court in the case of *N. F. Frazier v. Edward Prince*. So far as that question is concerned, plaintiff in error agrees that the brief of the defendant in error in said case may be considered in connection with the brief of this plaintiff in error; it is also agreed that any other question, if any there be, identical with the questions presented by the plaintiff in error in this case with similar questions in the *Frazier* case, may be likewise considered.

R. B. Forrest, Attorney for Plaintiff in Error.
Dille & Blake, for Defendant in Error.

j. That Case be Heard in the Supreme Court on the Pleadings, Judgment and Stipulation, and Admitting that the Allegations in the Complaint and Answer are True.

Form No. 18908.¹

(Precedent in *People v. Pacheco*, 27 Cal. 186.)

[[*Title of court and cause as in Form No. 5910.*]]²

It is hereby stipulated and agreed by and between the above-named plaintiffs and defendants, that this case shall be heard and determined in the *Supreme Court* upon the pleadings, the judgment and this stipulation, and it is further agreed and admitted, that the facts stated in said complaint and not denied in the answer of the *Central Pacific Railroad Company of California* are true; and further, it is admitted that the averment of facts in said answer of the said company are also true, except that it is not admitted as a matter of fact that at the time of the passage of the act of *April 4, 1864*, mentioned in said pleadings, or since, the said State (though it is that the General Government) was engaged in any war, or repelling any invasion, or suppressing any insurrection.

J. G. McCullough,
Attorney-General and for Plaintiffs and Appellants.
E. B. Crocker,
Attorneys for Defendants and Respondents.

1. See, generally, *supra*, note 1, [] will not be found in the reported case.

2. The matter to be supplied within

k. That Cause be Remanded from the United States Court to the State Court and that Causes be Consolidated.

Form No. 18909.¹

(Precedent in Boston, etc., R. Co. v. Boston, etc., R. Co., 65 N. H. 394.)

Merrimack, ss.

Supreme Court.

June Law Term, 1888.

*Boston, Concord & Montreal R. R. v. Boston & Maine R. R.,
Boston & Lowell R. R.*

It is agreed, —

I. That the bill in equity (lease case so called) now pending in the *United States circuit* court be at once remanded to the *New Hampshire supreme* court; that the *three* cases — ejectment suit, bill in equity filed *March 30, 1888*, and lease case (so remanded) — be consolidated and tried as one case in the *New Hampshire supreme* court; that the *Boston & Lowell Railroad* shall appear at once in all said suits without further notice, the proceedings being amended by joining them as parties; that the *Boston & Maine Railroad* and the *Boston & Lowell Railroad* will not attempt to remove any question arising out of said cases to the *United States circuit* court.

All the testimony now taken in each of the cases may be used in the consolidated case; all further testimony on both sides to be taken and concluded before *July 15, 1888*.

The defendants' pleas and answers shall be filed before *June 1, 1888*.

All the parties agree that final arguments shall be made before the *Supreme Court* at the *December Law Term, 1888*, and the consolidated case, and all questions arising thereon, shall then be submitted to said court for final determination, and both parties shall urge the court for a speedy decision.

II. The *Boston & Lowell Railroad* or *Boston & Maine Railroad* shall, in all respects and without delay, put, and hereafter maintain, said *Boston, Concord and Montreal Railroad* property into a safe and proper condition for doing its business, to the satisfaction of Hon. *B. A. Kimball* and Hon. *John W. Sanborn*, who shall determine in regard to the same.

Among other repairs and renewals which the *Boston & Lowell Railroad* or *Boston & Maine Railroad* agree to make on said *Boston, Concord & Montreal Railroad* without delay are the following:

The *four-span single-lattice bridge* (No. 12 in the report) just north of *Tilton* station shall be rebuilt.

New track stringers shall be laid, and other general repairs made, on the *third bridge* north of *Tilton* (bridge No. 14). No. 16, trestle over highway at *East Tilton*, shall be rebuilt.

The trestle over the *Winnepesaukee* river at *East Tilton* (No. 17), *Rum Hill* bridge, so called (No. 66), and *Bath Upper* bridge, so called (No. 68), shall be immediately rebuilt, or strengthened and repaired in such a way as to be made safe and suitable for the business of the road, according to the judgment of said *Kimball* and *Sanborn*.

1. See, generally, *supra*, note 1, p. 454.

All of the other bridges on said *Boston, Concord & Montreal Railroad*, including stringer bridges and culverts, not now in safe or suitable condition for the business of the road, shall be at once repaired or rebuilt, according to the judgment of said *Kimball* and *Sanborn*.

It is also agreed that the said *Boston & Lowell Railroad* or *Boston & Maine Railroad* shall at once put into the *Boston, Concord & Montreal Railroad* line a sufficient quantity of ties, ballast, and 60-pound steel to put said road into a safe and suitable condition for its business; but the parties being unable to agree upon the precise number and amount of each that are needed, the same shall be determined according to the judgment of said *Kimball* and *Sanborn*. The *Boston & Lowell Railroad* and *Boston & Maine Railroad* agree to make, without delay, all other repairs and renewals which may be necessary in order to put the entire road into a safe and suitable condition for its business, according to the judgment of said *Kimball* and *Sanborn*.

The traffic of the road shall not be diverted by the *Boston & Maine Railroad* pending the decision in said cases. The usual summer business shall be encouraged by the *Boston & Lowell Railroad*, and the passenger service and equipment shall be kept equal to that of past years.

III. Nothing contained in the foregoing agreement, and nothing done under it, shall be construed as an admission by either party to it, and shall not be used, discussed, or considered in determining the merits of the case upon final submission; and neither shall it change or affect the manner or basis of accounting between the parties.

All differences of opinion between said *Kimball* and said *Sanborn* shall be at once submitted to *James R. Kendrick*, general manager of the *Old Colony Railroad*, who shall finally determine what and how much shall be done.

The parties will make and execute all such further agreements as may be necessary or convenient to carry the foregoing into effect.

In consideration of the foregoing agreements by the *Boston & Maine* and *Boston & Lowell* railroads, the *Boston, Concord & Montreal Railroad* agree that the application for the appointment of a receiver, and other temporary relief, shall be suspended.

Concord, N. H., May 7, 1888.

Boston & Maine Railroad,

by *Richard Olney, Charles H. Burns.*

The Boston, Concord & Montreal Railroad,

by its solicitors, *Chase & Streeter, Bingham & Mitchell.*

Boston & Lowell Railroad,

by *T. Jefferson Coolidge, President.*

1. That Cause be Submitted on a Single Issue.

Form No. 18910.¹(Precedent in *Bagley v. Ward*, 37 Cal. 123.)[[*Title of court and cause as in Form No. 5910.*)]²

For the purpose of this action it is agreed: That on the 5th day of November, 1855, *Sanders & Brenham* owned and possessed one equal undivided half of *Hundred Vara Lot Number Two Hundred and Fifty-three*. That plaintiff claims to have *Sanders & Brenham's* title to said undivided half of said lot, under attachments and judgment sales against *Sanders & Brenham*, and not otherwise, and said defendants claim to have *Sanders & Brenham's* title to said undivided half of said lot, under attachments and judgment sales against *Sanders & Brenham*, and not otherwise; and that the sole issue to be tried herein is, which party to this suit has succeeded to the title of *Sanders & Brenham*.

[[*(Date and signatures as in Form No. 18889.)*)]²Form No. 18911.¹(Precedent in *Lozano v. Palatine Ins. Co.*, 78 Fed. Rep. 279.)[[*(Title of court and cause as in Form No. 17895.)*)]²

It is stipulated and agreed by and between the parties hereto, by their respective attorneys of record hereunto fully authorized, for the purpose of expediting this cause, and having a final determination of the real point at issue, that this cause shall be submitted finally upon the simple question whether or not the alleged breach of the so-called "iron-safe clause" as it appears in the original policy filed with the declaration in this cause, and which policy is by agreement made a part of the pleadings, and as set up in the pleas demurred to, prevents a reconvey by the plaintiffs; that upon the determination of this issue by the *circuit* court final judgment be entered accordingly; that thereupon the losing side may take the cause by usual appellate process to the *United States circuit* court of appeals, where said issue as aforesaid, and not otherwise, shall be submitted for final determination by said *appellate* court, and the judgment entered there upon the said issue, and thereupon the losing side shall have reasonable opportunity in due course of practice to have said issue determined by the *United States supreme* court; that, in the event of reversal and throughout the history of this cause, this issue shall be and remain the issue, and its final determination shall finally settle this cause. In the event of final determination and settlement in favor of the plaintiffs, the judgment shall be for the plaintiffs in the sum total stated in the estimates contained in the so-called "proofs of loss" submitted by the plaintiffs to the defendant, without interest at the rate of *eight* per cent. per annum from the *sixtieth* day next after the same were submitted, together with their taxed costs. And in the event such final determination shall be for the defendant, the

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

judgment shall be, it go hence without delay, and recover of the plaintiffs its taxed costs.

[(*Date and signatures as in Form No. 18889.*)]¹

m. That Counterclaim be Stricken from Defendant's Answer.

Form No. 18912.²

(Precedent in *Foster v. Milliner*, 50 Barb. (N. Y.) 387.)

[(*Title of court and cause as in Form No. 17883.*)]¹

It is hereby stipulated and agreed, by and between the respective parties, that the counterclaim set up in the defendant's answer, in this action, be withdrawn, and stricken out of the answer, without prejudice to defendant's right to maintain an action thereon against the plaintiffs, and the same is not to be affected by the future litigation of this action.

Dated *April 10, 1865.*

[(*Signatures as in Form No. 18889.*)]¹

n. That Defendant shall Pay Judgment if Recovered, and if Judgment be Reversed the Amount Paid, with Interest, shall be Refunded.

Form No. 18913.²

(In *Fort Scott First Nat. Bank v. Elliott*, 60 Kan. 172.)

[(*Title of court and cause as in Form No. 17876.*)]¹

Whereas, on the *30th* day of *April*, 1892, in said *district* court above named, said plaintiff recovered a judgment against said defendant for the sum of \$3,205.39 debt, and the further sum of ——— dollars, cost of suit; and whereas, on the same day execution was issued out of said court against said defendant to collect said judgment, and said execution is now in the hands of the sheriff of said *Cowley* county; and whereas, said defendant is intending to file in the *supreme* court petition in error to review and endeavor to obtain a reversal of said judgment:

Now, therefore, for the purpose of saving cost and expense and damage by reason of further proceedings which may be taken by plaintiff to enforce said judgment, pending the determination of said matter by the *supreme* court, it is here stipulated by and between said parties that said defendant shall forthwith pay to said plaintiff the sum of \$2,655.37, which, if said judgment shall become final, shall be in full satisfaction of the judgment aforesaid, except for costs; but if said judgment shall be reversed by said *supreme* court, then said sum so paid, with interest thereon at the rate of *six* per cent. per annum from this date, shall be refunded to said defendant, his legal representatives or assigns, on demand, and the right of each of the parties shall be the same as if this stipulation and such payment had not been made. And if such petition in error shall be

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. [] will not be found in the reported 454. case.

filed, each of the parties agrees to use every possible effort to have the same brought to hearing by said *supreme* court at the earliest practicable time.

[(*Date and signatures as in Form No. 18889.*)]¹

- o. That One Defendant may Withdraw Part of His Counterclaim, that Plaintiff may Enter Judgment, and that Another Defendant shall Have the Right to Purchase the Judgment or Redeem the Premises from the Same.**

Form No. 18914.²

(Precedent in *Newton v. Marshall*, 62 Wis. 11.)

In *Circuit Court, Fond du Lac County.*

Semira P. Newton vs. John R. Cole, Adelaide Cole, C. F. Kalk, Maria Kalk, Columbus Smith and C. H. Marshall.

It is hereby stipulated that the defendant *C. F. Kalk* withdraw that portion of his counterclaim in the above action which sets up, or seeks to recover, a claim for money advanced by him for the use and benefit of the plaintiff in and about repairing, fitting up and improving the homestead and grounds of the plaintiff, and that the plaintiff may enter judgment for the amount due upon the note and mortgage described in the complaint, with a proviso in said judgment that the said *C. H. Marshall*, his heirs or assigns, shall have the right to purchase said judgment, or to redeem the premises from the same, upon the payment to the plaintiff, or her attorney, within the time of redemption allowed by law, the sum of \$1,000, with interest thereon at *ten* per cent. from *June 10, 1879*, less the sum of \$100 paid thereon *November 19, 1880*, and \$50 paid *October 4, 1881*, together with the costs of action; and that, upon said payment being made, the said plaintiff be compelled to assign and transfer such judgment to said *C. H. Marshall*, his heirs or assigns, on demand.

Dated *March 1, 1882.*

E. S. Bragg, Attorney for Defendants
C. F. Kalk and *C. H. Marshall.*
A. M. Blair, Attorney for Plaintiff.

- p. That Entry be Made on Docket of Judgment that the Judgment has been Secured on Appeal.**

Form No. 18915.²

(Precedent in *Burrall v. Vanderbilt*, 1 Bosw. (N. Y.) 640.)

[(*Title of court and cause as in Form 17883.*)]¹

Whereas, judgment was rendered on the *4th* day of *April, 1855*, in the above named court, in favor of the above named respondent, for the sum of \$1,153.90 cts., the same having been secured on appeal, it is hereby mutually agreed that an entry be made by the

1. The matter to be supplied within [] will not be found in the reported case.
 2. See, generally, *supra*, note 1, p. 454.

clerk of this court, on the docket of said judgment, that the same is secured on appeal, and that an order to that effect be granted.

November 7, 1855.

S. Sanxay,
Attorney for *De Groot,*
Burrill, Davison & Burrill,
Attorneys for Plaintiff.

q. That Certain Evidence is to be Considered Only for the Purpose Stated.

Form No. 18916.¹

(Precedent in *Lawrence v. McCready*, 6 Bosw. (N. Y.) 333.)

Superior Court.
Alexander M. Lawrence, Receiver, etc., }
agst.
Nathaniel L. McCready and others. }

It is stipulated and agreed that the fact that the original subscription note given in evidence on the trial was made by *N. L. McCready & Company*, a firm composed of *McCready & Mott* only, while the note on which this action is brought was made by *McCready, Mott & Company*, a firm composed of *McCready, Mott* and *James H. Brundage, Jr.*, is to have no effect upon the decision of the case, except so far as may tend to show the purpose for which the note sued upon was made and delivered.

M. G. Harrington, Defendants' Attorney.

r. That Evidence may be Admitted Without Reference to the Form of the Pleadings or Form of Action or Defense.

Form No. 18917.¹

(Precedent in *Miller v. McManis*, 57 Ill. 128.)

[(Title of court and cause as in Form No. 15219.)]²

It is agreed in this cause that either party may offer any legal evidence as to the actual state of the account between plaintiff and defendants on the issue of fact made up in said cause, so as to have a trial on the merits, on said issues, without reference to questions as to the form of such pleadings or the form of action or defense, saving to plaintiff that no evidence is to be offered as to matters heretofore excluded by the court, and saving to defendants the right to traverse any breach of said contract not already traversed by him.

[(Date and signatures as in Form No. 18889.)]²

s. That Allegations in the Complaint are True.

Form No. 18918.¹

(Precedent in *Bingham v. Winona County*, 8 Minn. 444.)

[(Title of court and cause as in Form No. 17878.)]²

It is hereby stipulated and agreed by and between the parties to

1. See, generally, *supra*, note 1, p. 454. 2. The matter to be supplied within [] will not be found in the reported case.

the above entitled action that all the facts alleged and charged in the plaintiff's complaint herein, and each and every one of them, be, upon the trial of this cause, admitted to be true by the defendants, and that no question or fact shall be submitted or urged before the court by either party other than that which relates to the amount of fees which the plaintiff is entitled to recover under the statute regulating fees in such cases.

Dated *June 16, 1860.*

Sargeant & Franklin, Plaintiff's Attorneys.

A. S. Seaton, County Attorney, for Defendants.

t. That Judgment be Entered.

(1) FINAL JUDGMENT UPON DEMURRER.

Form No. 18919.¹

(Precedent in *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 139.)

The County of San Mateo

v.

The Southern Pacific Railroad Company.

} No. 2807.

It is stipulated in the above entitled actions that each of them be, and hereby is, submitted upon the plaintiff's demurrer to the *first* affirmative defense (*second* defense) in the defendant's answer. And it is further stipulated that judgment final in the action may be rendered upon the demurrer, it being agreed that for the purpose of this proceeding the other defenses are withdrawn from the consideration of the court.

Rhodes & Bartsow, Att'ys for Plaintiff.

L. D. McKisick, Att'y for Defendant.

(2) OF DISMISSAL.

Form No. 18920.

(Precedent in *Wells v. Penfield*, 70 Minn. 66.)²

[(*Title of court and cause as in Form No. 17878.*)]³

It is hereby stipulated by and between the respective parties, the plaintiff and the defendant in the above entitled action, and their respective attorneys, that the defendant may take judgment for dismissal upon the merits against said plaintiff upon all of the causes of action set forth in plaintiff's complaint in said action, without cost to either party.

December 22nd, 1896.

A. L. Brice and J. T. Hutchinson,

Attorneys for Plaintiff.

Henry M. Farnam,

Attorney for Defendant.

1. See, generally, *supra*, note 1, that the stipulation was improvidently made.

2. The judgment rendered on this stipulation was set aside on the ground [] will not be found in the reported case.

(3) OF FORECLOSURE, BUT THAT NO PERSONAL JUDGMENT BE ENTERED.

Form No. 18921.¹(Precedent in *Preston v. Hill*, 50 Cal. 45.)[(*Title of court and cause as in Form No. 5910.*)]²

It is stipulated that a decree be entered in the above-entitled action, of foreclosure and sale of the land described in the complaint, in fee, together with all title now existing in the defendants, or either of them, or which they may hereafter acquire, under the United States government, and that the amount due be stated, as of this day, at *eleven thousand five hundred* dollars, for which judgment should be entered, with *one and one-fourth* per cent. interest per month thereon, all payable in gold coin of the United States. The said judgment being in full of all claim on part of either party against the other; in said decree stipulations to be inserted protecting plaintiffs in possession of said land, during an existing lease up to *December 2, 1867*. No personal judgment to be entered.

San Rafael, March 5, 1867.

W. A. Thompson,

Attorney for Plaintiffs.

Patterson, Wallace & Stow,

Attorneys for Defendants.

ii. That Judgment be Stayed Upon Payment of Costs and that Cause be Continued, and that One of the Plaintiffs Have Charge of the Property in Controversy.

Form No. 18922.¹(Precedent in *Frink v. Le Roy*, 49 Cal. 315.)

In the *District Court, Twelfth Judicial District, County of San Francisco.*

Louis E. Ritter and Theodore Le Roy }

v.

Samuel Phillips. }

In this cause the defendant having paid to the plaintiffs the sum of *thirteen hundred and fifty* dollars and *twenty-five* cents, and having satisfied and paid the plaintiffs' attorney his fees in the cause, so that no charge is to be made by him against his clients, and also the defendant having paid to the plaintiffs' attorney *one hundred and sixty* dollars, the costs taxed in the cause; therefore, it is stipulated and agreed that the judgment for the *two* per cent. commission for counsel fee and costs taxed be satisfied to that extent, but remain in full force and effect for the *thirty-nine thousand two hundred and eighty-four* dollars and *thirty-nine* cents, with interest from the *5th* day of *March*, A. D. 1859, as expressed in the judgment. And it is

1. See, generally, *supra*, note 1, p. 454. [] will not be found in the reported

2. The matter to be supplied within case.

further agreed and stipulated that the plaintiffs will pay *A. H. Houston* the amount due him under the contract with defendant for grading the streets in front of the property mortgaged, and charge the amount paid against the payment by them received above and the rents to be hereafter collected by the said *Le Roy*. It is further stipulated and agreed, that *Theodore Le Roy*, one of the plaintiffs, is to have charge of the property mortgaged, and to have the right and power to collect the rents now due and to become due from the tenants, and to rent the property or any part of it as it becomes vacant, as fully and with the same right and power over the property as if it belonged to him and the other plaintiff; and at the end of each and every month to apply the rents so by him to be collected to the payment of the interest due on the judgment in this cause above referred to, amounting to *thirty-nine thousand two hundred and eighty-four* dollars and *thirty-nine* cents, and the surplus interest, after paying taxes, etc., to apply to the judgment. And it is further stipulated, that the order of sale or execution be and the same is stayed for the period of *eighteen* months from the *5th* day of *March*, A. D. 1859, and at the end of that time if the judgment, or any part of it remains due and owing, that then an order of sale or execution issue in this cause to the sheriff of this county, requiring him to sell the property mortgaged to pay the said judgment or amount due thereon, and that until the expiration of the said *eighteen* months this cause is continued.

Dated *March 12*, 1859.

[*Signatures as in Form No. 18889.*)]¹

v. That Judgment be Further Stayed and that One of the Plaintiffs Continue in Charge of the Property in Controversy.

Form No. 18923.²

(Precedent in *Frink v. Le Roy*, 49 Cal. 317.)

In the *District Court*, *Twelfth* Judicial District, in and for the County of *San Francisco*.

Louis E. Ritter and Theodore Le Roy }

v.

Samuel Phillips. }

The stipulation entered into on the *12th* day of *March*, A. D. 1859, between plaintiffs and defendant, staying the order of sale on execution for the space of *eighteen* months, having expired on the *5th* of *September*, A. D. 1860, and the accounts and vouchers having been rendered to defendant according to said stipulation, the amount due to plaintiffs has been found to be *thirty-five thousand four hundred and forty-two* dollars and *eighty-one* cents (\$35,442.81), and the defendant being unable to pay said debt, has asked a further continuance of this cause of the period of *twelve* months, with the

1. The matter to be supplied within [] will not be found in the reported case.
2. See, generally, *supra*, note 1, p. 454.

privilege of *twelve* months more, which request has been granted on the following terms:

1st. *Theodore Le Roy* shall have the management of the property as provided in the stipulation of *March 12*, 1859, but his commission on rents and profits of said property shall be *five (5)* per cent. on the gross amount of receipts, instead of *four* per cent.

2d. From and after the *5th* of *September*, 1860, the said *Theodore Le Roy* will keep *two* separate accounts, Nos. 1 and 2. Account No. 1 shall be charged with \$35,000, amount due for principal. Account No. 2 will be charged with \$442.81, balance of the amount due on the *5th* of *September*. \$35,442.81 total amount due on the *5th* of *September*. Account No. 2 shall be credited with the rents, and charged with all expenses; as taxes, repairs, assessments, commission on collection of rents, and generally all disbursements required for the management of the property, and also each month in advance, with the interest at *one and one quarter* of *one* per cent. (*1 1-4*) per month on \$35,000, unless said principal is reduced as hereinafter provided, and in case of any reduction of said principal, then with the monthly interest at *1 1-4* per cent. on the balance, and as soon as the credit balance of said account No. 2 shall amount to *one thousand seven hundred and fifty* dollars (\$1,750), that is to say *five (5)* per cent. on the principal, said sum of \$1,750 shall be divided between the plaintiffs, a pro rata of their respective interest in said principal, and said sum of \$1,750 shall be deducted from the principal in account No. 1. And from the date of such repartitions, the monthly interest of *1 1-4* per cent. shall be counted only on the balance of principal, but it is understood that said repartitions or dividends shall never be less than \$1,750 at one time.

Defendant having carefully examined the accounts rendered to him up to *September 5*, 1860, and having found said accounts correct and faithful, binds himself never to dispute the same, said accounts being hereby finally settled.

And it is expressly stipulated that the order of sale or execution be and the same is hereby stayed for the period of *twelve* months from the *5th* day of *September*, 1860, and at the end of that time, if any part of the judgment remains due and owing, then an order of sale on execution may issue in the cause to the sheriff of this county, requiring him to sell the mortgaged property to pay the amount due on the judgment; and that until the expiration of said *twelve* months this cause is continued.

Dated in *San Francisco*, the *10th* day of *September*, in the year of our Lord 1860.

[(Signatures as in Form No. 18889.)]¹

1. The matter to be supplied within [] will not be found in the reported case.

w. That Judgment Rendered in One Case shall be Entered in Another Case.

Form No. 18924.¹

(Precedent in *Western Land Co. v. English*, 75 Iowa 507.)

[(*Title of court and cause as in Form No. 17875.*)]²

It is hereby stipulated by and between the *Western Land Company*, plaintiff in each of the above entitled causes, and each of the defendants in each of the causes referred to by its number, that, inasmuch as cause No. 1,605, being the *Western Land Company* vs. *Andrew Nelson*, has been changed to *Cherokee* county for trial, and as the same questions are involved in each and all of said causes, and the plaintiff relies on the same chain of title of each and all of said causes, and for the purpose of saving expense, it is hereby stipulated and agreed that this court or judge shall have authority and jurisdiction to enter the same judgment in each of the foregoing numbered cases that the *district* court of *Cherokee* county may enter in the said cause of *Andrew Nelson*, No. 1,605, whenever either party shall file in the office of the clerk of this court a certified copy of the judgment of said *district* court of *Cherokee* county; and the clerk of this court is hereby authorized and directed to enter the proper order or judgment in each of said causes therefor; and the said judge of this court shall enter the exceptions of both parties to such judgment, and each and every part thereof; and the evidence and record in the said cause of the *Western Land Company* against *Andrew Nelson*, No. 1,605, shall be the record and evidence in each of said causes for all purposes of appeal and writs of error or other proceedings, to review such judgment as may be entered, except that the name of each respective defendant may be substituted in the place of *Andrew Nelson* in said record, and the description of the land claimed by the defendants, respectively; and that said cause, No. 1,605, shall be set down for trial on the *third* of the *next* term of the *district* court of *Cherokee* county, *Iowa* (*April 13, 1887*).

J. S. Monk, Geo. E. Clarke, and Barrett & Callvert,
Plaintiff's Attorneys.

Wm. Lawrence, J. B. Dunn, and Henry O'Connor,
Defendant's Attorneys.

Form No. 18925.¹

(Precedent in *Edwards v. Cary*, 20 Kan. 415.)

[(*Title of court and cause as in Form No. 17876.*)]²

Whereas, There is a case pending between one *J. Q. Howey* and the defendant, *E. H. Edwards*, in the same court, before the same justice, involving the same questions, as to the right of said *Howey* (who, with said *Cary*, plaintiff herein, claims to be cosurety of the said *Edwards*), to compel contribution of and from the said *Edwards*; for an amount paid by them on a judgment in favor of *J. V. Pierce*,

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

and against said *Howey* and *Cary*, rendered by *W. P. Talbot*, Esq., J. P., and accounting, by said *Edwards*, of certain moneys, received by him, proceeds of property claimed to apply on said debt;

Now it is hereby expressly agreed and stipulated, by and between the parties to this, the above-entitled suit, that whatever judgment shall be recovered against said *Edwards*, in the said action of *Howey v. Edwards*, shall be entered and shall stand as the judgment in this case, without any trial in this case, or any other evidence as to amount than the judgment in the case of *Howey v. Edwards*; provided, that said case shall be tried upon its merits; excepting also, the costs, which shall be taxed, in either case, the same as if this stipulation had not been made.

[(*Date and signatures as in Form No. 18889.*)]¹

Form No. 18926.²

(Precedent in *Stuart v. Bailey*, 57 Neb. 578.)

[(*Title of court and cause as in Form No. 17881.*)]¹

It is hereby stipulated by and between the parties plaintiff and defendant in the above entitled causes, respectively, that briefs shall be filed in the first numbered case, No. 8611, *A. P. S. Stuart* against *Bank of Staplehurst*. It is further stipulated and agreed that inasmuch as the records in all these cases are alike, and the same indential points are raised by the petition in error in each case, that the order of the court made in No. 8611, *A. P. S. Stuart* against *Staplehurst*, shall be the order in each of the other cases and shall be entered therein; that if No. 8611 is reversed, all said causes shall stand reversed, and if said No. 8611 is affirmed, all of said causes shall stand affirmed, the same as if the briefs were filed and arguments made separately in each of said cases.

[(*Date and signatures as in Form No. 18889.*)]¹

x. That Matter Stipulated be Taken as Forming Part of the Record in the Lower Court and in Lieu of a Return to Writ of Certiorari.

Form No. 18927.³

(Precedent in *Reed v. Curry*, 35 Ill. 537.)

[(*Title of court and cause as in Form No. 15219.*)]

It is hereby stipulated and agreed between the parties in the above entitled action that:³

On the *seventh* day of *October*, 1863, when the default in this case was taken, the plaintiff's attorney, who moved for the default, produced the summons, and read to the court the return of the sheriff thereon. Such summons was then handed to the clerk of the *superior* court of *Chicago*, who placed the same among the papers, which were before him upon his desk, this being the same summons which appears upon pages *two* and *three* of the record filed herein.

1. The matter to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 454.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

Judgment was entered the next day, *October 8th*, by default, as shown by said record, for \$361.02. On the same day the attorney for the defendant, and appellant, with said clerk, examined the files in this case, but were unable to, and did not find the said summons.

And on the *9th* day of *October*, 1863, filed the affidavits and motion to set aside said judgment, as also is shown by said record.

Said motion was argued and overruled, and appeal prayed and allowed, *October 28*, 1863, during the same term, as also appears by said record.

The said summons was found some days after said judgment was rendered, but was not marked filed by the clerk until some time after the appeal herein was allowed; and about the *25th* day of *November*, A. D. 1863, said clerk of his own motion indorsed thereon:

"Filed, *October 7*, 1863, *Thomas B. Carter*, clerk," which is the same summons and indorsement of filing appearing at page *three* of said record. It is admitted by the appellant and appellee, that the foregoing is a true statement of the facts in relation to the filing and marking of the summons in this case, and is to be taken and considered by the court as forming a part of the record in this case, and in lieu of a return to the writ of certiorari heretofore allowed to appellant herein, which is hereby waived as to any return thereto by the clerk.

[(*Date and signatures as in Form No. 18889.*)]¹

y. That if Names on Petition are Counted, Then Such Petition is Legal, and if Such Names are Not Counted, Then Such Petition is Not Legal.

Form No. 18928.¹

(Precedent in *Eggleston v. State*, 37 Kan. 427.)

[(*Title of court and cause as in Form No. 17876.*)]¹

It is hereby stipulated and agreed by and between the parties hereto, that if the names of the *332* persons which appear on "Exhibits *CC* and *DD*," (to wit, *278* on "Exhibit *CC*" and *54* on "Exhibit *DD*,") annexed to and made a part of the plaintiff's second amended petition, or amendment to plaintiff's original petition, and which names, it is agreed, appeared on the petition calling an election to relocate the county seat from *Iuka* to *Pratt*, in said county, and which names also appear on the petition in evidence, praying a relocation of the county seat from *Iuka* to the city of *Saratoga*, in said county, are retained and counted on the petition praying for a relocation of said county seat from the town of *Iuka* to the said city of *Pratt*, then the said *Pratt* petition did and does contain *three-fifths* of the legal electors of *Pratt* county, as appeared, and now appear, on the assessment rolls of the several township and city assessors of said county at the last assessment before said petition was presented to the board of county commissioners in the year 1885, and was and is a legal petition. But if said *332* names men-

1. The matter to be supplied within [] will not be found in the reported case. 2. See, generally, *supra*, note 1, p. 454.

tioned in said exhibits, which are on said petitions, are stricken off of said *Pratt* petition, and not counted thereon by reason of the following clause, which appears in said *Saratoga* petition, to wit: "We further petition your honorable board to erase and strike off our names from any and all petitions coming before your board other than this one petition praying a removal of said county seat to any place, hereby revoking any and all petitions on this subject heretofore signed by us," then the petition praying for a relocation of the county seat from the town of *Iuka* to the city of *Pratt* did not, and does not, without said names, contain *three-fifths* of the legal electors, as appears on the several assessment rolls of the several township and city assessors of said county, next before the presentation of said petition to said board of county commissioners, in the year 1885, and was not and is not a legal petition.

[(*Date and signatures as in Form No. 18889.*)]¹

z. That Order of Reference be Vacated and that New Order be Entered Nunc pro Tunc.

Form No. 18929.²

(Precedent in *Healy v. Gilman*, 6 Robt. (N. Y.) 481.)

[(*Title of court and cause as in Form No. 17883.*)]¹

The parties hereto stipulate as follows:

First. The order entered herein on the *third* day of *November*, 1855, shall be vacated, and the order hereto annexed shall be entered nunc pro tunc as of that date.

Second. All the testimony taken in this case, before Mr. *Maurice*, on the *second* trial, shall be considered as having been submitted to the referees named in the annexed order by the parties by whom it has been offered, respectively, and shall have the same weight and effect as if it had been taken before them.

Third. The plaintiffs shall also produce and put in evidence before the said referees all the check books, memorandum books and books of account of *Nathaniel Gilman & Son*, which have come to their possession, containing any entries or memoranda subsequent in date to *December 1st, 1846*.

Fourth. The plaintiffs shall also produce, and the defendants shall put in evidence before the said referees, a certain agreement in writing between the said firm and *Isaac Redington*, referred to in the testimony taken herein, together with all books and papers in their possession or under their control, relating to said agreement.

Fifth. No other testimony shall be offered by either party before said referees, or received by them.

Sixth. The said referees shall render their report within *ninety* days from the date when the said books shall be put in evidence, and the said agreement and the books and papers relating thereto shall be produced.

1. The matter to be supplied within [] will not be found in the reported case.
2. See, generally, *supra*, note 1, p. 454.

Seventh. Should the said referees, or a majority of them, fail to render a report within the said *ninety* days, then the authority of the said *Henry G. Lapham* and *Alexander Studwell*, as referees, shall forthwith cease, and the said *James Maurice* shall proceed as sole referee, and shall render a report on the testimony herein provided for within *thirty* days after such termination of the authority of the said *Lapham* and *Studwell*.

Eighth. The report to be rendered under this stipulation shall be final between the parties. Judgment shall be entered thereon in the usual manner, and neither party shall appeal from the said judgment.

Ninth. This stipulation shall be filed forthwith, and shall be attached and form part of the judgment roll herein.

[(*Date and signatures as in Form No. 18889.*)]¹

a'. That Premises in Question are Occupied by Defendant as a Homestead and that Debt Sued On was Not Incurred for the Purchase or the Improvement Thereof.

Form No. 18930.¹

(Precedent in *Connor v. Nichols*, 31 Ill. 152.)

[(*Title of court and cause as in Form No. 15219.*)]¹

It is hereby stipulated and agreed by the parties hereto, by their respective counsel, and admitted on behalf of said plaintiff, for the purposes of this suit, that the real estate in question in this suit, and the buildings thereon, were, in A. D. 1852, and from thence hitherto have been, and still are occupied as a residence by the defendant, *Thomas Connor*, and owned by him, [unless affected by the trust deed in this case,] and that he, said defendant, is a householder, and has a family, consisting of a wife and children, now living, and that he and his said family are and have been since A. D. 1852, occupying said premises as a householder. And it is further hereby stipulated and agreed, that the debt which the trust deed in this case, and under which the plaintiff claims title, was given to secure, was not incurred for the purchase or improvement of the premises described in the plaintiff's declaration, or any part thereof.

[(*Date and signatures as in Form No. 18889.*)]¹

a'. That Proceedings be Stayed Until Judgment be Rendered in Other Cases.

Form No. 18931.²

(Precedent in *San Mateo County v. Southern Pac. R. Co.*, 116 U. S. 140.)

In the *Supreme Court of the United States.*

The County of San Mateo

v.

Southern Pacific Railroad Company.

} No. 1063.

Whereas certain actions brought by the people of the State of

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. 454.
[] will not be found in the reported case.

California, or by certain counties of said state, against said defendant, and other railroad companies operating railroads in said state, for the recovery of taxes assessed against said companies for state and county purposes, were, during the month of *August* last, tried before and submitted to the *Circuit Court of the United States*, *Ninth Circuit*, for the District of *California*, which actions have since been decided against the plaintiffs;

And whereas the attorneys for the respective parties to said actions against whom judgments have been rendered intend to sue out a writ or writs of error in one or more said actions, and to prosecute the same with as much diligence as possible, and to move the *Supreme Court* that the same be advanced on the calendar for argument:

It is hereby stipulated by and between the parties of the first-mentioned action that the further consideration of the said action by the *Supreme Court* may be deferred until the argument of one or more of the last-mentioned cases.

San Francisco, September 18, 1883.

A. L. Rhodes, Att'y for Pl'ff in Error.

S. W. Sanderson, Att'y for Defendant.

a³. That Questions of Law be Submitted to the Supreme Court and that Proceedings be Stayed Until the Opinion shall be Had Thereon.

Form No. 18932.¹

(Precedent in *Bank of Republic v. Hamilton County*, 21 Ill. 55.)

[(*Title of court and cause as in Form No. 15219.*)]²

We do hereby agree, in the case of *The Bank of the Republic* versus *The People of Hamilton County*, that the following questions and points of law arising in the said cause may be submitted to the *Supreme Court* of the state of *Illinois* for final judgment and determination; and that no further action be taken or further proceedings had in the said cause until the opinion of the said *Supreme Court* shall be first had thereon.

1st. Whether the said assessment of plaintiff's property for the year 1857 was not valid, for the reason that the assessor did not comply with the provisions of the statutes of the state of *Illinois*, in not leaving the notice and blank required by law for the listing of property, and in not making any note or memorandum of the date and name as required in such cases, and not noting the words, "by assessor," in the assessment lists, against the name of the plaintiff.

2nd. Whether there was any such neglect or refusal on the part of the plaintiff to list property, as the law contemplates, in order to authorize the assessor to value the property independently of the owner.

3rd. Whether said assessor was not bound to accept the statement of the property as listed by the president of said bank, on being notified that it was ready for him at the clerk's office, before closing

1. See, generally, *supra*, note 1, [] will not be found in the reported case.
p. 454.

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his assessment list, and before entering therein any valuation of said property.

4th. Whether said statement of the order was sufficient authority for said assessor to enter the valuation of the property of said bank, without further information or inquiry.

5th. Whether the assessor had any legal authority to assess bank property at all.

6th. Whether the provision of the law is not compulsory, requiring a reduction of the assessment to the valuation fixed by the person required to list, when verified by the oath of such person, on applying for such reduction.

7th. Whether the bonds or stocks deposited with the State auditor, as the basis of issue of said bank, are taxable as personal property of said bank.

8th. Whether said stocks so deposited are the measure of the capital stock of said bank and liable to taxation according to their market value.

9th. Whether the act of 1857, amendatory of the general banking law, makes the bona fide cash capital of said bank actually paid in, or secured to be paid in, the basis of taxation for said bank.

10th. Whether the term "capital stock paid in," as employed in the sixth section of said amendatory act, is to be construed as synonymous with the term "bona fide cash capital actually paid in," as it occurs in the eighth section of said act.

11th. Whether the "capital stock paid in, or secured to be paid in," as used in said sixth section, means the investment of moneys other than the proceeds of the notes of issue of the bank, whether in purchase of real estate, coin, stocks deposited, or any other property belonging to the bank.

12th. Whether the bank officer, in listing the property of the bank as required, is bound to include in such list the stocks deposited by the bank, estimated according to their market value, together with the coin on hand and also the actual cash capital paid in, other than the proceeds of its own circulating notes, as well as any surplus profits and reserved fund in the bank.

13th. Whether if said stocks deposited are required to be listed as capital stock, together with the coin, bona fide cash capital paid in, surplus profits and reserved fund, the bank may not deduct from the aggregate thereof the true amount of its outstanding circulation.

14th. Whether the basis for taxation for banks, under the said amendatory act of 1857, is the same with that for individuals and other corporations or associations, namely, the actual value of property which they own; and in estimating such value, whether they are allowed, in listing property, to deduct from the gross amount of moneys and credits owned, the amount of bona fide debts owing, in the same manner as other persons or corporations.

15th. Whether the said amendatory act of 1857, in imposing additional burthens upon the banks, without any corresponding advantage or benefit conferred, and not authorized at the time of the passage of the general banking law in its adoption by the people, is not wholly null and void, and in conflict with the constitution of the United States, as impairing the obligation of contracts.

16th. Whether an appeal lies to the *Circuit Court*, from the decision of the *County Court*, on the refusal of an application to said court to reduce the valuation of property as assessed by the county assessor.
 [(Date and signatures as in Form No. 18889.)]¹

a⁴. That Transcript is Correct.

Form No. 18933.¹

(Precedent in *Carey v. Brown*, 58 Cal. 185.)

[(Title of court and cause as in Form No. 5910.)]¹

It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of the judgment roll, the bill of exceptions in this cause, and of all papers necessary to be used on this appeal; that the appeal was duly perfected, and the requisite undertaking on appeal was given and filed within the time prescribed by law; and that the foregoing is a full, true and correct transcript, and that this appeal may be heard thereon.

[(Date and signatures as in Form No. 18889.)]¹

a⁵. That Venue for Trial of Interplea be Changed.

Form No. 18934.²

(Precedent in *Talpey v. Doane*, 3 Colo. 23.)

[(Title of court and cause as in Form No. 18935.)]¹

In the matter of the interplea filed by *Lockhart T. Glenn* and *George O. Talpey* in the attachment cause now pending in said court, wherein *John W. Doane* and others are plaintiffs, and *Oliver S. Glenn* and *Rufus E. Talpey* are defendants, it is hereby stipulated by the attorneys for *J. W. Doane & Co.*, and by *France* and *Rogers*, the attorneys for *Lockhart T. Glenn* and *George O. Talpey*, that the interplea and the issues joined therein, may be tried at the *January* term, A. D. 1871, of the *Arapahoe* county *district* court; this stipulation to affect the interplea only, and to be in nowise considered as affecting the defendants in the attachment.

Charles & Elbert for *J. W. Doane et al.*
France & Rogers, for *Lockhart T. Glenn*
 and *George O. Talpey*, interpleaders.

a⁶. That Witness will Testify to Certain Facts.

Form No. 18935.³

(Precedent in *Thatcher v. Rockwell*, 4 Colo. 385.)

State of *Colorado*, }
 County of *Gilpin*. } ss.

In the *District Court* in and for *Gilpin County*; to the *September Term*, 1877.

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p.
 [] will not be found in the reported 454.
 case.

Watson B. Rockwell

v.

Joseph A. Thatcher and Joseph Standley.

It is hereby stipulated that *Elijah J. Giddings* would, if on the witness stand in this case, testify as follows:

1st. That he, *Giddings*, received from *Watson B. Rockwell* in due course of mail a letter dated *London, England, Nov. 27, 1872* (and now marked Exhibit 'A').

2d. That such letter contained *two* checks drawn by said *Rockwell* in favor of *Thatcher, Standley & Co.*, on a bank in *New York*, one check being for \$1,587.93, the other for \$1,421.07.

3d. That upon the receipt of said letter he showed *Thatcher* the instructions contained therein, and delivered to *T. S. & Co.*, their checks as *Rockwell's* agent.

4th. That afterward, and before the *28th* day of *January, 1873*, *Giddings* and *Thatcher* had several talks regarding the disposition of the money specified in said checks; that *Thatcher* wanted the amount of the *two* checks applied to the payment of what *Thatcher* represented to be *two* unpaid notes of *Cash, Rockwell & Co.*, but that said *Giddings*, on behalf of *Rockwell*, objected to having this done, as it was contrary to the instructions of *Rockwell*. That *Thatcher* wrote *Giddings* *two* letters regarding this matter, one of which is in pencil and without date (but is now marked Exhibit "B;" the other is dated *January 28, 1873*, and is marked Exhibit "C").

That after receiving these letters and having these talks, and without receiving any further instructions from *Rockwell*, he did permit *Thatcher* to apply the money on what he supposed were these unpaid notes of *Cash, Rockwell & Co.*, or at least \$2,820.92 of such money, and this may be read in evidence.

H. M. & W. Teller, Defendant's Attorneys.

Form No. 18936.¹

(Precedent in *State v. Florida Cent. R. Co.*, 15 Fla. 721.)

State and Trustees vs. Jacksonville, Pensacola and Mobile Railroad Company and others.

Duval Circuit Court.

Defendant, *Florida Central Railroad Company*, can prove by *T. B. Coddington* that the bonds of the *Florida Central Railroad Company* were delivered by him to the State of *Florida* and he received the bonds of the State; that the transaction was secret; and to avoid legal interruption of the same, he took a carriage and proceeded beyond the limits of *Florida*; that all this was done without the knowledge or consent of this company; that he received the *one million* of *Florida* bonds from the State as the agent of the State, and after the *Florida Central Railroad Company* had rescinded its resolution pretending to authorize the exchange of bonds; that he received the bonds now sued upon from *Edward Houstoun* after the rescinding of said resolution, as well as after they had been returned

1. See, generally, *supra*, note 1, p. 454.

to the company in compliance with the rescinding resolution; that he was to receive *twenty-five thousand* dollars for carrying out this negotiation, which was authorized by said company, and a wrong upon the same; that the State knew at the time of receiving the company's bonds and delivering the State bonds to *Coddington* that the rescinding resolution had been passed, and that *Houstoun* nor any other person had been given any authority by the company or the directors subsequent to the passage of said rescinding resolution to surrender said bonds to the State or exchange the same for State bonds, or part with said Company bonds.

And by *John Collinson* (50 Old Broad Street, London), that he received the State bonds from *Coddington*; that he received and held them as the agent of the State of *Florida*; that the State coupons, up to *January, 1873*, were sent to *New York City*, to the place for the payment of the *Florida Central Company* pretended coupons, to be surrendered in exchange for the *Florida Central Railroad Company* coupons; that he notified the Governor that they were there, and requested him to send the railroad company coupons there for exchange; that nothing has been paid by the State on said State bonds or coupons, and the said State bonds and coupons have never been sold.

By *C. L. Chase, Austin, Minnesota* — Was in *London* in 1873; went there to get the State bonds back and found that they had not been sold. The circumstances of *Houstoun's* delivery of the Company bonds to State through *Coddington*; that he was defeated by the action of the State in this suit from receiving the return of the State bonds, and the State bonds had not been sold at the commencement of this suit.

State of *Florida*, }
Duval County. }

Personally appeared *M. S. Littlefield*, a stockholder of the *Florida Central Railroad Company*, and he being duly sworn, says that he is such stockholder; that the facts stated above can be proved by the parties above named; that the testimony of said parties is material and cannot be dispensed with by the defendant in the cause or otherwise; that said parties reside beyond the limits of the State of *Florida*.

M. S. Littlefield.

Sworn to and subscribed before me this 24th day of *June*, A. D. 1875.

J. H. Durkee, Notary Public and Referee.

I hereby consent to the foregoing statement of what the *Florida Central Railroad Company* can prove by *T. B. Coddington, John Collinson* and *C. L. Chase*, sworn to by *M. S. Littlefield*, be admitted as testimony for the defendant, and that such statement shall have the same force and effect as testimony, as if said statements were depositions duly taken by commissioners from this court.

June 24, 1875.

H. Bisbee, Jr., Plaintiff's Attorney.

Form No. 18937.¹(Precedent in *Helmer v. Castle*, 109 Ill. 666.)[[*Title of court and cause as in Form No. 15219.*]]²

It is hereby admitted by and between the parties, that *A. F. Bradley* will testify that when he was county surveyor he surveyed and laid out and located a public highway, now known as *Lake street*, and where *Lake street* is now located, across the east half of the south-east quarter of section 11, township 39 north, range 13 east of the third principal meridian, prior to 1843, and that previous to the sale of the east half of the south-east quarter by the trustees of the *Illinois and Michigan Canal*, he surveyed the said east half for the said trustees, in two parcels, — one parcel lying north of and extending south to the center of the said road, and consisted of *forty-one* acres, and the other parcel lying south of and extending north to the center of said road, and consisted of *thirty-nine* acres.

James Frake, Atty. for Plff.*Joseph E. Barker*, Atty. for Deft.Form No. 18938.¹(Precedent in *Dickinson v. Bentley*, 80 Iowa 483.)

<i>E. H. Dickinson</i>	} In the <i>District Court, Dubuque county, Iowa.</i>
<i>v.</i>	
<i>W. E. Bentley et al.</i>	No. 8,160.

Stipulation and agreement in reference to the above-named and numbered *thirty-five* cases. Whereas, notices and interrogatories to take the deposition on commission of *Joseph Mercer*, of *Polk county, Iowa*, a witness for plaintiff in each of the foregoing *thirty-five* cases now pending in the *district court of Dubuque county, Iowa*, have been made out and served upon counsel for defendant in each of said causes, it is hereby stipulated and agreed, for the purpose of saving the expense of taking such depositions, that said witness, if present at the trial of said causes, or if his depositions were taken, would testify in each case as follows: That his name is *Joseph Mercer*; is *thirty-three* years of age; a citizen and resident householder of the city of *Des Moines, Iowa*; that he knows the saloon kept by each and all of said several defendant saloon-keepers to be situated as alleged and described in the several petitions filed in said causes, respectively, and to have been used by them, respectively, for the sale and keeping for sale of intoxicating liquors as charged in said petition; that between the *first* day of *August, 1888*, and the *eighteenth* day of the same month, he was in each of said saloons, and, whilst so in there, the person in charge of the bar in each sold to said witness *Mercer* a glass of whiskey, which was poured at the time from a bottle at said bar; that in each of said saloons at that time was posted up an internal revenue retail-liquor dealers' stamp for the fiscal year 1888; that each of said saloons contained, in addition to

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

the bar, the usual fixtures, furniture, glasses and bottles used in saloons. And, further, said witness would testify that between the *fifth* and *twenty-fifth* days of *February*, 1889, he was again in each of said saloons, except those of *Frederick Weland* and *Manhart & Conebruch*, and, whilst so in there, saw persons in each drinking liquor at the bar therein. It is hereby stipulated and agreed that the foregoing statement may be read in evidence as the testimony of said witness on the trial of each of said causes, and be entitled to and have the same force and effect as would the proper deposition of said witness to the same facts if taken in each of said causes separately.

Dubuque, April 29, 1889.

Fouke & Lyon and McCeney & O'Donnell,
Attorneys for Defendant.

a'. As to Evidence that may be Offered Under the Declaration and Under the Plea.

Form No. 18939.¹

(Precedent in *Foreman v. Ahl*, 55 Pa. St. 326.)

[(*Title of court and cause.*)]²

It is agreed that this case shall be considered at issue on the present pleadings, and that the plaintiff may, under his narr. now filed, offer any evidence which would entitle him to recover, either on a note sued upon, or upon the common counts in assumpsit. And the defendant, under the plea of payment, may offer any evidence which would be admissible under any plea, general or special, and which may be an answer, either in whole or in part, to the plaintiff's cause of action. The case to be put on the trial list for the *second* week of the *November* term, A. D. 1865, and to be then tried unless there is some good legal ground of continuance.

[(*Date and signature as in Form No. 18889.*)]²

a³. Correcting Omissions and Misprints in the Record.

Form No. 18940.¹

(Precedent in *West Virginia Oil, etc., Co. v. Vinal*, 14 W. Va. 671.)

West Virginia Oil and Oil Land Company, appellant, v. *John F. Vinal*, appellee. In the *Supreme Court of Appeals of West Virginia*, from the *Circuit Court of Ritchie County*.

The undersigned counsel for the above named parties, appellant and appellee, respectively agree that in the printed record in the said cause there are divers omissions and misprints, which we have mutually agreed to correct, and have corrected our respective copies of said printed record where such misprints occur; and we also agree that the original paper referred to in the cross-examination of *Vinal* in answer to question 71, marked by the notary as exhibit No. 5, on page 244, printed record, shall be used on the hearing of

1. See, generally, *supra*, note 1, [] will not be found in the reported case.
p. 454.

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said cause before the said Appellate Court. And we further agree that the copy of lease marked exhibit No. 7, beginning on page 327, shall be used instead of the like exhibit referred to in the cross-bill of *John F. Vinal*, made a part of the said record, which exhibit does not appear to be copied into said record, disregarding the names, dates and property leased therein; the object being to prove the usual terms of the printed leases of said company.

[(Date and signatures as in Form No. 18889.)]¹

a'. Extending Time to Answer.

Form No. 18941.3

Supreme Court, }
Suffolk County. }

John Doe, plaintiff,
 against
Richard Roe, defendant. } Stipulation Extending Time to Answer.

The time within which the defendant may answer the complaint of the plaintiff herein is extended hereby *fifteen* days from date, the issue to date of the *first* day of *April*, 1903.

Dated (concluding as in Form No. 18889.)

b'. Extending Time for Filing Bill of Exceptions.

Form No. 18942.'

(Precedent in *State v. Wyatt*, 124 Mo. 539.)

In the *criminal* court of *Buchanan* county, *Missouri*.

The State of Missouri, Plaintiff,

v.

Arnold Wyatt and Charles Hughes, Defendants.

It is hereby mutually agreed by and between *Romulus E. Culver*, prosecuting attorney of *Buchanan county, Missouri*, and *M. G. & J. Moran*, attorneys for the above named defendants, that the time for filing the bill of exceptions in said cause heretofore agreed upon, shall be extended until the *first day of October, 1893*.

Romulus E. Culver,
By W. B. Norris, Ass't.
M. G. & J. Moran,
Attorneys for Defendants.

b¹. For Appearance Without Notice and that Petition may be Filed During the Term of Court with the Same Effect as if Filed Before Term.

Form No. 18943.2

(Precedent in *Hefferman v. Burt*, 7 Iowa 320.)

[(Title of court and cause as in Form No. 17875.)]¹

As attorney of *B. C. Burt*, I hereby agree to appear to the fore-

1. The matter to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 454.

going petition, without further notice, waiving the same. I also agree that this petition may be filed at any time within the coming term of court, and have the same force as if filed *ten* days before the term.

September 15th, 1857.

J. A. Goodrich, Att'y for R. E. Burt.

b³. For Appearance Without Issuance of Process and that Plaintiff may Docket the Cause and File a Declaration as if Process had been Issued.

Form No. 18944.¹

(Precedent in *Teal v. Russell*, 3 Ill. 320.)

[(Title of court and cause as in Form No. 15219.)]²

We do hereby agree to appear in this suit at the *next* term of this court, without the issuing or service of process herein, and pray the court to enter our appearance accordingly; and we do agree, that the plaintiff's attorneys may docket this cause on the calendar of causes for that term, and file a declaration on the promissory note made by us for \$562.50 and interest, and enter up judgment thereon during said term, as fully and effectually as if such process had been served, and such declaration and a copy of said note had been duly filed, *ten* days before the sitting of said court of said term, dated *28 July, 1873*,

In the presence of *E. G. Ryan*.

Fr. Peyton.

J. E. McClure.

J. B. F. Russell.

b⁴. For Discontinuance of Suit.

Form No. 18945.¹

(Precedent in *Albee v. Hayden*, 25 Minn. 268.)

[(Title of court and cause as in Form No. 17878.)]²

It is hereby stipulated and agreed by and between the parties to the above-entitled action: In consideration of the agreements herein-after specified to be kept and performed, and upon their performance by the defendants, the above-named plaintiff agrees to discontinue the above-entitled action, to acknowledge full satisfaction of the verdict or any judgment thereon, rendered in his, said plaintiff's favor, in an action pending between same parties in the same court, and which was tried before a jury in *February, 1872*, which said action is now pending on appeal in the *supreme* court, and also to permit, so far as he is concerned, the said defendants, their heirs or assigns, to maintain a milldam at the point mentioned and described in the complaint in each of said actions, with *nine* foot head of water at an ordinary stage of water in *Elk River*, the stream mentioned in

1. See, generally, *supra*, note 1, [] will not be found in the reported case. p. 454.

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said complaint: this permit and right to be evidenced and authorized in a binding manner. And in consideration of this stipulation and the aforesaid agreements to be kept and performed by said plaintiff, the said defendants agree that they will pay to said plaintiff the sum of \$600, and will also, upon the said appeal case being remitted, discontinue and dismiss the same without delay. Each of the above-mentioned discontinuances and dismissals to be at the cost of the party dismissing and without statutory costs.

Dated at *Elk River*, February 11, 1874.

Kerr & Collins, Plff's Attys.
Hamlin & Searle, Defts' Attys.
Edward P. Mills, Defendant.

b¹. For Filing of Amended Pleading and Submission of Case.

Form No. 18946.¹

(Precedent in *Johnston v. San Francisco Sav. Union*, 63 Cal. 554.)

[(*Title of court and cause as in Form No. 5910.*)]²

It is mutually stipulated and agreed by and between the parties to this cause, their counsel and attorneys respectively, as follows:

First. That defendants, *James Johnston, Jr.*, *John F. Johnston* and *Francis T. Johnston* (the two last by their guardian), shall file as of this date their amended answer and cross-complaint in this cause. That the verification of said answer and cross-complaint is waived.

Second. That the defense of the Statute of Limitations in said answer be deemed denied, and that the answer of the plaintiff to the original cross-complaint be and is hereby taken as the answer of the plaintiff to the amended complaint.

Third. That the answer of *Parker Nicholson* to the original cross-complaint of *James Johnston, Jr.*, *John F. Johnston* and *Francis T. Johnston*, be taken as his answer to the amended cross-complaint this day filed.

Fourth. That this case be submitted to the court for trial and decision on the testimony heretofore taken, on *Wednesday next*, either party to offer such additional testimony as they may be advised.

Dated this 28th day of May, 1877.

Campbell, Fox & Campbell,
H. C. Campbell,
 Attorney for Plaintiff.

C. N. Fox,
 Attorney for defendant *Parker Nicholson*.

Sol. A. Sharp,
W. H. Tompkins,
 Attorneys for *James Johnston*, *James Johnston, Jr.*,
John F. Johnston and *Francis T. Johnston* (by guardian).

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

454. 2. The matter to be supplied within

b⁶. For Judgment and that Referee File His Report in Accordance with the Stipulation.

Form No. 18947.¹

(Precedent in *Chisholm v. Clitherall*, 12 Minn. 375.)

[*Title of court and cause as in Form No. 17878.*)]²

Whereas, the plaintiff in said action and *Henry H. Spencer*, of the defendants therein, have mutually compromised the matters of difference in said action upon the following basis and terms, to-wit, the said plaintiff, *Robert Chisholm*, is to take judgment and decree of foreclosure in said action upon *one* undivided *half* of the land described in the complaint in said action, and release all claim to the other half of said land: Now, therefore, it is mutually stipulated and agreed by and between the said plaintiff and said defendant *Henry H. Spencer* that *James Gilfillan*, Esq., referee in said action, make and file his report in accordance with the foregoing compromise and agreement and stipulation.

Dated *April 30*, 1866.

Robert Chisholm, Plaintiff.

John L. McDonald, Attorney for Plaintiff.

L. M. & J. H. Brown, Attys. for Deft. *Spencer*.

b⁷. For Nomination of Referee.

Form No. 18948.¹

(*Title of court and cause as in Form No. 17883.*)

It is hereby stipulated and agreed between the parties hereto, that in case the within motion be granted, the reference shall be to *Andrew Jackson*, Esq., of *Albany, New York*, counsellor-at-law.

Dated this *first* day of *June*, A. D. 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendant.

b⁸. For Partition of Land in Controversy.

Form No. 18949.¹

(Precedent in *Healdsburg Bank v. Hitchcock*, 76 Cal. 489.)

[*(Title of court and cause as in Form No. 5910.)*)]²

The parties to said action hereby stipulate for partition of the lands for which said action was brought; and to settle the question in relation to other lands adjoining said lands, stipulate as follows: That a division line be established between said parties, to wit, the creek known as the *Rock Pile Creek*, from the point where the said creek crosses the township line between townships 11 and 12, ranges 12 and 13, and running thence easterly through the said *Rock Pile* range to the point where the said creek crosses the section line

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

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between sections *four (4)* and *five (5)* in township *11*, range *13*, and the said plaintiff is to have the choice of the lands on either side of said creek, upon condition that a commission be appointed to value the lands of said *Hitchcock* on the side of said creek so selected, and pay to him, said *Hitchcock*, the value of the lands so appraised, and also to appraise all the lands separately owned by the plaintiff and *J. D. Hassett*, on the other side of said creek, and accept the price or value fixed on said lands and convey the same to *Hitchcock* on receipt of said amount; and in case the plaintiff selects the lands on the north side of said creek, the lands to be appraised on the south side are described as follows, belonging to said plaintiff and *J. D. Hassett*, to wit: That portion of the lands known as the *Cooper* claim, lying on the east side of said creek; the lands known as the *J. H. Reynolds* claim, containing *160* acres; the *Martin Hixon* claim, containing *40* acres; the *J. T. Hassett* claim, adjoining the *Hixon* claim, and containing *40* acres, the last two tracts being in section *9*, township *11*, range *13*; the *Benois* claim, *160* acres; the *J. T. Hassett* claim, in sections *22* and *23* in said township, and the *Hixon* claim in said section *23*; and the northeast quarter of section *16* in said township, northwest quarter of southwest quarter of said section *15*, and southwest quarter of southeast quarter, section *21*, in said township.

And in case the plaintiff selects the land on the south side of said creek, then the lands of *Hitchcock* to be appraised are described as follows, to wit: The lands known as the *William Englehart* claim, containing *160* acres, and the lands known as the claim of *Carothers*; and also in case of selecting the said south side, then to appraise all the separate lands of the said plaintiff and said *J. D. Hassett* on the north side of said creek within the said *Rock Pile*.

When said selection is made and the appraisement completed, each of said parties agrees to pay the other the appraised value thereof, and convey to the other the lands hereby agreed to be conveyed, it being understood and agreed that no matter which side the said plaintiff may select, the said *Hitchcock* is to pay, and the said plaintiff and *J. D. Hassett* is to convey to *Hitchcock* the said claims of *Benois* and *J. T. Hassett*, situated in said section *23*, and the said claim of said *Hixon* in said section *23*, at said appraised price; the parties to have the usual right of way over the lands of the other until a public road is established, but the right to maintain gates is not to be interfered with, and any right of way is to be subject to the right of maintaining gates.

And the said *Hitchcock* agrees to pay to the plaintiff the sum of *three hundred* dollars in full of the *Field* mortgage debt set forth in the plaintiff's complaint, and the plaintiff agrees to accept the said sum in full for the same, and as such commission the said parties hereby appoint *James Samuels*, *H. E. Lawrence*, and *James Seawell* to appraise and value said lands, and to employ a surveyor, if in their opinion the same is necessary. Each party is to pay *one-half* the costs of said suit and *one-half* the expense of said commission; said commission to make report within *sixty* days from the date hereof. In case any of the persons hereby appointed fail to act on said com-

mission, then the parties shall select others in the place of those failing to act.

J. H. McGee,
W. F. Russell,
 Attorneys for Plaintiff.
A. W. Ware,
Rutledge & McConnell,
 Attorneys for Defendant.

b⁹. For Substitution of Plaintiff in Error.

Form No. 18950.¹

(Precedent in Texas, etc., *R. Co. v. Anderson*, 149 U. S. 238.)

[(*Title of court and cause as in Form No. 17895.*)]²

That the said *Texas and Pacific Railway Company* may be substituted as plaintiff in error in the above-entitled cause now pending and undetermined upon writ of error in this court, such substitution, however, not to affect any of the questions or controversies presented by the record herein, and the questions and controversies presented by the record are to stand for the decision of this court the same as if said substitution had not been made.

[(*Date and signatures as in Form No. 18889.*)]²

c¹. For Trial by Court Without a Jury.

Form No. 18951.¹

(*Title of court and cause as in Form No. 17883.*)

It is hereby stipulated between the parties to this action by their respective attorneys, that the said action shall be tried by the court without a jury.

Dated (*concluding as in Form No. 18889.*)

c². In Action Against a Corporation on the Expiration of Its Charter to Continue in Name of New Corporation.

Form No. 18952.¹

(*Title of court and cause as in Form No. 17883.*)

The act of incorporation by which the defendants, the *President, Directors, and Company of the Bank of Albany*, were incorporated, having expired by its own limitation since this action was commenced, and the *Bank of Albany* having succeeded to the rights and liabilities of the defendants touching the subject matter of this action,—it is therefore stipulated that the action be continued against the *Bank of Albany*, without prejudice to the rights of

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

either party on the merits, and that an order of the court may at any time be entered by either party to this effect.

Dated this *first* day of *June*, A. D. 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendants.

c³. Settling and Discontinuing Case.

Form No. 18953.¹

(Precedent in *Platt v. Jerome*, 19 How. (U. S.) 384.)

[(*Title of court and cause as in Form No. 17895.*)]²

This cause, which is now pending, on writ of error, from the *United States Circuit Court of New York*, is hereby settled and discontinued by mutual consent, each party to pay their own costs, and satisfaction is hereby acknowledged of all claims and demands between the parties hereto.

Dated *Waterbury*, *December 20*, 1856.

Chauncey Jerome.
O. H. Platt.

c⁴. Settling Time for Hearing Motion and that Separate Answers of the Defendants be Filed with the Judge and with Like Effect as if Filed in the Clerk's Office.

Form No. 18954.¹

(Precedent in *Pensacola*, etc., R. Co. v. *Spratt*, 12 Fla. 56.)

[(*Title of court and cause as in Form No. 15218.*)]²

It is agreed between the Counsel and Solicitors of the complainants, and of the defendants, "That the hearing of the motion of complainants for injunction to be set for hearing before his Honor *Thos. T. Long*, Judge, at his Chambers at *Lake City*, on *next Wednesday*, the *24th* of *April*, at *10 o'clock A. M.*"

It is further agreed, "That the separate answers of the defendants shall be filed by his Honor *Judge Long*, and the same shall have like effect as if filed in the Clerk's office of *Suwannee Circuit Court* by the clerk thereof."

D. P. Holland,
Solicitor for Complainants.
Law, Lovell & Falligant,
Solicitors for *A. & G. R. R. Co.*
Papy & Westcott,
Solicitors for *P. & G. R. R. Co.*

1. See, generally, *supra*, note 1, p. 454. [] will not be found in the reported case.

2. The matter to be supplied within

c⁴. Upon Probate of Will, that Court shall Direct a Verdict, and Providing for Payment Out of the Estate.

Form No. 18955.¹

(Precedent in *Grady v. Porter*, 53 Cal. 683.)

Probate Court, In and For the County of San Joaquin, California.

In the matter of the estate of *Eliza Berry*, deceased, *December 9th*, 1871.

Proponent of the will, *David Porter*; contestants of the will, *Julia Grady* and *Eliza J. Grady*.

It is hereby stipulated and agreed by and between the parties to above contest, as follows:

First—That the Judge shall, by consent of the parties, charge the jury to find the special issues submitted to them in favor of *David Porter*, the proponent of said will.

Second—That there shall, by consent of all parties, be paid out of the assets and estate of said *Eliza Berry*, deceased, the sum of *two thousand five hundred* dollars, in United States gold coin, to the counsel for proponent in the above contest.

Third—That there shall, by the consent of all the parties, be paid out of the assets and estate of said *Eliza Berry*, deceased, the sum of *three hundred* dollars, for the erection of a monument over the grave of said *Eliza Berry*, deceased, said monument to be constructed under the joint superintendence of said *David Porter* and said *Julia Grady* and *Eliza J. Grady*.

Fourth—That the costs of this contest on both sides shall, by consent of all parties, be paid out of the estate of said *Eliza Berry*, deceased.

Fifth—That said *David Porter* shall, so soon as the debts of said estate are paid, and with all convenient speed, convey by a good and sufficient deed, free and clear from all incumbrances (save and except the debts of said *Eliza Berry*, deceased, and the sums herein provided to be paid out of said estate), and deliver up to said *Julia Grady* and said *Eliza J. Grady*, all the real and personal property and assets and choses in action owned by said *Eliza Berry* at the time of her decease, or to which the said *Eliza Berry*, at the time of her decease, was in any wise entitled.

Sixth—By consent of all parties there shall be allowed out of the income of said estate, during the administration of said estate (provided in the judgment of the judge of this court the condition of the estate will so allow), the monthly sum of *fifty* dollars in United States gold coin, as a support for said *Julia* and said *Eliza J. Grady*.

[(*Date and signatures as in Form No. 18889.*)]²

c⁴. Waiving Irregularities on Appeal.

Form No. 18956.¹

(Precedent in *Nez Perce County v. Latah County*, 2 Idaho 1134.)

[(*Title of court and cause.*)]²

Now, at this time, the motion for new trial having been over-

1. See, generally, *supra*, note 1, p. 454.

2. The matter to be supplied within [] will not be found in the reported case.

ruled, it is hereby stipulated by the parties to the above entitled action, *E. O'Neill* and *J. W. Poe* appearing for the plaintiff, and *A. J. Green* and *D. C. Mitchell* for the defendant, that on an appeal from the said order overruling the motion for a new trial therein, the appeal from the judgment heretofore taken, and the appeal from the said order overruling the motion for new trial, shall be considered as one case in the *Supreme* Court, by and with the consent of said court, and that one brief shall be prepared for both appeals, and both be argued at the same time and as one case.

Dated at *Moscow*, *Latah* county, *Idaho*, this *5th* day of *February*, A. D. 1892.

E. O'Neill & J. W. Poe, Attys. for Plaintiff.

D. C. Mitchell & A. J. Green, Attys. for Defendant.

c¹. Waiving Right of Appeal.

Form No. 18957.¹

(*Title of court and cause as in Form No. 17883.*)

It is hereby stipulated between the parties to this action, by their respective attorneys, that the judgment of this court in this cause shall be final and conclusive, each party hereby waiving his right of appeal.

Dated this *tenth* day of *June*, 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendant.

2. Entered Upon the Minutes of the Court.

a. That Cause be Tried by Court Without a Jury and Upon the Evidence Taken Before Referee.

Form No. 18958.²

(Precedent in *Silver Valley Min. Co. v. Baltimore Gold, etc., Min., etc., Co.*, 99 N. Car. 459.)

[(*Title of court and cause as in Form No. 17884.*)]³

It is agreed that this cause shall be tried before the court, without a jury, upon the evidence taken and returned by Hon. *John C. King*, Referee, upon law and fact.

b. That Defendant may Move to Set Aside Findings and Verdict and that the Judge may or may Not Set Aside Verdict as to Damages Only After Argument.

Form No. 18959.²

(Precedent in *Myers v. Stafford*, 114 N. Car. 232.)

[(*Title of court and cause as in Form No. 17884.*)]³

It is consented in this cause that at *December* Term of *Superior*

1. This is substantially the stipulation in *Pike v. Emerson*, 5 N. H. 393. [] will not be found in the reported case.
2. See, generally, *supra*, note 1, p. 454.

Court, 1893, this county, the defendant may move to set aside the finding and verdict upon second issue, as to damages, before *G. H. Brown, Jr.*, Judge, and that at that term said judge may or may not, in his discretion, set aside the verdict as to damages only, after hearing argument.

Agreed to in open court September 8, 1893.

G. H. Brown, Jr., Judge.

c. That Jury be Discharged and that Cause be Certified to the Higher Court.

Form No. 18960.¹

(Precedent in *Shuster v. Finan*, 19 Kan. 115.)

[[*Title of court and cause as in Form No. 11853.*)]²

Now comes the claimant in person, and by his attorneys, *Ady & Reid*, and the attachment-creditor in person and by his attorneys, *C. S. Bowman, A. L. Green* and *C. C. Nichols*, and consent that the cause proceed no further in this court, and that the jury be discharged from further consideration of this cause, and this action be certified to the *District Court* of this county, there to be tried. All costs of this suit to follow the result of the action.

Ady & Reid, for Claimant.

C. S. Bowman, C. C. Nichols, A. L. Green,
Attorneys for Defendant.

d. That Proceedings be Stayed Until Decision is Rendered in Another Cause, and Providing for Judgment.

Form No. 18961.¹

(Precedent in *Gillmore v. American Cent. Ins. Co.*, 65 Cal. 63.)

[[*Title of court and cause as in Form No. 11842.*)]²

This cause being called regularly for trial, the parties appearing by their respective attorneys, and both parties consenting in open court that the issues in this cause are identical with those of the other action pending in this court, No. 4,799, entitled *Lucy Gillmore v. The Lycoming Fire Insurance Company of Muncy, Pa.*

It is stipulated and agreed that all proceedings herein shall be stayed until final judgment and decision in said action wherein *The Lycoming Fire Insurance Company of Muncy, Pa.*, is defendant, and in case of an appeal in said last mentioned action, then said proceedings are stayed until the final determination of such appeal, and upon such final determination, judgment and decision in said action wherein said *The Lycoming*, etc., is defendant, either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment, and of the same date in said other action; and if such judgment shall be for the plaintiff, the amount for which the same shall be entered shall be

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

six hundred and fifty dollars and costs; and if for the defendant, then for its costs allowed by law.

An order pursuant to this stipulation shall be entered in the minutes of this court, *12th May, 1897.*

- e. That Proceedings be Stayed Until Decision Is Rendered in Another Cause, and that Judgment in the Cause shall Abide the Decision in the Latter Cause.

Form No. 18962.¹

(Precedent in Chicago, etc., *R. Co. v. Chicago*, 148 Ill. 146.)

[(*Title of court and cause as in Form No. 11850.*)]²

Whereas, a judgment has been rendered by the *Circuit Court of Cook county* in the case of the city of *Chicago* against the *Chicago and Northwestern Railway Company et al.*, for opening *Taylor street* across the property and right of way of the defendant, from which judgment the defendant has appealed to the *Supreme Court of the State of Illinois*; and whereas, a like judgment has been rendered in the above entitled case for opening a street across the property and right of way of the defendant herein; and whereas, the same question exists in the above entitled case as in the case for the opening of *Taylor street*:

Now, therefore, it is stipulated and agreed that the defendant need not prosecute an appeal from the judgment in the above entitled suit, but that the proceedings therein shall be stayed until the decision and final judgment in the said *Taylor street* case shall be entered by the *Supreme Court*, and that the judgment in the above entitled suit shall abide by said decision of the *Supreme Court*, and if revised, then the judgment in this case shall be set aside, upon motion, in the *Circuit Court*; if affirmed, then the city may proceed with the execution of said judgment, the same as if it had been affirmed by the *Supreme Court*.

f. Of the Evidence Given in the Cause.

Form No. 18963.¹

(Precedent in *Gage v. Billings*, 56 Ill. 269.)

[(*Title of court and cause as in Form No. 11850.*)]²

The counsel for the respective parties hereto, in open court, stipulate that the title and possession of the land in question may be assumed to be, and to have been, in the complainant, *Laura L. Billings*, and her grantors, direct and remote, as in said bill is stated, and that all taxes due upon said premises have been paid, and that, by and from the files and records of the *County Court of Cook county*, and of the office of the recorder of deeds in said county, appear the matters and things in said bill stated and alleged concerning the delinquent list, the collector's notice, the application for judgment,

1. See, generally, *supra*, note 1, p. [] will not be found in the reported case.

2. The matter to be supplied within

his oath to the delinquent list, the judgment, precept, return, certificate of sale, notice of purchase by assignee of certificate, affidavit of service of such notice, deed of the sheriff on said tax certificate, and the deed to the defendant, and that all such matters may be considered as proven by the said records and files, the production thereof being waived, and the foregoing being all the evidence given in said cause.

II. JUDGMENT OR ORDER ON STIPULATION.

1. Dissolving County Organization.

Form No. 18964.

(Precedent in State *v.* Garfield County, 54 Kan. 373.)

The State of Kansas, on relation of *J. N. Ives*, attorney-general,
Plaintiff,

v.

Thomas Rowe, J. E. Dawson, and Julius Johann, board of county commissioners, *E. Rall*, county treasurer, *S. L. Altens*, county clerk, *L. W. Fulton*, district clerk, *James Phelps*, sheriff, *G. W. Hovey*, county attorney, *A. T. Irvin*, register of deeds, *J. V. Killion*, probate judge, *M. L. Ramsel*, superintendent of schools, *D. H. Mandigo*, coroner, and *Thomas Morris*, surveyor, of *Garfield county, Kansas*, Defendants.

And now on this 7th day of *March*, 1893, this cause came regularly on for hearing, the plaintiff being represented by *John T. Little*, attorney-general, *S. D. Scott*, and *J. W. Parker*, its attorneys; the defendants *Thomas Rowe, J. E. Dawson, Julius Johann, E. Rall, S. L. Altens, L. W. Fulton, James Phelps, G. W. Hovey, A. T. Irvin, J. V. Killion, M. L. Ramsel, D. H. Mandigo*, and *Thomas Morris*, by *Milton Brown*, their attorney; and the defendants *George L. Jones*, executor of the estate of *Joseph A. Jones*, deceased, the *Wayne County Savings Bank*, of *Detroit, Mich.*, *H. P. Sinclair*, and *Benjamin Wissler*, intervening bondholders, by *Rossington, Smith & Dallas*, their attorneys.

Said cause was heard upon the motion of plaintiff for judgment according to the stipulation heretofore filed herein, and the report of *G. W. Potter*, surveyor, heretofore appointed by this court, also filed herein. And the court finds that *Garfield county* at all times has contained, and now contains, less than 432 square miles, and that the section of the statute of *Kansas* creating said county, being § 6, chapter 81, Laws of 1887, approved March 23, 1887, is unconstitutional and void.

It is, therefore, considered, adjudged, and decreed, that said county of *Garfield* be and is hereby dissolved, and adjudged to be an unconstitutional and void organization.

It is further ordered, adjudged and decreed by the court, that the application of intervening creditors for the appointment of a commission to assess, levy and collect taxes from the inhabitants within said territory be denied, but that nothing herein be taken or held to

be an adjudication or determination of any of the rights, legal or equitable, of the said parties intervening, by *Rossington, Smith & Dallas*, as their attorneys, or of any creditors of the said *Garfield* county, as heretofore constituted.

It is further ordered, that the defendants *Thomas Rowe et al.* pay the costs of this action, taxed at \$——, and that execution issue therefor.

2. That Dockets of Judgment and of Transcript Thereof be Marked "Secured on Appeal."

Form No. 18965.

(Precedent in *Burrall v. Vanderbilt*, 1 Bosw. (N. Y.) 640.)

[(Title of court and cause as in Form No. 11868.)]¹

On reading and filing the consent on the part of the respective parties in this action, whereby it appears that the judgment for \$1,153.90, recovered in this cause on the 4th day of April, 1855, has been secured on appeal, and on motion of *C. N. Potter*, of counsel for the said defendant, *De Groot*, it is ordered that the docket of the judgment in this cause, and the docket of the transcript thereof in the office of the clerk of the city and county of *New York*, be, on presentation of a certified copy of this order, marked "secured on appeal," as by the statute provided.

3. That Order of Reference be Vacated and that Another Order of Reference be Entered Nunc pro Tunc.

Form No. 18966.

(Precedent in *Healy v. Gilman*, 6 Robt. (N. Y.) 481.)

[(Title of court and cause as in Form No. 11868.)]¹

On reading and filing a consent, bearing date the 12th day of December, 1864, and signed by the parties hereto: Ordered, that the order entered herein on the 3d day of November, 1855, by which this cause was referred to *James Maurice*, Esq., as sole referee, be and the same is hereby vacated.

And it is further ordered, that this action and all the issues therein be, and the same are hereby referred to *James Maurice*, *Henry G. Lapham* and *Alexander Studwell*, to hear and determine the same, and that this order be entered nunc pro tunc as of the third day of November, 1855.

1. The matter to be supplied within [] will not be found in the reported case.

STOCK BROKERS.

See the title BROKERS, vol. 4, p. 90.

STOCK JOBBERS.

See the title BROKERS, vol. 4, p. 90.

STOCKS AND STOCKHOLDERS.

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STOCKS AND STOCKHOLDERS.

CROSS-REFERENCES.

- For Forms relating to Stock Brokers, see the title BROKERS, vol. 4, p. 90.*
- For a Form of Complaint by a Stockholder Seeking Contribution from Another Stockholder, see the title CONTRIBUTION, vol. 5, Form No. 6345.*
- For a Form of Petition by Minority Stockholders and Creditors to Dismiss an Application for a Voluntary Dissolution, see the title CORPORATIONS, vol. 5, Form No. 6466.*
- For another Form of a Bill in Equity by a Creditor of a Corporation to Collect Unpaid Stock Subscriptions, see the title CREDITORS' SUITS, vol. 5, Form No. 6654.*
- For Forms in Actions of Deceit in Sales of Stock, see the title DECEIT (ACTION OF) vol. 6, Form No. 6888 et seq.*
- For other Forms relating to Proceedings Against Directors and Corporation Officers for Unlawful Acts, see the title DIRECTORS AND CORPORATION OFFICERS, vol. 6, p. 691.*
- For Forms in Summary Proceedings Against a Stockholder on His Statutory Liability for Debts of the Corporation, see the title EXECUTIONS AGAINST PROPERTY, vol. 8, Form No. 8828 et seq.*
- For a Form of Declaration by a Foreign Corporation Against a Stockholder to Enforce His Statutory Liability for Debts of the Corporation, see the title FOREIGN CORPORATIONS, vol. 8, Form No. 9570.*
- For a Form of Petition on a Contract to Subscriber to Corporation Stock, Releasing Him from His Liability on the Subscription, see the title INDEMNITY CONTRACTS, vol. 9, Form No. 10667.*
- For other Forms in Proceedings by Injunction in Favor of or Against Stockholders, see the title INJUNCTIONS, vol. 9, p. 822.*
- For a Form of Criminal Complaint for the Larceny of Stock Certificate, see the title LARCENY, vol. 11, Form No. 12884.*
- For other Forms in Proceedings to Establish Lost Stock Certificates, see the title LOST PAPERS, vol. 11, Form No. 13299 et seq.*
- For other Forms in Proceedings by Mandamus in Favor of or Against Stockholders, see the title MANDAMUS, vol. 11, p. 767.*
- For a Form of Petition by an Attorney-General in Proceedings by Quo Warranto Against a Building and Loan Association for Disposing of Property Held as Security for Stockholders, see title QUO WARRANTO, vol. 15, Form No. 16862.*
- For a Form of Complaint in Proceedings by a Stockholder Against a Corporation for the Appointment of a Receiver, see the title RECEIVERS, vol. 15, Form No. 17119.*
- For a Form of Complaint in Proceedings to Annul a Subscription to Stock, see the title RESCISSION, CANCELLATION AND REFORMATION, vol. 16, Form No. 17919.*
- See also the GENERAL INDEX to this work.*

I. ACTION AGAINST STOCKHOLDER.

1. To Recover Unpaid Subscriptions to or Assessments on Stock.

a. By Corporation.¹

(1) MANUFACTURING OR MERCANTILE CORPORATION.

(a) *In General.*

1. Requisites of Complaint, Declaration or Petition, Generally. — For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 13, p. 244.

Manner and Object of Organization. — Where the corporation was in existence at the time of the subscription, the manner of its organization need not be set out. *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; *Williams v. Franklin Tp. Academeical Assoc.*, 26 Ind. 310; *Heaston v. Cincinnati, etc., R. Co.*, 16 Ind. 275; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329; *Henderson, etc., R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

Nor is it necessary to set out the specific object of such corporation. *Williams v. Franklin Tp. Academeical Assoc.*, 26 Ind. 310; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329.

But where the subscription was to articles of association by which the subscribers proposed to become incorporated thereafter, the complaint must show that all of the steps have been taken which are required by law to bring the corporation into existence. *Wheeler v. Thayer*, 121 Ind. 64; *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31; *Morehouse v. North Western Gravel Road Co.*, 44 Ind. 473; *Haun v. Mulberry, etc., Gravel Road Co.*, 33 Ind. 103; *Williams v. Franklin Tp. Academeical Assoc.*, 26 Ind. 310; *Wert v. Crawfordsville, etc., Turnpike Co.*, 19 Ind. 242; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329. And an allegation that subsequent to the subscription the plaintiff was legally organized is insufficient to show that the proper steps have been taken, as such an averment is but a conclusion of law. *Morehouse v. North Western Gravel Road Co.*, 44 Ind. 473; *Hain v. North Western Gravel Road Co.*, 41 Ind. 196.

Reference to Contract of Subscription. — In *McClasky v. Grand Rapids, etc., R.*

Co., 16 Ind. 96, the complaint made no reference to any written contract of subscription and it was held that the complaint did not show a good cause of action.

Execution and Delivery of Contract. — A complaint which avers that the defendant "subscribed under a heading in writing as follows:" setting out the contract of subscription, but does not aver either execution or a delivery of such contract, is insufficient. *Petty v. Church of Christ*, 70 Ind. 290.

An averment in a petition that the defendant signed and delivered to the plaintiff an agreement in writing is equivalent to an averment that the defendant entered into an agreement with the plaintiff in writing. *Waukon, etc., R. Co. v. Dwyer*, 49 Iowa 121.

By Whom Subscription Received. — Where the charter of the plaintiff corporation provided that commissioners were to receive subscriptions for the stock until directors were appointed, after which the directors were to receive the subscriptions, a complaint which did not state by whom the subscriptions for the stock were received was held to be insufficient. *Corydon Steam Mill Co. v. Pell*, 4 Blackf. (Ind.) 472.

Consideration for Subscription. — An allegation that the defendants subscribed to so many shares of stock legally implies that they were the owners of and entitled to those shares, and renders a specific allegation of consideration by virtue of the subscription unnecessary. *Oswego, etc., Plank Road Co. v. Rust*, (Supreme Ct.) 5 How. Pr. (N. Y.) 390.

Readiness to Comply with Terms of Subscription. — Where by the terms of the subscription certain acts are to be done by the plaintiff concurrent with the payment by the defendant of his subscription, the plaintiff must aver a readiness to perform such acts. But where such acts are to be performed subsequently to such payment an alle-

gation of readiness to perform is unnecessary. *Henderson, etc., R. Co. v. Leavell*, 16 B. Mon. (Ky.) 358.

In an action upon a railroad subscription contract, conditioned to be paid in instalments as might from time to time be called for by the directors, provided the same should be expended upon a certain line of road to be thereafter located by the company, it was held that the petition, showing neither the road constructed along the line designated nor an offer or readiness to expend the money subscribed according to the condition, was defective. *Trott v. Sarchett*, 10 Ohio St. 241.

Requisite Amount Subscribed — Generally. — Where the liability of the defendant by reason of his subscription is conditioned upon a certain amount being subscribed, that the required amount had been subscribed must be alleged. *San Bernardino Invest. Co. v. Merrill*, 108 Cal. 490; *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 320; *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 314; *Penobscot R. Co. v. White*, 41 Me. 512; *Ellis v. White*, (Tex. Civ. App. 1895) 31 S. W. Rep. 1071.

Within Time Stipulated. — Where the articles of subscription provide that unless the required sum be subscribed by a certain time the subscriptions shall be null and void, it must be alleged that the required sum has been so subscribed. *Knottsville Roller Mill Co. v. Mattingly*, (Ky. 1896) 35 S. W. Rep. 1114.

Making of Assessment or Call — Generally. — Where an assessment or call is necessary to fix the liability of the defendant on his unpaid subscription, the making of such assessment or call, in the manner provided by the charter of the corporation or otherwise, must be alleged. *Great Western Tel. Co. v. Gray*, 122 Ill. 630; *Lamar Ins. Co. v. Moore*, 84 Ill. 575; *McClaskey v. Grand Rapids, etc., R. Co.*, 16 Ind. 96; *Gebhart v. Junction R. Co.*, 12 Ind. 484; *Halsey Fire Engine Co. v. Donovan*, 57 Mich. 318; *Minneapolis Threshing Mach. Co. v. Crevier*, 39 Minn. 417; *Atlantic Mut. F. Ins. Co. v. Young*, 38 N. H. 451; *Braddock v. Philadelphia, etc., R. Co.*, 45 N. J. L. 363; *Grosse Isle Hotel Co. v. I'Anson*, 43 N. J. L. 442; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Bouton v. Dry Dock, etc., Stage Co.*, 4 E. D. Smith, (N. Y.) 420; *Pennsylvania, etc., Canal*

Co. v. Webb, 9 Ohio 136; *Chandler v. Siddle*, 3 Dill. (U. S.) 477; *Glenn v. Priest*, 48 Fed. Rep. 19, 51 Fed. Rep. 400.

In *Mansfield, etc., R. Co. v. Hall*, 26 Ohio St. 310, it was held under sections 6 and 7 of the act of May 1st, 1852, to provide for the creation and regulation of incorporated companies, that where a railroad company sues to recover unpaid instalments of stock, an allegation in the petition that its board of directors required subscriptions to its stock to be paid in instalments of a certain amount, at a certain time and place, is material to its right of recovery.

Duly Made. — Allegations that assessments or calls were duly made have been held sufficient to show that they were made in conformity with statutory requirements. *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48; *Bavington v. Pittsburgh, etc., R. Co.*, 34 Pa. St. 358.

Assessment by Directors. — In a suit against a stockholder for assessments upon his stock, which assessments could be made only by the board of directors, averments in the declaration that "the corporation was organized," and that "the board of directors of said corporation made assessments," etc., are sufficient to show the existence of the board of directors. *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455.

In *Steinmetz v. Versailles, etc., Turnpike Co.*, 57 Ind. 457, it was held that a complaint which alleged the election of the directors, and that the directors proceeded to locate the road and to make the calls, sufficiently showed that the directors were elected before the calls were made.

Notice of Assessment or Call. — Where notice of an assessment or call is necessary to fix the liability of the defendant, the giving of such notice, in the manner provided by the charter of the corporation or otherwise, must be alleged. *Epps v. Mississippi, etc., R. Co.*, 35 Ala. 33; *Carlisle v. Cahawba, etc., R. Co.*, 4 Ala. 70; *Macon, etc., R. Co. v. Vason*, 57 Ga. 314; *Tomlin v. Tonica, etc., R. Co.*, 23 Ill. 429; *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468; *Van Riper v. American Cent. Ins. Co.*, 60 Ind. 123; *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31; *Breedlove v. Martinsville, etc., R. Co.*, 12 Ind. 114; *Smith v. Indiana, etc., R. Co.*, 12 Ind. 61; *Ross v. Lafayette, etc., R. Co.*, 6 Ind. 297; *Lackey v. Rich-*

mond, etc., Turnpike Road Co., 17 B. Mon. (Ky.) 43; *Scarlett v. Academy of Music*, 43 Md. 203; *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48; *Minneapolis Threshing Mach. Co. v. Crevier*, 39 Minn. 417; *Eastern Plank Road Co. v. Vaughan*, 20 Barb. (N. Y.) 155; *Pennsylvania, etc., Canal Co. v. Webb*, 9 Ohio 136.

In *Beckner v. Riverside, etc., Turnpike Co.*, 65 Ind. 468, the court says:

"It is also objected to the complaint that it contains no averment of a publication in a newspaper, thirty days previous to the time when the payment of stock was required, according to sec. 11, 1 R. S. 1876, p. 658. Such averment is necessary only when the stock is not payable at a fixed time, or not upon a given contingency, as upon call by the directors. In this case, the undertaking of the appellants was, to pay 'in such installments, and at such times, as the company may direct;' with an averment in the complaint that the company had 'ordered that the subscription of stock be paid to the treasurer in three equal installments, in thirty, sixty and ninety days from June 1st, 1872.'

The money thus became due, according to the terms of the call, which the stockholders were bound to notice, without either publication or demand made."

An allegation that the defendant was duly notified is sufficient. Such an allegation "means that the proper notice had been prescribed and served and that all the requisites necessary to constitute a legal and valid notice had been complied with." *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48.

In *Mississippi, etc., R. Co. v. Turrentine*, 21 Ark. 445, the declaration, after setting out the assessments upon the defendant's stock, the time when made, the amount of each, when due and payable, the interest chargeable thereon, and the aggregate amount in arrear, averred thus: "Of all which said assessments, installments, or calls, at the county aforesaid, on the said day on which they were respectively made, as aforesaid, the said *Charles P. Turrentine* had notice, and was requested to pay the same."

It was held that this averment of notice was sufficient.

Where the charter of the corporation provided that sixty days' notice should be given of each call, and the declaration alleged that the defendant had no-

tice on a certain day, but did not allege that sixty days had expired before the commencement of the action, it was held that the court would look to the time of the filing of the declaration to ascertain whether the sixty days had expired. *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455.

Assessment Due and Payable — That the assessment or call sought to be recovered was due and payable when the action was commenced must be alleged. *Bethel, etc., Toll-bridge Co. v. Bean*, 58 Me. 89.

Promise to Pay. — In those states which hold that the mere subscription to the capital stock imports in itself a promise to pay for the same, it is not necessary to allege a promise to pay, but an allegation that the defendant "subscribed" to such stock is sufficient. *Selma, etc., R. Co. v. Tipton*, 5 Ala. 787; *Carlisle v. Cahawba, etc., R. Co.*, 4 Ala. 70; *Kirksey v. Florida, etc., Plank Road Co.*, 7 Fla. 23; *Griswold v. Peoria University*, 26 Ill. 41; *Instone v. Frankfort Bridge Co.*, 2 Bibb (Ky.) 576; *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56; *Northern R. Co. v. Miller*, 10 Barb. (N. Y.) 260; *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51.

In *Cheraw, etc., R. Co. v. White*, 14 S. Car. 51, the court says, "the word 'subscribed' as applied to contracts of this nature has a definite technical sense, including in it the idea of a promise to pay the amount subscribed in the manner agreed upon."

But in those states which hold that the mere subscription to the capital stock is insufficient in itself to create a promise to pay, there must be an allegation of a promise by the defendant to pay. *Kennebec, etc., R. Co. v. Kendall*, 31 Me. 470; *South Bay Meadow Dam Co. v. Gray*, 30 Me. 547; *Bangor House Proprietary v. Hinkley*, 12 Me. 385; *Katama Land Co. v. Jernegan*, 126 Mass. 155; *Franklin Glass Co. v. White*, 14 Mass. 286; *Taunton, etc., Turnpike Corp. v. Whiting*, 10 Mass. 327; *New Bedford, etc., Turnpike Corp. v. Adams*, 8 Mass. 138; *Andover, etc., Turnpike Corp. v. Hay*, 7 Mass. 102; *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 40; *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23; *New Hampshire Cent. R. Co. v. Johnson*, 30 N. H. 390; *Franklin Glass Co. v. Alexander*, 2 N. H. 380.

Tender of Stock Certificate. — That a

tender of the certificate of stock was made to the defendant need not be alleged in the absence of a special contract providing for a delivery of the certificate upon payment. *California Southern Hotel Co. v. Callender*, 94 Cal. 120; *Delaware R. Co. v. Tharp*, 1 Houst. (Del.) 149; *South Georgia, etc., R. Co. v. Ayres*, 56 Ga. 230; *Fulgam v. Macon, etc., R. Co.*, 44 Ga. 597; *Wemple v. St. Louis, etc., R. Co.*, 120 Ill. 106; *Chandler v. Northern Cross R. Co.*, 18 Ill. 190; *Slipher v. Earhart*, 83 Ind. 173; *Brover v. Evans*, 59 Ind. 454; *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Vawter v. Ohio, etc., R. Co.*, 14 Ind. 174; *New Albany, etc., R. Co. v. McCormick*, 10 Ind. 499; *Hedge v. Gibson*, 58 Iowa 656; *Shelbyville v. Shelbyville, etc., Turnpike Co.*, 1 Met. (Ky.) 54; *Smith v. Gower*, 2 Duv. (Ky.) 17; *Webb v. Baltimore, etc., R. Co.*, 77 Md. 92; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367; *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456; *Walter A. Wood Harvester Co. v. Robbins*, 56 Minn. 48; *Marson v. Deither*, 49 Minn. 423.

Readiness to Deliver Stock Certificate.

—Where the action is for the whole amount subscribed, or where it is to enforce payment of the final instalment, it must be alleged that the plaintiff was willing and ready to deliver the certificate. *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367; *Walter A. Wood Harvester Co. v. Jefferson*, 57 Minn. 456; *Minneapolis Harvester Works v. Libby*, 24 Minn. 327; *James v. Cincinnati, etc., R. Co.*, 2 Disney (Ohio) 261.

Profert of Subscription Paper. — A copy of the subscription paper need not be filed with or made a part of the complaint. *Mississippi, etc., R. Co. v. Gaster*, 20 Ark. 455; *Hudson v. Burlington, etc., Plankroad Co.*, 4 Greene (Iowa) 152; *Workman v. Campbell*, 46 Mo. 305; *Hannibal, etc., Plankroad Co. v. Robinson*, 27 Mo. 396. But see *contra Petty v. Church of Christ*, 70 Ind. 290; *Stockton v. Creager*, 51 Ind. 262.

Profert of Notice of Assessment. — Where an allegation of notice of assessment or call is necessary, the notice itself need not be made a part of the complaint. *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

Precedents — Sufficient. — In *Worcester Turnpike Corp. v. Willard*, 5 Mass. 80, the declaration was as follows:

"For that the said plaintiffs were,

by an act of the General Court, etc., passed, etc., made and constituted a corporation or body politic by the name of *The Worcester Turnpike Corporation*, to make, lay out and keep in repair a turnpike road from *Roxbury* to *Worcester*, in the course, direction and manner described in said act of incorporation, and afterwards, at, etc., on, etc., in consideration that the plaintiffs, at the request of the said *Aaron*, had admitted him to take one share in the capital stock of said corporation, and to become a proprietor therein, he, the said *Aaron*, then and there undertook and faithfully promised the plaintiffs, that he would take the said one share in their said stock, and would pay all such legal assessments as should thereafter be made by the government of said corporation, after the same should have been organized, and carried into operation according to the said act of incorporation, at the time the same should become due and payable; provided, however, and his, the said *Aaron's*, promise aforesaid, was upon these conditions following, to wit, that the number of shares in said capital stock should be six hundred, and also that the said road should be finally located and made from *Worcester*, so as to cross *Charles River*, near the upper falls, so called, at or near *General Elliot's* mills, thence in the most eligible and practicable route near the *Punch Bowl Tavern* in *Roxbury*, thence down near *Roxbury Meeting-House*; and the plaintiffs aver that afterwards the said corporation was fully organized and went into operation, and the number of shares in the said stock thereof was six hundred, and the said road was located and made in the course and direction in the conditions aforesaid described, and the said *Aaron*, as such proprietor as aforesaid, paid the first assessment of twenty dollars on his said share; and afterwards, to wit, at said *Boston*, on, etc., the government of said corporation made a second assessment of ten dollars upon each and every of the shares in the said stock, to be paid into the treasury of said corporation, on or before, etc.; and there afterwards on, etc., the government of the said corporation made a third assessment of thirty dollars, etc., and there afterwards on, etc., the government of the said corporation made a fourth assessment of twenty dollars, etc., all which said assessments amounted in the whole on said *Aaron's* share to the sum

of sixty dollars; of all which said assessments, at said *Boston*, on the said days on which the same were respectively made as aforesaid, the said *Aaron* had notice, and was requested to pay the same: Yet although the said times for the payment of the said assessments are all long since passed, the said *Aaron* hath not paid said several sums of money assessed as aforesaid, nor either nor any part thereof, to the plaintiffs, but neglects and refuses so to do."

Upon the issue of non assumpsit, the cause was tried and there was a verdict for the plaintiff, which was affirmed.

In *Oswego, etc., Plank Road Co. v. Rust*, (Supreme Ct.) 5 How. Pr. (N. Y.) 390, the complaint was as follows:

"The *Oswego and Syracuse Plank Road Company*, plaintiffs, by *Ransom H. Tyler*, their attorney, complain of *Charles Rust* and *Spencer Rust*, defendants, for this, to wit: That the plaintiffs now are and have been ever since on or about the 28th day of *December, 1848*, an incorporated company, organized pursuant to the provisions of the act of the legislature, entitled 'an act to provide for the incorporation of companies to construct plank roads, and of companies to construct turnpike roads, passed May 7, 1847,' and the acts amending the same. That, as the plaintiffs are informed and believe, in contemplation of the organization of said company, to wit, on the 21st day of *December, 1848*, upon due notice, subscription books were opened, as required by law, and the defendants subscribed to the capital stock of said company twenty shares, amounting to \$500 (said shares being \$25.00 each), and thereby agreed to take twenty shares of the said stock, and promised to pay the same to the directors of said company at such times and places as said directors should from time to time direct. That as plaintiffs are also informed and believe, pursuant to due notice, the subscribers to capital stock met at the *Fulton House*, in the village of *Fulton*, on the 28th day of *December, 1848*, and elected directors, adopted articles of association, and organized said company, and then and there said defendants again subscribed twenty shares of said stock, amounting to \$500, and thereby agreed to pay the same to the said directors (except five per cent. thereon, which had been paid to said directors), at such times and places as

said directors should from time to time direct. The plaintiffs, upon their information and belief, further say that the requisite amount of the capital stock of said company was in due time subscribed, and five per cent. paid thereon, and that said directors required the whole of said stock subscribed to be paid by installments until the whole thereof should be paid; the last of which installments was required to be paid to the treasurer of said company at *Fulton*, on the first day of *August, 1849*, which requirement of said directors was published as required by law. The plaintiffs, upon their information and belief, further aver that said defendants have paid upon said subscription, in all, only the sum of \$25, and that the sum of \$475 is now actually due thereon, with interest from the first day of *August, 1849*.

Whereupon the plaintiffs demand judgment against said defendants for said sum of \$475, with the interest thereon from *August 1, 1849*."

The defendants demurred as follows:

"1. Because it appears, on the face of the complaint, that this action is brought to recover the amount of a voluntary subscription for the balance of twenty shares of capital stock of said *Plank Road Company*, amounting to \$475.

2. Because it does not appear on the face of said complaint that there was any consideration for said subscription, or for defendants' promise to pay said subscription or any part thereof.

3. Because it does not appear upon the face of said complaint that the plaintiff has any cause of action against defendants, nor does it show any legal liability of defendants to the plaintiffs.

4. The complaint does not show upon the face thereof that said company has any legal existence."

This demurrer was overruled.

In 1 *Humph. Prec.* 644, § 166, is set out the following form:

"City and county of *Albany*, ss: *John Townsend, Erastus Corning, Jared L. Rathbone, Samuel Stevens, James Stevenson, George W. Stanton, and Samuel M. Woodruff* plaintiffs in this cause, by *Samuel M. Woodruff*, their attorney, complain of *John Doe*, defendant in this cause, by the filing and service of a copy of the declaration, according to the statute in such case made and provided:

For that whereas heretofore, to wit,

on the *twenty-fourth* day of *May*, in the year of our Lord one thousand eight hundred and *thirty-six*, at the city of *Albany* aforesaid, the said defendant and certain other persons were desirous of associating themselves together for the purpose of procuring a certain block of ground in the city of *Albany*, and of erecting a certain building thereon, for the ornament of the said city, and the benefit of those who should become members of the said association; and whereas afterwards, to wit, on the same day and year aforesaid, at the place aforesaid, in consideration thereof, and for the purpose of effecting the said object, he, the said defendant, made and subscribed his certain agreement in writing, as follows, to wit: (*setting out the articles of association*).

And the said plaintiffs aver that the said defendant did at the time of subscribing the said article, set opposite to his name thereto subscribed the number of *five* shares. And the said agreement being so made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at the place aforesaid, in consideration thereof, and of the premises aforesaid, he the said defendant undertook, and then and there faithfully promised the said plaintiffs to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. And although the said plaintiffs have always from the time of making said agreement hitherto, well and truly performed and fulfilled the same, according to the tenor and effect, true intent and meaning thereof, and although *two thousand five hundred* shares were subscribed for within *ten* days from the date of the said agreement, and although the said plaintiffs relying upon the said subscription of the said defendant and other persons, did make large purchases of land in the block in said subscription mentioned, and enter into contracts and personal liabilities to a large amount, to wit, the sum of *one hundred and forty thousand* dollars; and the said plaintiffs did, as such trustees on the *seventeenth* day of *August*, one thousand eight hundred and *thirty-six*, make a call and require the said defendant and the other stockholders, to pay upon the capital stock held by him and them, to the *Firemen's Insurance Company*, at their office in the city of *Albany*, the sum of *five* dollars upon each share of stock so

subscribed by him, the said defendant, and the other stockholders, upon the *first* day of *September*, one thousand eight hundred and *thirty-six*, and did cause at least *ten* days' previous notice of such call to be given by publication of the same in a daily newspaper, published in the city of *Albany*; yet the said plaintiffs in fact say, that the said defendant, contriving and fraudulently intending unjustly to injure the said plaintiffs, did not, nor would perform his said agreement nor his said promises and undertakings, but therein craftily and subtly deceived the said plaintiffs in this, to wit, that the said defendant wholly neglected and refused to pay the said sum of *five* dollars upon each share subscribed by him as aforesaid, according to the form and effect of the said agreement, and of his said promise and undertaking, to wit, at *Albany* aforesaid.

And also, for that whereas heretofore, to wit, on the *twenty-fourth* day of *May*, in the year of our Lord one thousand eight hundred and *thirty-six*, at the city of *Albany* aforesaid, the said defendant and certain other persons were desirous of associating themselves together for the purpose of procuring a certain block of ground in the city of *Albany*, and of erecting a certain building thereon, for the ornament of the said city, and the benefit of those who should become members of the said association; and whereas afterwards, to wit, on the same day and year aforesaid, at the place aforesaid, in consideration thereof, and for the purpose of effecting the said object, the said defendant made and subscribed a certain agreement in writing, in the said first count mentioned.

And the said plaintiffs aver that the said defendant did, at the time of subscribing the said article, set opposite to his name thereto subscribed the number of *five* shares. And the said agreement being so made as aforesaid, afterwards, to wit, on the same day and year aforesaid, at the place aforesaid, in consideration thereof, and of the premises aforesaid, the said defendant undertook, and then and there faithfully promised the said plaintiffs to perform and fulfil the said agreement in all things on his part and behalf to be performed and fulfilled. And although the said plaintiffs have always from the time of making said agreement hitherto well and truly performed and fulfilled the same, according to the

tenor and effect, true intent and meaning thereof, and although *two thousand five hundred* shares were subscribed for within *ten* days from the date of the said agreement, and although the said plaintiffs, relying upon the said subscription of the said defendant and other persons, did make large purchases of land in the block in said subscription mentioned, and enter into contracts and personal liabilities to a large amount, to wit, the sum of *one hundred and forty thousand* dollars; and the said plaintiffs did, as such trustees, on the *twenty-eighth* day of *March*, one thousand eight hundred and *thirty-eight*, make a call and require the said defendant and the other stockholders to pay upon the capital stock held by them, to the *Canal Bank*, at their banking house in the city of *Albany*, the sum of *five* dollars upon each share of stock so subscribed by the said defendant and the other stockholders, upon the *first* day of *June*, one thousand eight hundred and *thirty-eight*, and did cause at least *ten* days' previous notice of such call to be given by publication of the same in a daily newspaper published in the city of *Albany*; yet the said plaintiffs in fact say, that the said defendant, contriving and fraudulently intending unjustly to injure the said plaintiffs, did not, nor would perform his said agreement nor said promises and undertakings, but therein craftily and subtly deceived the said plaintiffs in this, to wit, that the said defendant wholly neglected and refused to pay the said sum of *five* dollars upon each share subscribed by him as aforesaid, according to the form and effect of the said agreement, and of his said promise and undertaking, to wit, at *Albany*, aforesaid, to the damage of the said plaintiffs of *six hundred* dollars, and therefore they bring suit, etc.

Samuel Woodruff, Pliffs Atty."

In *Weinman v. Wilkinsburg, etc.*, R. Co., 118 Pa. St. 192, the narr. was as follows:

"For that whereas *A. N. Sutton*, one of the said defendants, heretofore, to wit, on 1885, to wit, in the county of *Allegheny* aforesaid, became a subscriber to the articles of association of the plaintiff company, a corporation organized under the act of assembly approved March 19, 1879, and agreed to take *twenty* shares of the capital stock of said corporation, of the par value of \$50.00 each, and to pay for the same when calls were duly

made therefor. And the said *A. N. Sutton*, heretofore, to wit, on 1885, sold and assigned said shares of the capital stock of said plaintiff company to the firm of *Weinman & Company*, said firm being composed of said *A. N. Sutton* and *Jacob Weinman*, the defendants in this case, and said firm accepted said assignment, and thereupon became liable to pay to the said plaintiff said amount of money so subscribed, and being so liable, they, the said defendants, heretofore, to wit, on 1885, undertook and then and there faithfully promised the said plaintiff to pay it, the said money, when they should be thereafter requested.

And, whereas, *A. N. Sutton*, one of the said defendants, heretofore, to wit, on 1885, to wit, in the county of *Allegheny* aforesaid, became a subscriber to the articles of association of the plaintiff company, a corporation organized under the act of assembly, approved March 19, 1879, and agreed to take *twenty* shares of the capital stock of said corporation of the par value of \$50.00 each, and to pay for the same when calls were duly made therefor. And the said *A. N. Sutton* heretofore, to wit, on 1885, sold and assigned said shares of the capital stock of said plaintiff company to the firm of *Weinman & Company*, said firm being composed of said *A. N. Sutton* and *Jacob Weinman*, the defendants in this case, and said firm accepted said assignments and agreed with the said assignor that they would pay to the said plaintiff said amount of money so subscribed, and being so liable, they, the said defendants, heretofore, to wit, on 1885, undertook and then and there faithfully promised the said plaintiff to pay it, the said money, when they should be thereafter requested."

There was a judgment for the plaintiff, which was affirmed. It was held that the defendant firm was liable, not on the ground of the sale of the stock by the original subscriber, but on the ground of a substitution of the firm as a subscriber in his place by an arrangement to which all the parties had assented.

Insufficient.—In *Bethel, etc., Tollbridge Co. v. Bean*, 58 Me. 89, the declaration was as follows:

"For that the said plaintiffs, by an act of the legislature of the state of *Maine*, approved on the *eighth* day of *February*, in the year of our Lord one thousand eight hundred and *sixty-six*,

Form No. 18967.¹

(Precedent in Lincoln Shoe Mfg. Co. v. Sheldon, 44 Neb. 283.)

[[*Title of court and cause as in Form No. 5923.*]]²

The plaintiff complains of the defendant and alleges that the plaintiff is a corporation duly organized and incorporated under the laws of the state of *Nebraska* for the purpose of manufacturing, selling, and dealing in boots and shoes of every description and kind

were made and constituted a corporation, or body corporate, by the name of '*The Bethel & Hanover Toll-bridge Company*,' for the purpose of erecting and keeping in repair a bridge over the *Androscoggin* river at *Hemlock Island*, between the towns of *Bethel* and *Hanover*, in the county of *Oxford*, in the direction and manner described in said act of incorporation, and thereafterwards, to wit, on the *seventh* day of *May*, in the year of our Lord one thousand eight hundred and *sixty-six*, at said *Bethel*, in consideration that the plaintiffs, at the request of the said defendant, has admitted him to take one share of the par value of *fifty* dollars each in the capital stock of said corporation, and to become a proprietor therein; he, the said defendant, then and there undertook and faithfully promised and agreed with the plaintiffs that he would pay all assessments on the same for the purpose of constructing a toll-bridge across the *Androscoggin* river at *Hemlock Island*, connecting *Bethel* and *Hanover*.

And the plaintiffs aver, that they, relying on the said promise and undertaking of the said defendant, thereafterwards made, constructed, and erected said toll-bridge across the *Androscoggin* river, at *Hemlock Island*, connecting *Bethel* and *Hanover*; and after the making of said promise by the said defendant, to wit, on the *sixteenth* day of *June*, in the year of our Lord one thousand eight hundred and *sixty-six*, the plaintiffs made an assessment of *five* dollars upon each and every share in the said stock so agreed to be taken, to be paid into the treasury of said corporation agreeably to the by-laws of said corporation; and thereafterwards, to wit, on the *eleventh* day of *March*, in the year of our Lord one thousand eight hundred and *sixty-seven*, the plaintiffs made a *second* assessment of *ten* dollars on each and every of the shares so agreed to be taken in said stock, to be paid as aforesaid; and thereafterwards, to wit, on

the *eighth* day of *June*, in the year of our Lord one thousand eight hundred and *sixty-seven*, the plaintiffs made a *third* assessment of *thirty-five* dollars on each and every of the shares in said stock so agreed to be taken, to be paid as aforesaid; and thereafterwards, to wit, on the *sixteenth* day of *December*, in the year of our Lord one thousand eight hundred and *sixty-seven*, the plaintiffs made a *fourth* assessment of *twenty-five* dollars upon each and every of the shares in said stock as agreed to be taken, to be paid as aforesaid; and thereafterwards, to wit, on the *fourth* day of *January*, in the year of our Lord one thousand eight hundred and *sixty-nine*, the plaintiffs made a *fifth* assessment of *fifteen* dollars on each and every of the shares in said stock so agreed to be taken, to be paid as aforesaid; all which assessments amounted in the whole on said defendant's share to the sum of *ninety* dollars; of all which said assessments, to wit, on the said days on which the same were respectively made as aforesaid, the said defendant had due notice, and was requested to pay the same; and after *thirty* days from the notice thus given on each of said assessments so made as aforesaid, the defendant was requested by the plaintiffs to pay the same. Yet the said defendant, although the times for the payment of the said assessments are all long since passed, hath not paid said several sums of money assessed as aforesaid, nor either, nor any part thereof to the plaintiffs, or their treasurer, but neglects and refuses so to do."

'This declaration was on general demurrer held bad for the reason that "it nowhere appears that the assessment, 'agreeably to the by-laws,' were due and payable when this action was commenced."

1. A demurrer to this petition was overruled.

2. The matter to be supplied within [] will not be found in the reported case.

and character and to deal in all branches common to that line of trade, and to that end to own all necessary real estate, buildings, machinery, and appliances necessary for said business, and having a capital stock of \$100,000, divided into 2,000 shares of \$50 each, of which more than *ten* per cent. has been subscribed.

2. That the said plaintiff corporation was organized under the general laws of the state of *Nebraska* relating to manufacturing corporations as well as that relating to corporations in general as found in sections 37, 38, 39, and 123-144 of the laws of *Nebraska* (Compiled Statutes, 1891), and became organized and incorporated on the 10th day of *February*, 1890, and ever since has been, and is and was at the time hereafter mentioned a corporation in fact and conducted and carried on business as such corporation.

3. On the 22d day of *March*, 1890, and for the purposes of manufacturing and dealing and buying boots and shoes and for the purposes named in the first paragraph of this petition and in consideration of the advantages thereof and of each other's subscriptions the defendant, with other persons, became a subscriber to the capital stock of the plaintiff by severally executing and delivering to the duly authorized representatives and agents and officers of the plaintiff company the following agreement in writing: "For value received we, the undersigned subscribers, hereby bind ourselves to purchase the number of shares of stock set opposite our names in the *Lincoln Shoe Manufacturing Company* at fifty (\$50) dollars per share; *one-fourth* of the amount so by us subscribed respectively to be paid when the foundation of the building is laid; *one-fourth* when the building is under roof; the balance on call of the directors. In consideration of the building being erected on the west half of the north-east quarter of section *twenty-eight* (28), town *ten* (10), range *six* (6), along the line of the *Lincoln & Northwestern* railroad. Witness our hands on this 22d day of *March*, 1890."

4. That the defendant signed and delivered the said above agreement and placed the number of shares opposite his name for which he subscribed, to wit, the number of *fifty* shares for which he subscribed, and thereby agreed to take the number of *fifty* shares, each share being of the par value of \$50, and agreed to pay the plaintiff thereof the sum of \$2,500, as required by law and the terms of said agreement.

5. That there was subscribed with the defendant greatly in excess of *ten* per cent. of the said amount of capital stock as specified by the charter, and after the amount of *ten* per cent. of the capital stock had been subscribed the plaintiff company commenced operations and adopted rules and began the erection and equipment of a building for the purposes of the company and made preparations for the business of manufacturing and dealing in boots and shoes and bought material and acted under their charter and as an incorporation, and after as before the subscription of the defendant.

6. The plaintiff company was formed on the 10th day of *February*, 1890, and the articles of incorporation were duly filed the same day, a true copy of which are hereto attached and marked "Exhibit A" and made a part of this petition. The plaintiff accepted the sub-

scription of the defendant and proceeded with the work and business of its charter and organization. A board of directors was chosen and the other officers necessary to the corporation and provided by its charter were elected and qualified. By and on the *10th* day of *June*, 1890, the foundation of the building in which the operations of the company were to be carried on was laid, and on the *1st* day of *September*, 1890, the said building was erected and under roof. This building was the same building referred to and set forth in the agreement as set forth in paragraph 3 of this petition, and was so founded and erected and roofed on the land described and along the railway named in the agreement as above set forth. And the sum of *one-fourth* of the said amount so agreed by the defendant to be paid became due on the *10th* day of *June*, 1890, and the *one-fourth* part also became due on the *1st* day of *September*, 1890, and the plaintiff company requested and duly demanded the payment of the said sums and offered to deliver and tendered the certificates of stock to defendant before the beginning of this action, and now offers to deliver them to defendant, amounting in all to the sum of \$1250 (*twelve hundred and fifty* dollars).

7. The plaintiff has performed all the conditions precedent in said agreement on its part. The defendant has not paid the said sum or any part thereof, and the plaintiff therefore prays judgment against the defendant for the sum of \$1250, as aforesaid, with interest thereon at the rate of *seven* per cent. from the *1st* day of *June*, 1890, on half the amount due, and from the *1st* day of *September* on the other half due, and costs of suit.

[(Signature and verification as in Form No. 5923.)]¹

Form No. 18968.²

County Court of Westchester County.
The Yonkers Gazette Company, Plaintiff, }
 against } Complaint.
Henry B. Jones, Defendant.

The complaint of the plaintiff in the above entitled action respectfully shows to this court:

I. That on or about the *20th* day of *January*, 1896, under and in pursuance of an act of the Legislature of the state of *New York* entitled "An Act in relation to business corporations, constituting chapter forty-one of the General Laws," passed June 7th, 1890, and the acts amendatory thereof, the above named plaintiff was duly formed and organized as a domestic corporation under the name of "*The Yonkers Gazette Company*," and now exists as such, having its office and place of business in the city of *Yonkers*, *Westchester* county, *New York*.

II. That the defendant is a resident of the county of *Westchester*.

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the form of complaint in the case of *Yonkers Gazette Co. v. Jones*, 30 N. Y. App. Div. 316, and is

copied from the records. There was a judgment for the plaintiff, which was affirmed.

See also, generally, *supra*, note 1, p. 514.

III. That on or about the *first* day of *January*, 1896, the above named defendant, in contemplation of the above named company and for the purpose of conducting and publishing in the city of *Yonkers* a daily newspaper to be known as "*The Yonkers Gazette*," in connection with the weekly paper of that name, and in consideration thereof, subscribed for *one* share of the capital stock of said company, amounting to the sum of *one hundred* dollars, and promised and agreed to take said *one* share of stock.

IV. That at the time of subscribing for said stock as aforesaid, defendant promised and agreed to pay plaintiff the sum of *one hundred* dollars, the amount of said share of stock, and thereafter, on the *25th* day of *January*, 1896, defendant paid on said subscription *ten* per cent. thereof, that is to say, the sum of *ten* dollars.

V. That at the time of the incorporation of plaintiff as above set forth, the whole of the capital stock of said company had been subscribed for, and after said incorporation plaintiff accepted said subscription and the above named defendant became and was a stockholder in said company.

VI. That thereupon and after the amount of capital specified in plaintiff's certificate of incorporation with which it should commence business had been paid in, as required by law, the above named plaintiff, relying upon the said subscription of the above named defendant, did incur a large indebtedness, and that a large indebtedness now exists, and expended large sums of money in conducting and publishing said newspaper.

VII. That thereafter, on or about the *24th* day of *April*, 1896, plaintiff, through its directors, made a call for the amount due for said stock, and gave due notice to defendant that the balance of *ninety* dollars was due on said subscription.

VIII. That on the *20th* day of *July*, 1897, plaintiff duly delivered to defendant a certificate of the share of said stock subscribed for by him as aforesaid, which certificate was prepared in the manner required by law, and at the same time, the sum due from said defendant for said share, to wit: the sum of *ninety* dollars, was duly demanded from the defendant.

IX. That said sum of *ninety* dollars became due and payable to plaintiff as aforesaid, but that defendant has neglected and refused to pay the amount of said subscription except the sum of *ten* dollars aforesaid, and is now justly indebted to plaintiff in the sum of *ninety* dollars.

X. That plaintiff, on its part, has performed all the terms and conditions of said agreement.

Wherefore plaintiff demands judgment against said defendant for the sum of *ninety* dollars, with interest thereon from *April 24th*, 1896, besides costs of this action.

John H. Ferguson, Plaintiff's Attorney,
51 Warburton Avenue, *Yonkers*, *N. Y.*

State of *New York*,
County of *Westchester*, } ss.
City of *Yonkers*.

Edwin R. Holden, being duly sworn, deposes and says, that he is the

treasurer of the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Edwin R. Holden.

Sworn to before me this 30th day of July, 1897.

Gabriel Reeves, Commissioner of Deeds,
City of Yonkers, N. Y.

Form No. 18969.

(Precedent in Guarantee, etc., Co. v. Mayer, 141 Pa. 511.)¹

[[*Commencement as in Form No. 6947.*)]² Plaintiff is a corporation, and defendant is a stockholder therein. On June 27, 1889, the defendant and divers other stockholders agreed to subscribe, take and pay for stock of the plaintiff, as set forth in the agreement of the subscription hereunto annexed, marked exhibit *A*, which is made part of this statement, wherein and whereby the defendant agreed to subscribe for fifty shares of the capital stock of the plaintiff at the par value of twenty-five dollars, of which amount five dollars per share was to be paid plaintiff upon the delivery of the stock; and upon the faith of defendant's signature to exhibit *A* as aforesaid, other stockholders as mentioned therein subscribed for the capital stock of plaintiff and paid for them as therein agreed, of which fact defendant was informed, as also that the stock for which he subscribed was ready for delivery upon the payment of the sum agreed upon; notwithstanding which the defendant refused to accept a delivery of or to pay for the stock for which he subscribed, and which is held by the secretary of the company plaintiff for the use of and in the name of defendant; whereby defendant became and was liable to pay the sum of two hundred and fifty dollars, with interest as aforesaid; hence this suit.

[[*Signature and verification as in Form No. 6947.*)]²

(b) Where Corporation is a Foreign One.

aa. TO RECOVER ASSESSMENTS ON STOCK PURCHASED.

Form No. 18970.³

Supreme Court, City and County of New York.
Sigua Iron Company }
against } Amended Complaint.
Harold P. Brown. }

The plaintiff above named, by *Evarts and Moffat*, its attorneys,

1. There was a verdict for plaintiff in this case, which was affirmed.

See also, generally, *supra*, note 1, p. 514.

2. The matter to be supplied within [] will not be found in the reported case.

3. This is the second amended complaint in the case of *Sigua Iron Co. v. Brown*, 171 N. Y. 488. Judgment was entered for the plaintiff, which was affirmed.

See also, generally, *supra*, note 1, p. 514.

complaining of the defendant, for cause of action shows upon information and belief:

First. — That at all the times hereinafter mentioned the *Sigua Iron Company* was and still is a foreign corporation organized and existing under the laws of the state of *West Virginia*, and having its principal office or place of business in the city of *Philadelphia* and state of *Pennsylvania*.

Second. — That on or about the 9th day of *July*, 1890, at the city of *Philadelphia*, at the request of the defendant, the plaintiff duly issued and delivered to said defendant its stock certificate No. 106, certifying that said defendant was entitled to sixty shares of the capital stock of the *Sigua Iron Company*, of the par value of one hundred dollars each, upon which seventy per cent. had been paid and subject to calls and assessments to the extent of thirty per cent. thereof, and that a certificate of full paid stock would be issued after all the installments had been paid and upon surrender of said certificate No. 106, so issued and delivered as aforesaid; and in consideration of the issue and delivery of said certificate to said defendant, said defendant then and there agreed with said plaintiff company and that he would pay unto said company all calls and assessments on said stock to the extent of thirty per cent. remaining unpaid on said sixty shares, when and as called for by said company's board of directors.

Third. — That thereafter said board of directors duly made the following calls, which were payable upon the following dates, respectively, and thereby required the stockholders of the said company, including this defendant, to pay on said respective dates the thirty per cent. still due on their respective shares of stock, to wit:

On *November 1*, 1890, 5%.

On *May 1*, 1891, 5%.

" *January 15*, 1891, 2 1-2%.

" *June 15*, 1891, 5%.

" *February 1*, 1891, 2 1-2%.

" *August 1*, 1891, 5%.

" *March 1*, 1891, 5%.

Fourth. — That notice of said calls were duly given to the defendant at the respective times thereof, and defendant was thereupon required to pay on said sixty shares of stock so issued and delivered to him as aforesaid, the sum of \$1800, with interest from the several dates of said calls upon the respective amounts thereof, but no part thereof has been paid except that on or about the respective dates thereof said defendant paid or caused to be paid the following of the above named calls, to wit:

On the call payable *November 1*, 1890, 5% or \$300.

On the call payable *January 15*, 1891, 2 1-2% or \$150.

On the call payable *February 1*, 1891, 2 1-2% or \$150.

Making a total payment by the defendant of but \$600 on said calls.

Wherefore plaintiff demands judgment against the defendant for the sum of \$1200, with interest on \$300 thereof from *March 1*, 1891, on \$300 thereof from *May first*, 1891, on \$300 from *June 15*, 1891; and on the remaining \$300 thereof from *August 1*, 1891, besides the costs and disbursements of this action.

Evarts and Moffat, Attorneys for Plaintiff,
63 Wall Street, New York.

Commonwealth of *Pennsylvania*, }
 City and County of *Philadelphia*. } ss.:

Logan M. Bullitt, being duly sworn, says:

I am receiver of the *Sigua Iron Company*, the plaintiff above named, having been appointed as such on *February 9th*, 1894, by order of the Circuit Court of the United States for the Eastern District of *Pennsylvania*.

On or about the 22a day of *June*, 1896, in a certain suit pending in this court, wherein one *William R. Montgomery* was plaintiff, and said *Sigua Iron Company* was defendant, I was by order of this court appointed ancillary receiver of all the property and assets of the plaintiff in this state.

I have duly qualified and entered upon the discharge of my duties as receiver under each of said orders, and am now engaged in the discharge of my duties as such.

I have read the foregoing amended complaint and know the contents thereof, and the same is true to my knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

Logan M. Bullitt.

Sworn to before me this 24th day of *September*, 1897.

John Rogers, Notary Public.

bb. TO RECOVER ON SUBSCRIPTION TO STOCK, WHICH SUBSCRIPTION WAS MADE BEFORE INCORPORATION.

Form No. 18971.¹

Supreme Court, New York County.

The United States Vinegar Company, plaintiff,
 against

Francis Foehrenbach and *Michael Foehrenbach*, defendants. }

The plaintiff complains of the defendants and alleges that it is a foreign corporation duly organized under the laws of the state of *Illinois* under the name of the *United States Vinegar Company*, with a capital stock of one hundred thousand dollars divided into one thousand shares of \$100.00 each; and that it was organized to buy, sell, deal in and handle vinegar.

The plaintiff further alleges, upon information and belief, that the defendants are copartners doing business under the firm name of *Foehrenbach & Co.*

The plaintiff further alleges, upon information and belief, that in contemplation of its incorporation, the defendants with others became subscribers to its capital stock by signing and delivering an agreement in writing by which they, under their said firm name, subscribed for twenty shares of the capital stock of the plaintiff and agreed to pay it \$100.00 for each and every share of stock so subscribed for by them; that such corporation of the defendants was

1. This is the form of complaint in favor of plaintiff on verdict directed U. S. Vinegar Co. v. Foehrenbach, 148 by the court, which was affirmed. N. Y. 58, and is copied from the See also, generally, *supra*, note 1, records. There was a judgment in p. 514.

duly transferred to the plaintiff immediately after its incorporation; that at or about the time of making such subscription the defendants paid thereon the sum of \$100.00, leaving still due and unpaid the sum of *nineteen hundred* dollars, which was duly demanded from the defendants by the plaintiff on or about the 4th day of *December*, 1888, but the same was not paid and is now justly due and owing from the defendants to the plaintiff.

The plaintiff further alleges, upon information and belief, that since its incorporation it has in the regular course of its business incurred debts and liabilities to various persons, and is now justly indebted to such persons to the aggregate amount of over *thirty thousand* dollars, and has no assets or property with which to pay the same except the unpaid subscriptions to its capital stock made by the defendants and others.

Wherefore the plaintiff demands judgment against the defendants for *nineteen thousand* dollars, with interest thereon from the 4th day of *December*, 1888, besides costs.

Ten Eyck & Remington, Pltff's Attorneys.

New York County, ss.:

Sanford R. Ten Eyck, being duly sworn, says: That he is one of the firm of *Ten Eyck & Remington*, who are attorneys for the plaintiff in the above entitled action.

That the foregoing complaint is true, to the deponent's own knowledge, except the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the cause of action stated in the complaint is founded upon a written instrument that now is in deponent's possession, and deponent derives his information in regard to the matters set forth in the complaint from said written instrument and from a personal interview with the secretary of the plaintiff, and from a certificate of the secretary of state of the state of *Illinois* showing the incorporation of the plaintiff.

That the plaintiff is a foreign corporation and none of its officers are within the county of *New York*, where deponent resides, and for that reason deponent makes this verification.

S. R. Ten Eyck.

Sworn to before me this *21st* day of *January*, 1890.

Vincent Roseman, Notary Public,
Kings and New York Counties.

(2) GRAVEL-ROAD COMPANY.¹

1. Requisites of Complaint, Declaration or Petition, Generally. — See *supra*, note 1, p. 514.

Election of Directors. — It is sufficient to aver the fact that a board of directors was elected by the stockholders without alleging the mode of election. *Fox v. Allensville, etc., Turnpike Co.*, 46 Ind. 31.

In *Miller v. Wild Cat Gravel Road*

Co., 52 Ind. 51, it was held that, where it is alleged that the calls were made by the board of directors of the plaintiff, an objection that the complaint did not allege that a board of directors was elected and qualified to order payment of subscriptions will not be sustained.

Road Completed as Described in Articles of Association. — Where the defendant

Form No. 18972.¹(Precedent in *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 53.)²[(*Venue and title of court and cause as in Form No. 5915.*)]³

The *Wild Cat Gravel Road Company*, for her amended complaint, complains of the defendant, *Mathew W. Miller*, and complaining says that on the 25th day of *July*, 1869, for the purpose of accomplishing the organization of a corporation, to be known by the corporate name of the *Wild Cat Gravel Road Company*, the defendant, with others, mutually agreed to and subscribed to the articles of association of this plaintiff, a copy of which articles of association and of the subscription thereto is filed herewith and made a part hereof, and marked exhibit "*A*," and agreed to take and pay for the number of shares of the corporate stock of the plaintiff set opposite each of their names. That the defendant, by the terms of his subscription, agreed to take and pay for *five* shares of the capital stock of the plaintiff, amounting, in the aggregate, to the sum of *two hundred and fifty* dollars, and to pay the same as soon, and in such instalments, as the board of directors of the plaintiff might order, notice of such order first having been given in orders according to law.

And the plaintiff further avers that afterwards, to wit, on the [*first*] day of [*October*], 1869, having secured a valid and solvent subscription to her capital stock, amounting to more than *five hundred* dollars per mile of the gravel road proposed to be constructed, for the purpose of completing said organization, a copy of said articles of association were, on the day last aforesaid, caused to be filed in the recorder's office of the recorder of *Howard* county, in the state of *Indiana*, and recorded in the proper records in said office, [such county being the county and the only county through which the proposed gravel road aforesaid was to pass.]⁴

subscriber agreed to pay a certain sum per square for his stock, at such times and in such manner as required by the directors of the plaintiff corporation, the complaint need not allege that the plaintiff corporation has constructed or will construct a gravel road upon the line or route described in the articles of association. *Darrell v. Hilligoss, etc., Gravel Road Co.*, 90 Ind. 264.

Articles of Association — Filed with Recorder of County. — That the articles of association were filed in the office of the recorder of the county in which the road was located must be alleged, where the subscription sued for was made to the articles of association prior to the organization of the corporation. *Miller v. Wild Cat Gravel Road Co.*, 52 Ind. 51; *Haun v. Mulberry, etc., Gravel Road Co.*, 33 Ind. 103.

Need Not be Made Part of the Complaint. — The articles of association

need not be made a part of the complaint, since the complaint is not based on the articles of association, but on the agreement of subscription. *Williams v. Franklin Tp. Academical Assoc.*, 26 Ind. 310.

1. *Indiana.* — Horner's Stat. (1901), § 3624 *et seq.*

2. A demurrer to this complaint for want of sufficient facts was overruled.

3. The matter to be supplied within [] will not be found in the reported case.

4. The matter within [] has been supplied to show definitely that the copy of the articles of association was filed in the office of the recorder of the county through which the road was to pass as provided by statute. An objection to the complaint on the ground that this did not sufficiently appear was overruled on demurrer, the court holding that the complaint alleged that a copy of the articles was filed in the recorder's office in *Howard* county and

Plaintiff further avers that on the [first] day of [November], 1869, the board of directors of the plaintiff ordered *thirty-three and one-third* per cent. of said subscription to the capital stock to be paid to the secretary of the plaintiff, at his office, on or before the 11th day of January, 1870; that on the [first] day of [March], 1870, said board of directors ordered *thirty-three and one-third* per cent. more of said subscription to be paid to the secretary of the plaintiff, at his office, on or before the 15th day of October, 1870; and on the [first] day of [March], 1871, said board of directors ordered an additional *thirty-three and one-third* per cent. of said subscription to be paid to said secretary, at his office, on or before the 1st day of April, 1871; of all of which orders so made by said board, as aforesaid, due notices were given for at least *thirty* days before maturity of each of said instalments so ordered to be paid as aforesaid, in the "*Howard Tribune*," a weekly newspaper printed and published in the city of *Kokomo*, *Howard* county, in the state of *Indiana*.

And the plaintiff further says that, notwithstanding the making of said orders, of all of which the defendant had due notice, so given as aforesaid, he has wholly neglected, refused and declined to pay said subscription, or any part thereof; that the same, with the interest thereon from the dates of the maturity of said instalments, is now due and remains wholly unpaid. Wherefore [(concluding as in *Form No. 5915*).]¹

(3) RAILROAD COMPANY.²

(a) In General.

an inspection of the termini and course of the road as specified in the articles showed that it was not to run elsewhere than in that county.

1. The matter to be supplied within [] will not be found in the reported case.

2. **Requisites of Declaration, Complaint or Petition, Generally.** — See *supra*, note 1, p. 514.

Precedents. — In *Eppes v. Mississippi*, etc., R. Co., 35 Ala. 33, the amended complaint was as follows:

"*The Mississippi, Gainesville and Tuskaloosa Railroad Co.*
vs.
Richard J. Eppes."

The plaintiff, a corporation created by the legislature of *Alabama*, claims of the defendant the sum of *two thousand* dollars, with interest thereon as hereinafter stated, due from the defendant to the plaintiff on an agreement in writing signed by the defendant, by which the defendant subscribed for and promised to pay for *twenty* shares, of *one hundred* dollars each, in the capital stock of said company, to be paid upon assessment and call of said

company, unless paid in work by taking and performing a contract or contracts to that extent, for the grading, earth-work, preparation and completion of the road bed ready for the iron (bridging excepted), by bidding off the same at public letting, and performing accordingly; or, if he should not bid off the same at public letting, then by taking such and so much at private letting, of any portion not otherwise or before let, as should be wanting to make up the amount, at the estimate of the engineer making the estimates; the work to be executed, in either case, under the direction and in conformity with the specifications of the chief or resident engineer, as is customary in railroad contracts. And the plaintiff avers, that after the defendant so subscribed and promised as aforesaid, he had opportunities, of which he was notified by the plaintiff, to pay said subscription in work, by taking and performing a contract or contracts to that extent for the grading, earth-work, preparation and completion of the road bed of said road ready for the iron (bridging excepted), both by bid-

ding at public letting and performing accordingly, and by taking such or as much of said grading, etc., at private letting as was not otherwise or before let, as was wanting to make up the amount, at the estimate of the engineer who made the estimates, but failed and refused to pay said subscription by so doing, or in any other way, although said contract was to be performed by him within a reasonable time after such opportunity occurred, and a reasonable time had elapsed. And the plaintiff further avers, that after the making of [said contract], and after he had had opportunities as aforesaid to pay his said subscription in work as aforesaid, (the said subscription by the said defendant,) the said company duly made the following assessments and calls upon the subscription to the capital stock of said company, and upon the said subscription of the defendant, of the following amounts, and at the following dates, of all which the defendant had due notice, to wit: *Dec. 29, 1854, twenty per cent., to bear interest from the 1st July, 1855; Nov. 16, 1855, twenty-six and one-half per cent., to bear interest after thirty days; May 26, 1856, twenty per cent., to bear interest after thirty days; March 7, 1857, twenty per cent., to bear interest after thirty days.* (Notice published in the *Independent*.) And the plaintiff further avers, that the said defendant has also failed to pay the said calls and assessments, or any part thereof, although notified thereof, and requested so to do; and that the same, with the interest thereon, are now due and unpaid."

To this complaint the defendant demurred, and specified the following causes of demurrer: "1. Because the said complaint is altogether repugnant and inconsistent, in that the said plaintiff avers and states therein a certain agreement in writing, alleged to have been signed by the defendant, and further avers and states therein that the undertakings in said agreement were to be performed by said defendant in a reasonable time, and that a reasonable time had elapsed; whereas the said defendant here insists to the court, that time is not of the essence of said agreement, and that said last averment is wholly inconsistent with and repugnant to the terms and meaning of the said agreement. 2. Because said complaint does not aver that the

whole of said grading, earth-work and preparation of the road bed of said company ready for the iron, had been contracted for or offered, at either private or public letting. 3. Because the said averment, that said taking and performing of a contract or contracts was to be performed in a reasonable time, is a mere argumentative conclusion, and unauthorized by the alleged agreement. 4. Because said complaint does not show any sufficient cause of action. 5. Because it appears from the face of the complaint that the action had been prematurely commenced. 6. As to the last assessment defendant demurs, on the ground that there is no allegation that notice was published in the *Independent*." The demurrer was overruled.

In New Hampshire Cent. R. Co. v. Johnson, 30 N. H. 390, the declaration was as follows:

"In a plea of the case, for that on the first day of August, A. D. 1848, at said Manchester, in consideration that the said corporation then and there permitted the said Johnson to become a member of said corporation, and assigned and transferred to him five shares of one hundred dollars each in the capital stock thereof; the said Johnson promised said corporation to pay into the treasury thereof such assessments on the said shares, not exceeding in all the said sum of one hundred dollars on each, as should be ordered by the directors from time to time, and on the first day of November, A. D. 1848, at said Manchester, the directors of said corporation ordered an assessment of five per cent. on all the shares in the capital stock aforesaid, to be paid the first day of December, A. D. 1848, being on the shares of the said Johnson the sum of twenty-five dollars, of which the said Johnson then and there had notice. Yet, though the time limited for the payment thereof has long since elapsed, and though often requested, the said Johnson has not paid the said assessment, but refuses so to do.

Also, for that the said corporation, on the first day of August, A. D. 1848, at said Manchester, at the special instance and request of said Johnson, permitted him to become a subscriber for five shares in the capital stock of said corporation, and then and there assigned to him said shares, and the said Johnson then and there accepted

Form No. 18973.¹(Precedent in *South Branch R. Co. v. Long*, 26 W. Va. 693.)²*Hampshire County*, to-wit:In the *Circuit Court*.

The South Branch Railway Company, plaintiffs, }
 vs. } Ass'p't.
Conrad Long, defendant.

The plaintiff complains of *Conrad Long*, being summoned, etc., of a plea of trespass on the case in assumpsit, for that, whereas, heretofore, to-wit, on *February 25*, 1871, the legislature of *West Virginia* passed an act entitled "An act to incorporate the *South Branch Railway Company*," whereby a number of persons were appointed commissioners to open books of subscription to the capital stock of said company in shares of \$100.00 each to the amount of \$50,000.00, which was allowed to be increased by the sale of additional shares to the amount of \$500,000.00, for the purpose of constructing, equipping and operating, by steam or otherwise, a railway from *Romney*, in said county, to the *Baltimore and Ohio Railroad*, between the *South Branch* and *Patterson's* creek bridges; and afterwards, to-wit, on *June 17*, 1871, at (*stating place*), the sum of \$8,000.00 (and afterwards and not exceeding \$50,000.00) to the capital stock of said company having been subscribed by various persons (not less than *twenty* in number) under the provisions and by virtue of said act, in shares of \$100.00 each, as required by law, the said company did then and there, in

the said shares, and thereby became liable, and then and there promised to pay to the said corporation such assessments on the said shares as the directors of the said corporation might from time to time order, not exceeding in all the sum of *one hundred* dollars on each share. And on the *first day of November*, A. D. 1848, the directors of said corporation ordered an assessment of *five* per cent. on all the shares in the capital stock aforesaid, to be paid the *first day of December*, A. D. 1848, being on the shares of said *Johnson* the sum of *twenty-five* dollars, of which the said *Johnson* had then and there due notice, and then and there became liable to pay the same according to the said order. And in consideration thereof, then and there promised the plaintiffs to pay the same according to said order. Yet, though the time limited for the payment thereof has long since elapsed, and though often requested, the said *Johnson* has not paid the said assessment, but refuses so to do."

The defendant pleaded the general issue and on trial had there was a verdict for the plaintiff, which was reversed, but not on the ground that there was any defect in the declaration.

1. *West Virginia*. — Code (1899), c. 54, § 43.

2. In the circuit court, demurrers to the first, second, fifth and sixth counts were sustained and to the third and fourth counts overruled, but in the supreme court of appeals the judgment sustaining the demurrers was reversed. The court said: "Did the court err in sustaining the demurrer to the said four counts in the declaration? The only objection I can discover that might be made to said counts and each of them is, that neither of them avers the payment on the shares of stock at the time of the subscription, which the statute requires. After fully considering this question, this court held in *Pittsburgh*, etc., R. Co. v. *Applegate*, 21 W. Va. 172, that a subscriber to the stock of a corporation cannot escape his liability to pay his subscriptions on the ground that he did not pay the sum required to be paid by the statute at the time he subscribed. We think the said four counts are good, and that the court erred in sustaining the demurrer thereto." The plaintiff entered a retraxit on the third and fourth counts.

See also, generally, *supra*, note 2, p. 530.

general meeting of stockholders assembled, organize as provided by law, and said company then and there became fully organized and incorporated under the corporate name of the *South Branch Railway Company*; that on (*stating time*), at (*stating place*), upon a book of said stock subscription, the said defendant did subscribe for *five* shares of said capital stock of the par value of \$500.00, together with others who subscribed various other shares, and some of them with the understanding and agreement with said defendant that he would and did subscribe for said *five* shares, and in consideration thereof, that said subscriptions were made under a heading in these words, to-wit: "The subscribers promise and bind themselves severally to pay unto the capital stock of the *South Branch Railway Company* the shares of stock affixed to their names (of \$100.00 each), as shall be required by said company after its organization;" and said defendant did then and there, duly and fully, become a subscriber to the capital stock and a stockholder in said company; and said plaintiff avers that afterwards, to-wit, on (*stating time*), at (*stating place*), the plaintiff (through its individual members), on the faith of said subscription and the stock taken by said defendant and other parties as aforesaid, did, in order to give credit to said company and to raise funds to carry on the work of constructing said railway as proposed, guarantee the payment of \$35,000.00 of the said subscribed stock of the road aforesaid; and further, said plaintiff avers that heretofore, to-wit, on (*stating time*), at (*stating place*), the plaintiff, on the faith and dependence that said defendant would keep his said promise and pay in said stock as required, let the construction of said road to contract, and did cause the construction of said road to be entered upon and progressed in, whereby said plaintiff was required to expend large sums of money and to become liable to pay further sums; and on *May 28, 1873*, the work on said road having commenced, the said company, by an order of its duly authorized board of directors, did require that said stockholders should pay an instalment of *ten* per cent. of each share of their stock subscription on or before *June 10, 1873*; also *ten* per cent. on each share, thereafter to be paid monthly on or before the *10th* day of each month until the subscription be paid up, of which requirement said defendant then and there had notice; and although defendant was, on (*stating time*), at (*stating place*), duly notified and required to pay in the *eight* several instalments which became payable *June 10, 1873*, and in every month since, the defendant has wholly failed to pay the same, whereby, and by force of the statute in such case made and provided, an action has accrued to plaintiff to have and demand of the defendant *eighty* per cent. on his *five* shares of stock aforesaid, with *ten* per cent. per annum interest on each instalment from the time the same became payable as aforesaid, the aggregate amount of principal payable at the institution of this suit amounting to \$400.00; and being so liable, the said defendant, afterwards, to-wit, on (*stating time*), at (*stating place*), in consideration thereof, did undertake and faithfully promise the plaintiff to pay it the said sum of \$400.00, with interest as aforesaid, whenever thereunto afterwards requested.

Second. — Also, for that, whereas, heretofore, to-wit, on the

— day of —, 1871, at (*stating place*), the said defendant made, signed and executed, for the use of plaintiff, a certain paper writing, without date on its face, whereby he promised and bound himself to pay into the capital stock of the *South Branch Railway Company*, for *five* shares of stock of \$100.00 each, making the gross sum of \$500.00, to be paid when and as the said company should require the same to be paid, after its organization, which said writing was then and there made and delivered to the commissioners for and agents of said company, for its use, and accepted by it. And the plaintiff avers that said company was organized on *June 17*, 1871, at (*stating place*), whereof the defendant then and there had notice, and afterwards, on *May 28*, 1873, at (*stating place*), the work on the *South Branch* railway having been commenced, the said company, by the order of the duly authorized board of directors, did require the defendant to pay *ten* per cent. on said \$500.00 on or before *June 10*, 1873, also *ten* per cent. on each share of stock, thereafter to be paid monthly on or before the *10th* day of each month until the whole amount of said \$500.00 be paid up; and the plaintiff avers that *eighty* per cent., amounting to \$400.00 of said gross sum, has been thus required by said company to be paid prior to the institution of this suit, and the defendant on (*stating time*), at (*stating place*), had notice of said requirement, yet refuses to pay the same. Wherefore an action accrued to plaintiff to have and demand of the defendant the said sum of \$400.00, with interest; and being so liable, said defendant, afterwards, to-wit, on (*stating time*), at (*stating place*), undertook and faithfully promised said plaintiff to pay it said \$400.00 and interest whenever he should be thereunto afterwards requested.

Third. — Also, for this, that the said defendant heretofore, to-wit, on (*stating time*), at (*stating place*), in consideration that the plaintiff then and there agreed to sell him *five* shares of its capital stock at its par value of \$500.00, he, said defendant, then and there agreed to purchase the same at the price of \$100.00 a share, and pay for the same as and when he should be required by said company; and afterwards, to-wit, on (*stating time*), at (*stating place*), on the faith of the sale of said stock to defendant and that he would keep and perform his said agreement, the said plaintiff (through its individual members), in order to raise the credit of said company, and to raise funds to carry on the work of constructing said company's proposed railway, did guarantee that said *five* shares of stock, agreed to be taken as aforesaid, would be so taken and paid for by defendant according to the contract; and on (*stating time*), at (*stating place*), the plaintiff, on the faith that said *five* shares of stock would be so taken and paid for by defendant, let the construction of its railway to contract, and laid out and expended large sums of money in such construction, and became liable to pay other sums therefor; and said plaintiff avers that it has always been ready and willing, to carry out said contract on its part, and has offered to sell and transfer to said defendant said *five* shares of its stock for said price as agreed on; and on *May 28*, 1873, at (*stating place*), said company (by an order of its authorized board of directors) did require said defendant to pay *ten* per cent. on his said stock agreed to be taken

as aforesaid, on or before *June 10, 1873*, and also *ten per cent.* per month thereon in each subsequent month till the same should be paid for in full, whereof defendant then and there had notice, and the payment of said monthly instalments was, on and at (*stating place*), duly demanded of defendant, yet defendant refused to pay the same, or any part thereof, and refused to comply with his said agreement, but has openly repudiated the same, whereby said defendant is greatly damaged, to-wit, in the sum of \$600.00.

Fourth. — Also, for this, to-wit, that the defendant, heretofore, to-wit, on (*stating time*), at (*stating place*), was indebted to the plaintiff in the sum of \$500.00 for *five* shares of the capital stock of said company before that time bargained and sold by said plaintiff to him, at his special instance and request, and being so indebted, afterwards, to-wit, on (*stating time*), at (*stating place*), he, said defendant, undertook and promised said plaintiff to pay it said last mentioned sum of money whenever afterwards requested.

Fifth. — Also, for this, that the defendant, heretofore, to-wit, on the ——— day of ———, 1871, at (*stating place*), subscribed for and became the owner of *five* other shares, of the par value of \$100 each, of the capital stock of the *South Branch Railway Company*, and thereby and then and there became liable to pay, and promised to pay, to said plaintiff the amount due on said *five* shares, to-wit, \$500.00, as and when required by said company after its organization; and said plaintiff avers that said company was fully organized under its charter on the *17th* day of *June, 1871*, at (*stating place*), of which the defendant then and there had notice; and afterwards, to-wit, on the *28th* day of *May, 1873*, at (*stating place*), said company having commenced work on the construction of its road (by the order of its duly authorized board of directors), required that its stockholders should pay in on each share of their stock in said company *ten per cent.* on or before *June 10, 1873*; also *ten per cent.* on each share, thereafter to be paid monthly on or before the *10th* day of each month until the subscriptions be paid up, and on (*stating time*), at (*stating place*), said defendant had notice of said requirement, and that the *eight* instalments which became payable under such requirement prior to the institution of this suit, amounted to *eighty per cent.* — that is to say, \$400.00 on his last named stock subscription, and had been required to be paid in by said company and board, yet said defendant failed to pay the same, or any part thereof, so that thereby, and by force of the statute, an action had accrued to plaintiff to have and demand of defendant said last mentioned \$400.00, with *ten per cent.* interest on each of said instalments from the time it became payable as aforesaid; and being so liable, afterwards, to-wit, on (*stating time*), at (*stating place*), said defendant, in consideration thereof, undertook and faithfully promised said plaintiff to pay it said last mentioned sum of \$400.00 and interest whenever he should be thereunto afterwards requested.

Sixth. — And said plaintiff further says that heretofore, to-wit, on the ——— day of *January, 1874*, at (*stating place*), the said defendant was further indebted to said plaintiff in the sum of \$500.00 on account of subscription to the capital stock of said company; and being so

indebted, on (*stating time*), at (*stating place*), said defendant undertook and promised said plaintiff to pay it the said sum whenever thereunto afterwards requested.

Nevertheless, the said defendant, not regarding his said several liabilities, agreements, promises and undertakings in the several counts mentioned, has failed to pay plaintiff said several sums of money, or any part thereof, or any of them or to perform and keep his said liabilities or agreements, or any of them, though often requested so to do, but the same to pay and perform and keep, said defendant hath hitherto refused, and still doth refuse, to the damage of the plaintiff \$600.00; and therefore he sues, etc.

[(*Signature as in Form No. 6952.*)]¹

(*b*) *Where Stockholder is a Municipal Corporation.*

Form No. 18974.

(Precedent in Evansville, etc., *Straight Line R. Co. v. Evansville*, 15 Ind. 397.)²

[(*Venue and title of court and cause as in Form No. 5915.*)]¹

The Evansville, Indianapolis and Cleveland Straight Line Railroad Company, a corporation created by the laws of the State of Indiana, plaintiff, by *O. H. Smith*, her attorney, complains of the city of *Evansville*, defendant, and says that said defendant heretofore, to wit, on the *28th* day of *May*, in the year *1853*, by her certain subscription in writing, with full power to make the same, a copy of which is herewith attached and filed, subscribed to the capital stock of said railroad company *four thousand* shares of *fifty* dollars each, making *two hundred thousand* dollars, upon the terms and conditions stipulated and expressed in said written subscription, which said subscription was, and is, in the words and figures following, that is to say: (*Here was set out such subscription*).

And the plaintiff says, after the making of said subscription by said defendant — by *John S. Hopkins*, her said authorized agent — the said defendant ratified and confirmed the same, and paid of said subscription the sum of *one hundred thousand* dollars, in said bonds, to said plaintiff, running *twenty* years from their date, payable in *New York*; and said defendant, by her authorized proxy, voted at the subsequent elections for directors, the number of votes her said stock was entitled to, up to the *July* election, *1857*, inclusive, and received her certificate of stock of said *two hundred thousand* dollars. And the plaintiff further says, that she has complied with, and performed, all the conditions of said subscription, on her part to be kept and performed, and that *one hundred thousand* dollars of said subscription remains wholly unpaid. And the plaintiff further says, that, after the making of said subscription, and after the payment by said defendant of *one hundred thousand* dollars thereof in said bonds, in pursuance of the tenor and effect of said subscription, that is to say, heretofore, to wit, on the *12th* day of *December*, *1855*, she duly demanded of said defendant the payment of the said sum of

1. The matter to be supplied within 2. A demurrer to this complaint was
[] will not be found in the reported case. overruled.

one hundred thousand dollars of said subscription, the balance then due and unpaid, in their bonds, in pursuance of the terms, tenor, and effect of said subscription; and upon such demand, the said defendant failed and refused to issue and deliver said bonds, or in any other manner to pay said *one hundred thousand* dollars of said subscription, whereby the said defendant became liable to pay said plaintiff said sum of *one hundred thousand* dollars in money; and being so liable, the said defendant, afterward, to wit, on the day and year aforesaid, at the county aforesaid, in consideration thereof, undertook and faithfully promised said plaintiff to pay her the said sum of *one hundred thousand* dollars in money, whenever she should be thereto requested. Nevertheless, the plaintiff says that said *one hundred thousand* dollars of said subscription remains still due and unpaid by the defendant to the plaintiff, although often requested; and the plaintiff demands judgment against said defendant for *one hundred and fifty thousand* dollars, and other proper relief.

O. H. Smith, Att'y for Pl'ff.

[(Verification).¹]

b. By Creditor of Corporation.²

1. Verification. — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. Requisites of Bill, Declaration or Complaint, Generally. — For the formal parts of a bill, declaration or complaint in a particular jurisdiction see the titles BILLS IN EQUITY, vol. 3, p. 417; DECLARATIONS, vol. 6, p. 244; COMPLAINTS, vol. 4, p. 1019.

Capital Stock Fully Subscribed. — It has been held that a complaint by a judgment creditor of an insolvent corporation against a stockholder whose stock was not fully paid up need not allege that all the shares of corporate stock had been subscribed. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614.

Subscription to Stock. — That the defendant subscribed for and agreed to take stock in the corporation must be alleged. *Libby v. Tobey*, 82 Me. 397; *Grindle v. Stone*, 78 Me. 176; *Turnbull v. Pomeroy Salt Co.*, 24 Cinc. L. Bul. 133, 11 Ohio Dec. (reprint) 19.

Unpaid Subscription. — It must be alleged further that the subscription is unpaid. *Ryan v. Jacques*, 103 Cal. 280; *Toner v. Fulkerson*, 125 Ind. 224; *Wheeler v. Thayer*, 121 Ind. 64; *Libby v. Tobey*, 82 Me. 397; *Grindle v. Stone*, 78 Me. 176; *Blanke v. St. Louis-Senora Gold, etc., Min. Co.*, 35 Mo. App. 186; *Turnbull v. Pomeroy Salt Co.*, 24 Cinc. L. Bul. 133, 11 Ohio Dec. (reprint) 19.

Cause of Action During Ownership of Stock. — That the cause of action against

the corporation arose during the defendant's ownership of the unpaid stock must be alleged. And it must be alleged further that the proceedings to obtain judgment against the corporation on such cause of action were commenced during such ownership, or, in case of a transfer of the stock, within one year after such transfer was recorded on the corporation books. *Libby v. Tobey*, 82 Me. 397; *Grindle v. Stone*, 78 Me. 176.

Judgment and Unsatisfied Execution Against Corporation. — In order that a creditor of a corporation may recover the amount of his debt from a stockholder who has not fully paid the amount of his subscription, the creditor must show that judgment has been recovered against the corporation for the amount of the debt and that execution has issued and has been returned unsatisfied, or he must show some legal excuse for not doing so. *Rule v. Omega Stove, etc., Co.*, 64 Minn. 326; *Kelly v. Clark*, 21 Mont. 291; *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah 423; *Henderson v. Turngren*, 9 Utah 432.

In *Maine*, the creditor must, in order to bring his case within the statute, show a lawful and bona fide judgment recovered against the corporation within two years next prior to his action against a stockholder. *Libby v. Tobey*, 82 Me. 397; *Grindle v. Stone*, 78 Me. 176.

(1) IN EQUITY.

Form No. 18975.¹(Precedent in *Barron v. Paine*, 83 Me. 313.)²[[*Commencement as in Form No. 4271.*]]³

1. That your complainants, under their writ, dated *September 7th*, A. D. 1889, entered in the *Supreme Judicial Court*, holden at *Ellsworth*, within and for said county of *Hancock*, on the *second Tuesday of October*, A. D. 1889, recovered a lawful and bona fide judgment against the *Bar Harbor Land Company*, on the *thirtieth day of January*, A. D. 1890, for the sum of \$3196.29, debt or damage, and \$16.29 costs of suit, upon which said judgment execution was duly issued, dated *January 31st*, A. D. 1890, and placed in the hands of one *William Fennelly*, a deputy sheriff of the said county of *Hancock*, who, on *March 8th*, A. D. 1890, made return thereon, in substance, that after diligent search therefor he could find no property of said corporation in his precinct and he duly returned said execution in no part satisfied; which said judgment was based upon a claim in contract against said *Bar Harbor Land Company*, in favor of your complainants, expressed and implied; and that said judgment is still held by your complainants in full force and not satisfied, reversed or annulled.

2. That said *Bar Harbor Land Company* is a corporation with a capital stock fixed at *three hundred thousand* dollars, divided into *sixty thousand* shares of the par value of *five* dollars each, organized, created and established under the laws of *Maine*, on the *twenty-seventh day of May*, A. D. 1887, and from then to and at the date of this bill duly existing and having an established place of business at said *Bar Harbor*.

3. That on the *fourth day of June*, A. D. 1887, said respondent subscribed for, agreed to take and did take stock in said corporation to a large amount, to wit: *one hundred* shares; that the said respondent has not paid for the stock so taken by him, either in cash or in any other matter or thing at a bona fide and fair valuation thereof, or made payment in any manner required by law.

4. That the cause of action, upon which the said judgment of the complainants against said corporation was founded, was contracted

Where Creditor is Himself a Stockholder.—Where the creditor is himself a stockholder, and he seeks to recover his debt against the corporation from a stockholder whose subscription to stock is not fully paid up, such creditor must aver that his subscription to the stock is fully paid up; that the defendant was a stockholder at the time the debt was contracted and that such defendant has not paid up his subscription. *Weber v. Fickey*, 47 Md. 196.

Liabilities of Corporation in Excess of Assets.—In *Blair v. Gray*, 104 U. S. 769, it was held, under a charter of an insurance company which declared that

"in all cases of losses exceeding the means of the corporation each stockholder shall be held liable to the amount of unpaid stock held by him," that a declaration was bad in substance which failed to aver that the losses of the company or its liabilities exceeded its assets.

1. *Maine*.—Rev. Stat. (1883), c. 46, § 47.

2. This was the amended bill in the case and was sustained.

3. The matter to be supplied within [] will not be found in the reported case.

wholly during the ownership by the said respondent of his said stock.

5. That the proceedings of the said complainants to obtain their said judgment against said corporation were commenced on the 7th day of *September*, A. D. 1889, as by the date of the writ above mentioned appears; and that your complainants are informed and believe, and therefore allege, that their said proceedings to obtain judgment were thus commenced during the ownership by the said respondent of his said shares of stock, or within *one* year after the transfer of such stock was recorded on the books of said corporation.

Wherefore your complainants believing that the respondent in the premises has become liable to pay said judgment and costs to the extent of his said unpaid stock, pray:

(1) That a subpoena in the usual form required issue unto the said *Edgar M. Paine*, commanding him to appear at a certain day and make full answer to this bill, but not under oath, answer under oath being hereby waived.

(2) That it may be ordered and decreed by this Honorable Court that the said respondent pay your complainants such sum as may be found justly due them in the premises, in such manner as to this Court may seem proper.

(3) That this Honorable Court may grant such other and further relief in the premises as may be necessary and proper.

Dated this 14th day of *March*, A. D. 1890.

Lucy A. Barron.

George A. Barron.

(2) AT LAW.

Form No. 18976.¹

(Precedent in *Libby v. Tobey*, 82 Me. 398.)²

[[*Commencement as in Form No. 6940*]]³ in a plea of the case; for that the said plaintiff on the *twenty-ninth* day of *May*, A. D. 1886, by the consideration of the justices of the *Superior* Court of the county of *Cumberland*, at a term of said court begun at *Portland*, on the *first Tuesday* of *May* aforesaid, recovered judgment against the *Deer Isle Silver Mining Company*, a corporation established by law and having a place of business in said *Portland*, for the sum of *five thousand six hundred thirty-four* dollars and *sixty-nine* cents, debt or damage, and *one hundred sixteen* dollars and *ten* cents costs of suit as by the record thereof, now remaining in said court, appears, which said judgment is in full force, and not reserved, annulled or satisfied.

1. *Maine*. — Rev. Stat. (1883), § 4647.

See also, generally, *supra*, note 2, p. 537.

2. No objection was made to the sufficiency of this declaration, but the evidence showed that only four hundred shares had been subscribed for by the defendant, the remainder having been bought in open market; and as a

stockholder under the Maine statute is liable only to the extent of stock subscribed for, it was held that the plaintiff could recover for so much only as remained unpaid on those four hundred shares.

3. The matter to be supplied within [] will not be found in the reported case.

And the plaintiff avers, that said judgment was rendered in an action of assumpsit on a contract of affreightment, made and entered into by the said *Deer Isle Silver Mining Company* and the plaintiff, on the *eighteenth* day of *November*, A. D. 1882, and performed by the plaintiff between that time and the *third* day of *March*, 1883.

And the plaintiff further avers, that at the organization of said *Deer Isle Silver Mining Company* on the *sixteenth* day of *August*, A. D. 1879, at said *Portland*, the defendant subscribed for or agreed to take stock in said corporation to the extent of *two thousand two hundred and fifty* shares of the par value of *five* dollars each, and the defendant never paid said company the par value of said shares bona fide in cash nor in any other matter or thing at a bona fide and fair valuation thereof.

And the plaintiff further avers, that the said defendant continued a stockholder in said company from the time of its organization, as aforesaid, to the *third* day of *March*, A. D. 1883, and was a stockholder and owner of said unpaid stock, to wit, of *fourteen hundred* shares, at the time the indebtedness was contracted, upon which said judgment was rendered.

And the plaintiff further avers, that at the time his proceedings to recover his judgment aforesaid against said corporation were commenced, to wit, on the *twentieth* day of *October*, A. D. 1883, the said defendant still remained the owner of said *fourteen hundred* shares of unpaid stock, or had remained the owner thereof up to the time within *one* year prior thereto, so that said proceedings were commenced during the defendant's ownership of said unpaid stock, or within *one* year after its transfer was recorded in the corporation books.

Whereby, and by virtue of the statutes in such case made and provided, an action hath accrued to the plaintiff to have and recover of the defendant, and the defendant became liable and promised to pay the plaintiff the sum of *five* dollars a share for each of said *fourteen hundred* shares or so much thereof as may be required to pay that portion of said judgment, of \$5,750.79 with interest from said *twenty-ninth* day of *May*, A. D. 1886, as may remain unsatisfied and unpaid at the time of the rendition of judgment in this suit.

Yet the said defendant, though requested, [has not paid the said sum of money above demanded, so due to said plaintiff as aforesaid, or any part thereof, but so to do has wholly refused, and still does refuse, to the damage (concluding as in Form No. 6940).]¹

2. To Recover on His Statutory Liability to Creditors of Corporation.²

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. **Requisites of Declaration, Complaint or Petition, Generally.**—For the formal parts of a declaration, complaint or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Statutes Strictly Pursued.—Statutes creating a liability on the part of stockholders for debts against the corporation must be strictly followed. *Ryan v. Jacques*, 103 Cal. 280; *Bidwell v. Babcock*, 87 Cal. 29; *Gibbs v. Davis*, 27 Fla. 531; *Andrews v. Gwinnett Mfg. Co.*, 50 Ga. 637; *Tarbell v. Page*, 24 Ill. 46; *Banty v. Buckles*, 68 Ind.

a. By Creditor of Corporation.

(1) DECLARATION.

49; *Hight v. Quinn*, 86 Me. 491; *Hathorn v. Calef*, 53 Me. 471; *Hicks v. Burns*, 38 N. H. 141; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Barnes v. Wheaton*, 80 Hun (N. Y.) 8; *Flash v. Conn*, 109 U. S. 371; *Hale v. Hardon*, 95 Fed. Rep. 747; *McVickar v. Jones*, 70 Fed. Rep. 754; *U. S. v. Globe Works*, 7 Fed. Rep. 530.

Direct and Certain.—The plaintiff's averments must be direct and certain, and not in alternative or in ambiguous language. *Ryan v. Jacques*, 103 Cal. 280; *Wheeler v. Thayer*, 121 Ind. 64; *Wincok v. Turpin*, 96 Ill. 135; *Perkins v. Sanders*, 56 Miss. 733.

Performance of Conditions Precedent.—The plaintiff must aver a performance of all conditions precedent or set forth facts which in law excuse their performance. *Hirshfeld v. Bopp*, 145 N. Y. 84.

Existence of Corporation.—The existence of the corporation must be alleged. *Bidwell v. Babcock*, 87 Cal. 29; *Krider v. Coley*, 7 Kan. App. 349.

Judgment and Unsatisfied Execution.—As a general rule, in order to charge a stockholder with liability under the statute, the plaintiff creditor must show that he has secured judgment against the corporation, that execution has issued on such judgment and that such execution has been returned unsatisfied. *Samainego v. Stiles*, (Ariz. 1889) 20 Pac. Rep. 607; *Head v. Daniels*, 38 Kan. 1; *Krider v. Coley*, 7 Kan. App. 349; *Guerney v. Moore*, 131 Mo. 650; *United Glass Co. v. Vary*, 152 N. Y. 121; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Stephens v. Fox*, 83 N. Y. 313; *Miller v. White*, (Supreme Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 46; *Freeland v. McCullough*, 1 Den. (N. Y.) 414; *Thompson v. Nicolai*, (Supreme Ct. Spec. T.) 21 Misc. (N. Y.) 700; *Morgan v. Lewis*, 46 Ohio St. 1; *Salt Lake Hardware Co. v. Tintic Milling Co.*, 13 Utah 423; *American Freehold Land Mortg. Co. v. Woodworth*, 79 Fed. Rep. 951.

But it has been held unnecessary to show the recovery of a judgment against a corporation, and that execution has issued, which has been returned unsatisfied, where it is shown that the corporation was insolvent. *Morgan v. Lewis*, 46 Ohio St. 1; *Salt Lake Hardware Co. v. Tintic Milling*

Co., 13 Utah 423. Or where it is shown that the corporation has been dissolved or suits are prohibited against the corporation either by reason of an injunction or by statute. *United Glass Co. v. Vary*, 152 N. Y. 121; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Hunting v. Blun*, 143 N. Y. 511; *Thompson v. Nicolai*, (Supreme Ct. Spec. T.) 21 Misc. (N. Y.) 700.

Insolvency of Corporation.—That the corporation was insolvent must be alleged where the liability of the stockholder is dependent on the fact of the insolvency of the corporation. *Perkins v. Church*, 31 Barb. (N. Y.) 84.

In *Spence v. Shapard*, 57 Ala. 598, it was held that the liability of the stockholder was not dependent upon the fact that the corporation was insolvent and that an averment of insolvency was unnecessary.

Where an allegation of insolvency is necessary, it may be averred generally without setting out the particular facts upon which the averment is based. *Perry v. Turner*, 55 Mo. 418.

Dissolution of Corporation.—Where the liability of the stockholder is fixed by the dissolution of the corporation, it must be alleged that the dissolution has taken place, but the facts and circumstances relied upon as constituting such dissolution need not be stated. *Spence v. Shapard*, 57 Ala. 598; *Gibbs v. Davis*, 27 Fla. 531; *Krider v. Coley*, 7 Kan. App. 349; *Perry v. Turner*, 55 Mo. 418; *Poughkeepsie Bank v. Ibbotson*, 24 Wend. (N. Y.) 473.

Defendant a Stockholder.—That the defendant was a stockholder must be alleged. *Sherman v. Smith*, 20 Ill. 350; *Overmyer v. Cannon*, 82 Ind. 457; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; *Hawes v. Anglo-Saxon Petroleum Co.*, 101 Mass. 385; *Railroad Co. v. Smith*, 48 Ohio St. 219; *Williams v. Meloy*, 97 Wis. 561; *Flour City Nat. Bank v. Wechselsberg*, 45 Fed. Rep. 547. But an allegation that the defendant was a stockholder is sufficient without showing how he acquired the stock. *Overmyer v. Cannon*, 82 Ind. 457.

In *Railroad Co. v. Smith*, 48 Ohio St. 219, the petition averred that each of the defendants, except the corporation, was a holder of a specified number of shares of the capital stock of the cor-

poration, and it was held that the petition contained "a sufficient allegation that the defendants [were] stockholders. It need not be averred in terms that the defendants are owners of the stock held by them."

Amount of Stock Held.—Under some statutes the amount of stock held by the defendant must be averred. *Sherman v. Smith*, 20 Ill. 350; *Rowell v. Janvrin*, 151 N. Y. 60; *Butt v. Cameron*, 53 Barb. (N. Y.) 642.

Defendant a Stockholder When Debt Contracted.—That the defendant was a stockholder when the debt was contracted is, under some statutes, a necessary allegation. *Whitehurst v. Stuart*, 129 Cal. 194; *J. J. Case Plow Works v. Montgomery*, 115 Cal. 380; *Winona Wagon Co. v. Bull*, 108 Cal. 1; *Knowles v. Sandercock*, 107 Cal. 629; *Reeder v. Maranda*, 66 Ind. 485; *International Trust Co. v. American L. & T. Co.*, 62 Minn. 501; *Young v. New York, etc., U. S. Mail Steamship Co.*, (Supreme Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 69; *Freeland v. McCullough*, 1 Den. (N. Y.) 414. And where the debt is represented by a promissory note, it is not sufficient to allege that the promissory note was made while the defendant was a stockholder, as the note may have been given subsequent to the time when the debt was contracted. *J. J. Case Plow Works v. Montgomery*, 115 Cal. 380; *Winona Wagon Co. v. Bull*, 108 Cal. 1; *Knowles v. Sandercock*, 107 Cal. 629; *Overmyer v. Cannon*, 82 Ind. 457; *Hancock Nat. Bank v. Ellis*, 166 Mass. 414; *Railroad Co. v. Smith*, 48 Ohio St. 219; *McVickar v. Jones*, 70 Fed. Rep. 754; *Bank of North America v. Rindge*, 57 Fed. Rep. 279.

Liability Limited to Debts of a Certain Kind.—Where statutes confine the liability of a stockholder for debts of a corporation to debts of a certain kind, it must be alleged that the debt which it is sought to charge the stockholder with is of that kind. *Sherman v. Smith*, 20 Ill. 350; *Toner v. Fulkerson*, 125 Ind. 224; *Hight v. Quinn*, 86 Me. 491; *Coffin v. Reynolds*, 37 N. Y. 630; *Hirshfeld v. Bopp*, 145 N. Y. 84; *Boutwell v. Townsend*, 37 Barb. (N. Y.) 205; *Tabor v. Commercial Nat. Bank*, 62 Fed. Rep. 383.

Liability Limited to Debts Sued On Within Specified Time.—Under statutes providing that the liability of stockholders shall be limited to debts on which an action has been brought against the corporation within a speci-

fied time, that the action was brought within such time must be alleged. *Tarbell v. Page*, 24 Ill. 46; *Grindle v. Stone*, 78 Me. 176; *State Sav. Assoc. v. Kellogg*, 52 Mo. 583; *Hirshfeld v. Bopp*, 145 N. Y. 84.

Proportional Liability.—Where the liability of the stockholder is in proportion to the stock owned by him, the plaintiff must state the proportion which the stock owned by the defendant at the time the demand sued for was incurred bears to the whole subscribed stock at that time, or he must state facts from which said proportion can be deduced. *John A. Roebling's Son's Co. v. Butler*, 112 Cal. 677; *Bidwell v. Babcock*, 87 Cal. 29; *Andrews v. Gwinnett Mfg. Co.*, 50 Ga. 637.

Notice or Demand to Pay.—Where notice to or demand on the corporation or stockholder to be charged to pay the debt is a necessary step to a suit against a stockholder, the declaration must allege that such notice or demand was given. *Connecticut River Sav. Bank v. Fisk*, 60 N. H. 363; *Hicks v. Burns*, 38 N. H. 141; *Haynes v. Brown*, 36 N. H. 545.

Precedents.—In *Flash v. Conn*, 109 U. S. 371, which case was brought up from the circuit court of the United States for the northern district of Florida, the declaration alleged in substance that the defendant, on or before the first day of April, 1874, was a stockholder in the Pensacola Lumber Company, a corporation organized in the state of New York, under the provisions of an act of the legislature of that state, passed February 17th, 1848, entitled "An Act to authorize the formation of a corporation for manufacturing, mining, etc., purposes," and various amendments thereof; that the defendant was the holder of seventy-five thousand dollars of the stock of said company, the entire stock being three hundred thousand dollars; that the company carried on business and had an office and an agent in said county of Escambia, state of Florida; that the company, while the defendant was the holder of the stock aforesaid, became legally indebted to the plaintiffs, which indebtedness was evinced by two promissory notes, one for five thousand dollars, dated the eleventh day of September, 1864, and one for five thousand nine hundred and forty-six dollars and twenty cents, of like date, and on account stated for two thousand

six hundred and forty-six dollars and forty-seven cents; that the plaintiffs, on the sixteenth day of February, 1875, instituted their suit in the circuit court of said Escambia county against the said company to recover the amount due on said notes and account, and on the fifteenth day of March, 1875, judgment was rendered by said court in favor of plaintiffs for the sum of fourteen thousand one hundred and twenty dollars and fifty cents and costs; that the company having been adjudged bankrupt by the United States district court for the southern district of New York in the year 1875, its property could not be taken in execution to satisfy said judgment, nevertheless an execution was issued thereon and returned wholly unsatisfied; that the property of the company had been sold by order of the bankrupt court, and its proceeds would not more than pay the costs of the bankrupt proceedings, leaving nothing to be applied to the payment of said judgment or claims of other creditors against the company; that by the provisions of the act under which the company was organized, all the stockholders were severally individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company should have been paid in, and a certificate thereof made, signed, and sworn to by the president of said company and a majority of its trustees, and recorded in the office of the clerk of the county where the business of the company was carried on. It was averred that the company failed to comply with the said provisions of the act, and did not, by its president and a majority of its trustees, make, sign, swear to, and record said certificate, either in the county of New York, the county in which the operations of said company were by its articles to be carried on, or in said county of Escambia, in which the company carried on business, or in any wise as required by the act, so as to exempt the defendant from his individual liability. Wherefore, the declaration alleged, the defendant became liable to the plaintiffs for the said debt and contract made by the company, and the plaintiffs claimed twenty-eight thousand dollars.

On demurrer, this declaration was held sufficient.

In *Hancock Nat. Bank v. Ellis*, 166 Mass. 414, the declaration alleged in substance that the plaintiff was a creditor of the Commonwealth Loan and Trust Company, a corporation organized under the laws of the state of Kansas; that in December, 1893, it recovered judgment against said corporation for the sum of sixteen thousand one hundred and thirty-six dollars and seventy-six cents, and, execution having been taken out thereon, no property of the corporation could be found to be taken in satisfaction thereof, and the same was returned to the plaintiff wholly unsatisfied; that the General Statutes of the State of Kansas of 1889, paragraph 1192, provide that, "if any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder," except by order of court, "or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment;" that thereafter, in accordance with said law, the plaintiff, not being a railway or a religious or charitable corporation, brought actions of contract against all the solvent stockholders to it known, severally, of said corporation, who were residents of Kansas and within the jurisdiction of its courts, to recover from each one an amount equal to the stock then owned by him in said corporation, the several liability of stockholders under said paragraph 1192 having been judicially determined by the supreme court of Kansas; that the plaintiff recovered in such actions a total sum of two thousand nine hundred and fifty-nine dollars and thirteen cents, and applied the same in partial payment of said execution, leaving unpaid thereon the sum of thirteen thousand one hundred and seventy-seven dollars and sixty-three cents; that the defendant is a stockholder in said corporation, now owning ten shares of the capital stock thereof, of a par value of one hundred

dollars each, and appearing as such stockholder upon the books of the corporation, whereby he is conclusively presumed to be a stockholder of said corporation within the meaning and liability of said paragraph 1192, according to the interpretation of said paragraph by the supreme court of the state of Kansas; that the defendant has not paid in good faith the just debts of the corporation equal to the amount of the stock held by him therein, or to any part thereof, since the assets of said corporation have been exhausted, which payment would operate *pro tanto* to discharge him of his stockholder's liability under paragraphs 1192 and 1206 of the General Statutes of Kansas, of which the last named provides that "no stockholder shall be liable to pay debts of the corporation beyond the amount due on his stock, and an additional amount equal to the stock owned by him," said paragraphs having been judicially interpreted to that effect by the supreme court of Kansas; that the defendant has no just claim in set-off against the corporation, which would wholly or in part discharge him from liability under the paragraphs as interpreted by said court; that no action under paragraph 1192 had been brought against the defendant by any judgment creditor of the corporation prior to this action and been prosecuted to judgment, and said judgment been satisfied in whole or in part by the defendant, which payment would operate to that amount as a discharge of the liability of the defendant under the paragraphs as interpreted by said court, nor is any such prior action under paragraph 1192 now pending against the defendant; that the plaintiff has recovered no judgments which have been satisfied and applied in payment of its said execution, except as above set forth, and that it has brought no action under paragraph 1192 or otherwise, which, if prosecuted to final judgment and satisfaction thereof, will wholly satisfy said execution against the corporation, or reduce the amount unsatisfied on the execution below one thousand dollars, and that it seeks to recover the amount of one thousand dollars against the defendant and no more, being only an amount equal to the par value of the stock held and owned by the defendant in the corporation; that the defendant owes it the sum of one thousand dollars under and by virtue of his liability as a

stockholder of said corporation, as set forth in paragraph 1192, which liability is a contractual liability, and arises upon the contract of subscription to the capital stock of said corporation made by the defendant in becoming a stockholder, and that the defendant, in subscribing to the stock and becoming a stockholder, thereby guaranteed payment to the creditors of the corporation of an amount of the debt of the corporation equal to the par value of the stock held and owned by him, which should be payable to the judgment creditors of the corporation, who first pursued their remedy under paragraph 1192 against the defendant, until the amount as guaranteed has been paid by him, and that an action to enforce the liability is transitory, and may be brought in any court of general jurisdiction in the state where personal service can be made upon the stockholder, according to the interpretation of the liability under said paragraph, by the decisions of the supreme court of Kansas; that on July 16, 1894, William S. Hinman and Waldo H. Howard were by the circuit court of the United States for the district of Kansas appointed receivers for said Commonwealth Loan and Trust Company, and now report that the total indebtedness of the corporation, at the time when its property was wholly exhausted, for which the stockholders were liable to the full amount of the par value of their stock under paragraph 1192, amounted to not less than three hundred thousand dollars, and the total par value of all the shares of stock of the corporation amounted to one hundred thousand dollars; that therefore each stockholder is liable to the creditors of the corporation, in a suit against him, under paragraph 1192, for the full par value of his stock, and for a further sum, in case any of his shares have not been fully paid for, equal to the amount unpaid upon their par value, but for no more, and that after each stockholder has once paid in full the amount of his liability, the debts of the corporation will not be wholly paid and discharged, so that all the stockholders are charged with said liability to the full amount, and there can be no contribution among the stockholders according to paragraph 1205 of the General Statutes of Kansas for 1899, which provides that, "if any stockholder pay more than his due proportion of any debt of the corpora-

tion he may compel contribution from the other stockholders by action;" that therefore no injustice can be done the defendant by enforcing the liability herein set forth in this action; and that said statutes of the state of Kansas, as construed in the highest court of that state, impose a liability upon the defendant to the plaintiff as above set forth.

The defendant demurred to this declaration, assigning as grounds therefor: 1. That it does not appear by said declaration that under the laws of this commonwealth the defendant is under any liability to the plaintiff, but that the only liability of the defendant to the plaintiff set forth in the declaration is a liability under the laws of the state of Kansas, and only enforceable by the laws of that state. 2. That it appears from the declaration that on July 16, 1894, in the circuit court of the United States for the district of Kansas, William S. Hinman and Waldo H. Howard were appointed receivers for the Commonwealth Loan and Trust Company; and that it does not appear therein that the receivers are not still in charge of the company, and have the sole right to sue for the company, and collect all indebtedness due the company by its stockholders, of which the defendant is alleged in the plaintiff's declaration to be one; and that the plaintiff has not set forth any right vesting in it to sue the defendant in any court while the receivers are still in charge of the company. 3. That it does not appear that, at the date of the incurring of the liability in the declaration alleged, the defendant was the holder and owner of stock in the company.

A judgment of the superior court sustaining this demurrer was reversed by the supreme court.

In *Farmers' Bank v. Gallaher*, 43 Mo. App. 482, it was alleged in substance that on the — day of August, 1886, the defendant, together with one O. L. Garrison and one W. T. Robertson, organized a corporation known as the Montserrat Terra Cotta Company, under the statute in regard to manufacturing and business companies, with a capital stock of twenty-five thousand dollars, divided into two hundred and fifty shares of one hundred dollars each; that defendant was a subscriber for two hundred and forty-eight shares of the stock and Garrison and Robertson each for one share; that upon the

organization of the corporation defendant conveyed to it certain real estate described in the petition by deed, which expressed upon its face to be for a consideration of twenty-four thousand eight hundred dollars, and was in fact made to said corporation as in full payment of defendant's stock; that certificates of stock were duly issued to defendant as fully paid up in consideration thereof; and that the stock had been ever since and still was owned by defendant; that the consideration in the conveyance was grossly in excess of the real value of the real estate conveyed, the real estate not being of greater value than two thousand dollars; that the corporation was fraudulently organized with the aforesaid large capital stock with the purpose of obtaining credit to an amount far in excess of what the amount put in the same would justify, and the real estate fraudulently conveyed by defendant in pretending payment of the stock for the fraudulent purpose of exempting defendant from any liability to the creditors of the corporation; that there was in fact twenty-two thousand eight hundred dollars still unpaid by defendant on his stock; that on the fifteenth day of March, 1888, said Terra Cotta Company executed a note to the Wallace Manufacturing Company, a corporation, for one thousand six hundred and eighty-two dollars; that said note was afterward assigned to plaintiff, and that on the twenty-first day of June, 1889, it recovered a judgment thereon in the circuit court of Johnson county for five hundred and thirty-five dollars and thirty cents and costs of suit; that said Montserrat Terra Cotta Company had become wholly dissolved and insolvent, having no goods or chattels, lands or tenements, upon which to levy to satisfy said judgment. Prayer for judgment for the amount of the judgment against the Terra Cotta Company, interest and costs of suit. The court said of this petition: "There is * * * no substantial objection to the petition. The allegations of fraud, it may be, are unnecessary, yet such statements in the petition do not destroy the material portions, nor convert this action at law into a suit in equity. These allegations may be rejected, and yet sufficient remains to constitute a good cause of action to the defendant. *Clark v. Edgar*, 84 Mo. 106. Plaintiff's petition contains every material allegation required to fasten on defendant a legal obliga-

tion to pay the plaintiff's claim. To hold defendant liable, it is only necessary to allege and prove, first, that plaintiff is an unsatisfied creditor of the defunct corporation, the said Terra Cotta Company, and, second, that defendant, at the dissolution of the said corporation, was the holder of stock therein not fully paid up. These propositions established, it follows therefrom that plaintiff should recover to the extent of such unpaid stock, limited by the amount of his claim against the dissolved corporation. These allegations appear on the face of the petition."

In *Perkins v. Church*, 31 Barb. (N. Y.) 84, the complaint alleged in substance that the plaintiffs were copartners under the firm name of Dennis Perkins & Co., at the city of New York, in the business of commission merchants and factors. That the Merchants' Bank was a banking corporation located at Madison in the state of Wisconsin, and incorporated under the laws of that state, pursuant to the provisions of "An act to authorize the business of banking in the state of Wisconsin," approved April 19, 1852. That between the fourth day of April, 1857, and the twenty-second day of March, 1858, inclusive, the plaintiffs, at the city of New York, lent and advanced to the Merchants' Bank money and accepted and paid, for the accommodation of said bank, drafts drawn by said bank on them, amounting in all to the sum of fifty-five thousand eight hundred and eighty dollars and seventeen cents, and paid, laid out and expended for telegraph and express charges and protest fees in and about the business of the bank, thirteen dollars and seventy-three cents. That said drafts were accepted, and payments made, in accordance with an agreement made between the plaintiffs and the bank, by which the bank was to consign produce to the plaintiffs, for sale on commission, against which the said drafts were to be drawn, and to keep the plaintiffs in funds to meet all drafts which should be drawn on them, in all cases where such consignments were not made. That thirty-four thousand nine hundred and fifty-five dollars and forty-one cents of the amount of their acceptances and of the drafts aforesaid were paid by them without any funds of the bank then in their hands to pay the same, and in excess of proceeds of sales of consignments received from the bank. That upon the sum of thirty-

four thousand nine hundred and fifty-five dollars and forty-one cents the plaintiffs were entitled to a commission of two and one-half per cent. That there was due from the bank to the plaintiffs the sum of nine thousand four hundred dollars and nine cents, which it refused and neglected to pay. That during all the time between the fourth day of April, 1857, and the twenty-second day of March, 1858, the defendant was a holder of stock in the bank to the amount of over seven thousand dollars. That by the laws of Wisconsin stockholders in every corporation or association organized under the provisions of the banking act are individually responsible for its debts to the amount of their stock. Wherefore the plaintiffs demanded judgment against the defendant as a stockholder of said bank for the sum of seven thousand dollars, besides costs of suit. A demurrer to this complaint was overruled.

In *Booth v. Dear*, 96 Wis. 516, the complaint was in substance as follows: The plaintiff, complaining on behalf of himself and of creditors of the bank who might wish to become parties to the action, alleged that the defendant corporation, during all the times mentioned in the complaint, had been a duly organized banking corporation under the laws of the state of Wisconsin; that its capital stock was fifty thousand dollars; that on the twenty-seventh day of May, 1895, it made an assignment for the benefit of its creditors, which assignment was completed in all respects as required by the laws of this state; that, at the time of the making of such assignment, the bank was indebted to the amount of one hundred and thirty-five thousand dollars, and that its assets did not exceed twenty thousand dollars; that the bank had wholly ceased doing business; and that it did not possess any property whatever subject to execution or to sequestration in equity. There were further allegations showing who were stockholders during the six months prior to the making of the complaint, and during the time the indebtedness of the plaintiff mentioned existed, together with the amount of stock owned by each of such stockholders. There were further allegations to the effect that the amount of plaintiff's debt at the time of the making of the assignment and the commencement of the action was seven hundred and thirteen dollars and eighty-six cents; that he duly filed proof of his

Form No. 18977.

(Precedent in *Root v. Sinnock*, 120 Ill. 351.)¹[[*Commencement as in Form No. 6939.*]]²

For that whereas, heretofore, to-wit, on the 26th day of *March*, A. D. 1869, at, to-wit, the county aforesaid, by a certain public law of the state of *Illinois*, entitled "An act to incorporate the *Union Bank of Quincy*," the *Union Bank of Quincy* became and was incorporated, and said *Union Bank of Quincy* was, on the first day of *June*, A. D. 1883, and was from thence hitherto, and down to the time of the closing of its doors, as hereinafter mentioned, hath been and was, engaged in the business of banking, at the city of *Quincy*, in said *Adams* county; and the said *Union Bank of Quincy*, on said first day of *June*, A. D. 1883, had, and from thence hitherto and down to the time of said closing of its said doors hath had and did have, a savings department connected with and constituting a part of its said banking business, in which said savings department said *Union Bank of Quincy* received deposits at interest, from divers and sundry persons. And the said plaintiff avers, that said *Union Bank of Quincy*, on, to-wit, the first day of *September*, 1884, was and still is indebted to said plaintiff in a large sum of money, to-wit, the sum of \$7200, for so much money deposited by said plaintiff with said *Union Bank of Quincy*, in its said savings department, at different times between the first day of *June*, A. D. 1883, and the first day of *February*, A. D. 1884, and in the further sum of, to-wit, \$500, for interest upon the moneys so deposited as last aforesaid; and said plaintiff avers, that said defendant, on said first day of *June*, A. D. 1883, was, and from thence hitherto has been and still is, a stockholder in and owner of a large number of shares, to-wit, one hundred shares, of the capital stock of said *Union Bank of Quincy*, of the par value of \$100 each share; and the said plaintiff further avers, that the said *Union Bank of Quincy*, during the month of *May*, A. D. 1884, and on, to-wit, the 15th day of said last named month, closed its doors and suspended payments; and the said plaintiff further avers, that he did afterwards, to-wit, on the first day of *August*, A. D. 1884, make demand of said *Union*

claim therefor in the assignment proceedings, but had not received any dividend thereon. The complaint contained further allegations to the effect that on the eleventh day of December, 1894, the defendant bank was indebted to one William Brown in the sum of ten dollars and ten cents, and that such proceedings were duly had to collect such indebtedness that a judgment was rendered therefor in a court of competent jurisdiction; that such judgment was thereafter duly transcribed to the circuit court for Douglas county, Wisconsin, and execution duly issued thereon out of such court and was placed in the hands of the sheriff of Douglas county for collection; and that the same was on the sixteenth day of August,

1895, returned by such sheriff wholly unsatisfied; and that on the nineteenth day of August, 1895, and before the commencement of this action, such judgment was, for value, assigned to the plaintiff; and that he was the owner thereof at the time of the commencement of this action; and that there was due to him thereon sixteen dollars and eighty-five cents. A demurrer to this complaint was overruled.

1. A demurrer to each count of the declaration was overruled.

See also, generally, *supra*, note 2, p. 540.

2. The matter to be supplied within [] will not be found in the reported case.

Bank of Quincy for the payment of the several sums of money so due him from said *Union Bank of Quincy*, but said *Union Bank of Quincy* then and there refused to make payment of the same; and the said plaintiff avers, that said *Union Bank of Quincy*, after the said closing of its said doors, never opened the same for the resumption of business, and never resumed business as a bank, but afterwards, on, to-wit, *September 16*, A. D. 1884, made an assignment to one *John P. Mikesell*, for the benefit of its creditors, by means whereof, and by force of the said act above mentioned, the said defendant became liable to pay said plaintiff the indebtedness so due and owing from said *Union Bank of Quincy* to said plaintiff, to the extent of the aggregate amount of the shares of stock so as aforesaid held by said defendant in said *Union Bank of Quincy*, reckoned at the par value of \$100 per share, and being so liable, the said defendant, in consideration thereof, afterwards, to-wit, on the day and year last aforesaid, at, to-wit, the county aforesaid, undertook, and then and there promised to pay him, said plaintiff, said indebtedness last named, to the extent last aforesaid, on request.

And also for that, whereas, heretofore, to-wit, on the *26th* day of *March*, A. D. 1869, at, to-wit, the county aforesaid, by a certain other public law of the state of *Illinois*, entitled "An act to incorporate the *Union Bank of Quincy*," the *Union Bank of Quincy* became and was incorporated, and said *Union Bank of Quincy* was, on the *first* day of *June*, A. D. 1883, and from thence hitherto, and down to the time of closing its doors, as hereinafter mentioned, hath been and was engaged in the business of banking at the city of *Quincy*, in said *Adams* county, *Illinois*, and said *Union Bank of Quincy*, on said *first* day of *June*, A. D. 1883, had, and from thence hitherto and down to the time of said closing of its said doors hath had and did have, a savings department connected with and constituting a part of its said banking business, in which said savings department said *Union Bank of Quincy* received deposits at interest from divers and sundry persons; and the said plaintiff avers, that said *Union Bank of Quincy*, on, to-wit, the *first* day of *September*, 1884, was and still is indebted to said plaintiff in a large sum of money, to-wit: the sum of \$7200, for so much money deposited with said *Union Bank of Quincy* in its said savings department, at different times, between the *first* day of *June*, A. D. 1883, and the *first* day of *February*, A. D. 1884, and in the further sum of, to-wit, \$500, for interest upon the money so deposited, as last aforesaid; and the said plaintiff further avers, that the said *Union Bank of Quincy*, during the month of *May*, A. D. 1884, and on, to-wit, the *15th* day of said last named month, closed its doors and suspended payment; and the said plaintiff avers, that he did afterwards, on, to-wit, the *first* day of *August*, A. D. 1884, make demand of said *Union Bank of Quincy* for the payment of the several sums of money so as aforesaid due him from said *Union Bank of Quincy*, but the said *Union Bank of Quincy* then and there refused to make payment of the same; and the said plaintiff avers, that at the time of the said closing of said doors of said *Union Bank of Quincy*, the defendant was and still is the owner of a large number, to-wit, of *one hundred*, shares of the

capital stock of said *Union Bank of Quincy*, of the par value of \$100 each share; and the defendant further avers, that said *Union Bank of Quincy*, after the said closing of its said doors, never resumed the business of banking, but afterwards, on, to-wit, *September 16, 1884*, made an assignment to one *John P. Mikesell* for the benefit of its creditors, by means whereof, and by force of the said act above mentioned, the said defendant became liable to pay said plaintiff the said indebtedness so due and owing from the said *Union Bank of Quincy* to said plaintiff, to the extent of the aggregate value of the shares of stock in said *Union Bank of Quincy* so as last aforesaid owned by said defendant, reckoned at said par value of \$100 per share, and, being so liable, the said defendant, in consideration thereof, afterwards, on, to-wit, the day and year last aforesaid, at, to-wit, the county aforesaid, undertook, and then and there promised, to pay him, the said plaintiff, said indebtedness last aforesaid, to the extent last aforesaid, upon request, yet the said defendant, though often requested so to do, hath not paid the said indebtedness in this declaration, or any part thereof, but so to do hath wholly refused, to the damage of said plaintiff in the sum of \$7500, and therefore he brings his suit.

[(Signature as in Form No. 6939.)]¹

(2) PLEA THAT CREDITOR'S CAUSE OF ACTION HAS BEEN TAKEN AWAY BY A PREVIOUS SUIT IN EQUITY, PART OF THE FRUITS OF WHICH HE RECEIVED.²

Form No. 18978.

(Precedent in *Tunesma v. Schuttler*, 114 Ill. 158.)³

[(Venue and title of court and cause as in Form No. 15219.)

(First, second and third pleas.)]¹

And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that heretofore, to-wit, on the 7th day of *December, 1877*, the said *German Savings Bank* ceased to do business, and thereupon, on said day, in the *Superior Court*, one *Herman G. Berls* and other creditors of said bank, on behalf of themselves and of all other creditors of said bank, filed their certain bill of complaint, on the chancery side of said court, against said company,

1. The matter to be supplied within [] will not be found in the reported case.

2. For the formal parts of a plea in a particular jurisdiction see the title PLEAS, vol. 13, p. 918.

3. This is the fourth amended plea. It was filed in an action brought by a depositor against a stockholder of the late German Savings Bank of Chicago, to recover a balance due him as such depositor. The action was founded on the ninth section of the charter of the bank, which was as follows: "When

default shall be made in the payment of any debt or liability contracted by said corporation, the stockholders shall be held individually responsible for an amount equal to the amount of the stock held by them, respectively; and such liability shall continue until six months after an assignment of the stock, and publication of a notice thereof in a newspaper published in the city of Chicago." On demurrer, this plea was held a sufficient defense to the action.

praying that a receiver of the assets and property of said bank be appointed, and that said bank be declared insolvent, and its affairs wound up, its assets collected and its debts paid under the direction of said court; that thereupon such proceedings were had in said court that on the 8th day of *December*, 1877, said bank was by said court declared to be insolvent, and one *Oliver H. Horton* was by the order of said court appointed receiver of said bank, of all its property and assets, and empowered to collect and dispose of the same for the purposes as prayed in said bill; that thereupon such proceedings were had in said court that by an order therein entered on the 27th day of *June*, 1882, said receiver was authorized and directed, out of the moneys then in his hands, to pay unto the creditors of said bank a dividend of *seventy* per cent. upon the par value of their respective claims; that afterwards, to-wit, on the 3d day of *July*, 1882, the said complainant, *Beris*, and others, for themselves and all other creditors of the said bank, filed in said cause, in the court aforesaid, their amended and supplemental bill, making the said bank, and all stockholders thereof at the time of its insolvency aforesaid, including this defendant, *Peter Schuttler*, parties defendant thereto, and alleging the incorporation of said bank, and the acceptance of its charter, the insolvency of the said bank, the insufficiency of its assets then in the hands of the said receiver to pay its debts, and setting up the liability of said stockholders for the deficiency thus arising, as the said plaintiff has in his above declaration set out, and praying that the said defendant stockholders might be required to pay such deficiency by reason of such liability; that thereupon, on the 5th day of *July*, 1882, the said receiver filed his petition in said cause, setting forth, substantially, the same facts in said amended supplemental bill set forth, to which petition said stockholders, including this defendant, *Peter Schuttler*, were made parties defendant, and praying that any decree upon said amended and supplemental bill be made payable to him, the said receiver, for the benefit of all the creditors of the said *German Savings Bank*, and praying for the instruction of the court in the premises; that thereupon such proceedings were had, on the ——— day of *July*, 1882, the said creditors of said bank, who had also brought suits at law against the individual stockholders, as above set out, were, by preliminary injunction of said court, restrained from further prosecution of said suits until the final hearing of said cause; that during the pendency of said supplemental and amended bill, to-wit, on the 21st day of *July*, 1882, the said plaintiff asked for and received from the receiver in the said cause the sum of \$3,062.34, as and for his dividend of *seventy* per cent. upon its par value upon his said claim against the said bank, which said dividend was then paid by said receiver out of the assets of the said bank itself; that afterwards issues were joined upon said amended and supplemental bill and petition, and such proceedings were had by the said court that on the 27th day of *January*, 1883, upon the hearing of said cause upon said amended and supplemental bill and the petition of said receiver, the court found the facts to be as set out in said amended and supplemental bill, and it was theretofore decreed by the said court that the said defendant stockholders,

including this defendant, *Peter Schuttler*, were liable for the debts and liabilities of said bank to its creditors, as set forth in said amended and supplemental bill and petition, and as said plaintiff has in his said declaration above set out, and that the said *Peter Schuttler* was liable in the sum of \$5,000. It was further decreed by the court, before entering the final decree in said cause, that the same be referred to *Benjamin D. Magruder*, master in chancery in said court, to ascertain the amount due the creditors of said bank, and the amount necessary to defray the expenses of closing up said proceedings, and the amount necessary to pay such claims as might be proven against said bank. And it was further ordered, as follows: That said master shall give notice, by publication in the "*Chicago Daily News*," and the "*Illinois Staats Zeitung*," to all the creditors of the *German Savings Bank* to appear before him on or before a certain day, not less than *twenty* days from the date of such notice, to be by him fixed, and prove and establish their claims and the amount due them, and the said master shall thereupon report to this court his conclusions, together with the evidence taken by him touching the same; that thereupon the said master gave the notice in the manner and form required by the said decree, beginning on *February 1, 1883*, and fixed the *24th* day of *February, 1883*, and all intervening days, as the time, and his office in *Chicago* as the place, for the creditors of said bank to prove their claims against the same; that afterwards, by an order of said *Superior Court* in said cause, the time for proving such claims was extended until *March 16, 1883*; that on *May 5, 1883*, the said master duly filed in said *Superior Court* his report of said claims, etc., as required by said decree of *January 27, 1883*, and setting forth the notice given by him in pursuance thereof, as aforesaid; and thereupon such proceedings were had in said cause that on the *27th* day of *May, 1883*, it was decreed by said *Superior Court* in said cause that said report be approved, and that the assets of said bank were insufficient to pay the claims of said bank so proven and allowed; that the said *Oliver H. Horton*, the said receiver, for the use of all the creditors of said bank, have and recover from the stockholders of said *German Savings Bank* who were defendants in said cause, and including this defendant, *Peter Schuttler*, the sum of *four thousand six hundred and four dollars and seventy-five cents (\$4,604.75)* — the amount of such deficiency; and that upon payment thereof to him, the said *Horton* should satisfy the said judgment against all of said stockholders, including this defendant, *Peter Schuttler*, as a final release of the liability of said stockholders. And it was further ordered, that if any stockholder shall pay more than his pro rata share according to the amount of said stock held by him, he should be entitled to contribution from the other of said stockholders, and may apply to this court and have relief in this cause; that afterwards, to-wit, on the *14th* day of *July, 1883*, the said *Horton*, as such receiver, received payment of said sum of \$4,604.75 from said stockholders, including this defendant, and entered due and full satisfaction of said judgment and decree upon the records of said *Superior Court* in said cause, and acknowledged therein that he had received payment thereof from the said stock-

holders, including this defendant, *Peter Schuttler*, and that such payment was in full of all such liability of such stockholders and this defendant, *Schuttler*, as by the record thereof still remaining in the said *Superior Court*, and by a duly certified copy of said amended and supplemental bill, the two decrees of said court therein, and the receipt of said *Horton* hereto attached, marked "Exhibit A," and made part hereof, more fully appears, which said judgment and record still remains in full force, — and this the defendant is ready to verify by the said record, whereof he prays judgment if the plaintiff ought to have his aforesaid action.

[(Signature as in Form No. 15219.)]¹

b. By Receiver of Corporation.

Form No. 18979.²

Supreme Court, Kings County.
Elliott D. Wigton, as receiver of the *Iowa*
Savings Bank, plaintiff,
 against
Elbert S. Kenney, defendant. }
 Complaint.

The plaintiff complains of the defendant and says to this court, upon information and belief:

First cause of Action.

I. — That during all the times hereinafter mentioned, the *Iowa Savings Bank* was a foreign corporation, organized and existing under and by virtue of the laws of the state of *Iowa*, and that the said corporation was engaged in business as a savings bank in the said state of *Iowa* under and subject to the laws of said state in that behalf.

II. — That heretofore and on or about the *tenth day of November, 1896*, in an action pending in the *District court* of the state of *Iowa* in and for *Woodbury county*, wherein one *Leslie T. Richardson* was plaintiff and the said *Iowa Savings Bank* was defendant, one *W. P. Manley* was duly appointed receiver of said bank, and of all its assets, and that said *Manley* duly qualified as such receiver and continued in the said office until on or about *March 17th, 1897*, when he resigned, and that thereupon this plaintiff was duly appointed receiver of the said bank and of all its property and assets of every kind and nature by the order and decree of said court, and that he duly qualified as such receiver and entered upon the performance of his duties of said office, and has continued therein to the present time.

III. — And this plaintiff further shows and alleges that the said *Iowa Savings Bank* commenced business on or about *January 15th, 1883*, with a paid up capital stock of *\$25,000*, and that the said

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the form of complaint in *Wigton v. Kenney*, 51 N. Y. App. Div.

215, and is copied from the records. A demurrer to the complaint was overruled.

See, also, generally, *supra*, note 2, p. 540.

capital stock was at divers times increased as follows, to wit: On or about *April 1st, 1884*, to *fifty thousand* dollars (\$50,000); on or about *January 1st, 1886*, to *one hundred thousand* dollars (\$100,000), and on or about *July 1st, 1887*, to *two hundred and fifty thousand* dollars (\$250,000); and that the capital stock so increased as aforesaid was all duly issued and was divided into *twenty-five hundred* (2,500) shares of the par value of *one hundred* dollars (\$100) each.

IV. — This plaintiff further shows that the statute of the state of *Iowa* under which said *Iowa Savings Bank* was organized, and under which it continued to do business, provided among other things, that shareholders in banks organized under the provisions of the said statute should be individually and severally liable to the creditors of the corporation of which they were shareholders over and above the amount of stock held by them to an amount equal to their respective shares so held, for all its liabilities accruing while they were stockholders; and it was further provided by the said statute that should any such bank become insolvent, and its assets be found insufficient to pay its debts and liabilities, its shareholders might be compelled to pay such deficiency up to the amount of stock, at its par value, held by them respectively, and in proportion to the amount of stock owned by the respective stockholders.

V. — That on or about the end of *May, 1893*, the said defendant became the owner and holder of *forty* (40) shares of capital stock of the said bank, of the par value of *one hundred* dollars (\$100) each and amounting in all to the sum of *four thousand* dollars (\$4,000), and that he has continued to be such owner of such shares of stock from the date aforesaid to the present time. And this plaintiff further says and alleges that on *November 10th, 1896*, the date upon which the said *W. P. Manley* was appointed receiver of the said *Iowa Savings Bank*, and for a long time prior thereto, the said bank was wholly insolvent, and that it had not at the time aforesaid, nor has it had at any time subsequent thereto, sufficient money or property, or assets that could be converted into money (other than the liability of its stockholders), to pay its indebtedness; and that on or about the *21st* day of *May, 1897*, in the said *District* court of the state of *Iowa*, in and for *Woodbury* county, in the said action wherein *Leslie T. Richardson* was plaintiff and the said *Iowa Savings Bank* was defendant, in a proceeding duly brought for that purpose, it was then and there ordered and decreed that an assessment of *one hundred* per cent. (100%) upon the par value of the stock of each and every stockholder in the said *Iowa Savings Bank*, be made, and that the said receiver of said bank proceed to enforce collection for the same, and that thereafter and on or about the *4th* day of *November, 1897*, in a proceeding duly had in the said action, the said order and decree made by the said court in which it was duly ascertained and found by the said court that after proper application of all assets of the said *Iowa Savings Bank*, other than the stock assessment liability of stockholders of the said bank, there was a deficiency of *one hundred and twenty-five thousand* dollars (\$125,000), and that in order to meet the said deficiency and to provide for the payment of claims due to the creditors of the said bank, an assessment

of *fifty* per cent. (50%) upon the capital stock of each and every shareholder in the said bank should be made, and it was then and there accordingly ordered, adjudged and decreed that the aforesaid order of assessment be modified, and that an assessment be made upon the capital stock of each shareholder of the said *Iowa Savings Bank*, of *fifty* per cent. (50%) upon the par value of the amount of stock held by each of such shareholders or stockholders, and that such assessment be accordingly made; that the said decree last above mentioned further provided that each stockholder of the said *Iowa Savings Bank* shall be notified of the said assessment by a notice thereof mailed to his or her post office address, as shown by the stock book of the said *Iowa Savings Bank*, which notice should be mailed within *ten* days from the date of the said decree, and that the said stockholders should have *thirty* days from the date of the mailing of said notice, in which to pay the said assessment, and that in pursuance of the said decree the said defendant was duly notified of the said assessment by mailing a notice thereof to his post office address, as in the said decree directed, and that more than *thirty* days have elapsed since the date of mailing of said notice, and that the said defendant has failed and refused to pay the said assessment, or any part thereof.

VI. — And this plaintiff further shows and alleges that the said *District* court of *Iowa* was a court of competent jurisdiction and had jurisdiction of the subject-matter aforesaid and of the parties in the said action and in the proceedings aforesaid; and this plaintiff has been duly authorized by the said *District* court of the state of *Iowa*, the court which appointed him receiver as aforesaid, to bring suits to enforce the payment of the assessment made upon the shareholders of the said *Iowa Savings Bank*, as aforesaid, and that he was and is thereby authorized to maintain and bring this action.

VII. — That by reason of the premises, the said defendant became and is indebted to this plaintiff in the sum of *two thousand* (\$2,000).

Second cause of Action.

VIII. — For a second cause of action this plaintiff repeats the allegations contained in paragraphs "I," "II," "V" and "VI," of this complaint.

IX. Plaintiff further shows, upon information and belief, that the said *Iowa Savings Bank* unlawfully and improperly paid to the said defendant and the said defendant unlawfully and improperly received from the said *Bank*, as alleged dividends, the following sums of money: On or about the *13th* day of *January*, 1894, the sum of *one hundred and twenty* dollars (\$120), on or about the *10th* day of *July*, 1894, the sum of *one hundred and twenty* dollars (\$120), and on or about the *10th* day of *January*, 1895, the sum of *one hundred and twenty* dollars (120), amounting in all to the sum of *three hundred and sixty* dollars (\$360); that according to the statute of the state of *Iowa* under which the said *Iowa Savings Bank* was organized, dividends were lawfully payable to the shareholders only out of the surplus profits remaining after payment of interest to depositors, and after setting aside sufficient money to pay such interest, and the necessary expenses of the said bank, and that during all the years

aforesaid, and at the times the said moneys were received by the said defendant there were no surplus profits of the said bank, and no profits applicable to the payment of dividends to the said defendant, but that on the contrary the said sums of money and each of them were paid out of the assets of the said bank belonging to the creditors thereof.

Wherefore this plaintiff demands judgment against the said defendant for the sum of *two thousand three hundred and sixty* dollars with interest on *two thousand* dollars (\$2,000), from *December 15th*, 1897, on *one hundred and twenty* dollars, from the *13th* day of *January*, 1894, on *one hundred and twenty* dollars, from the *10th* day of *July*, 1894, and on *one hundred and twenty* dollars (\$120) from the *10th* day of *January*, 1895, besides his costs and disbursements of this action.

Foley & Powell, Attorneys for Plaintiff,

Office and post office address, *206 Broadway (Manhattan)*,
New York City, N. Y.

(Verification.)¹

3. By Former Owner of Stock on a Bond of Present Owner to Transfer the Stock Back When Required and to Pay Such Dividends as may be Declared Thereon in the Meantime.

Form No. 18980.

(Robinson's F. (Va.) 479.)

(Title of court as in Form No. 6951.)

Richard Roe complains of *John Doe*, being in custody, etc., of a plea that he render to the said plaintiff the sum of \$32,000, which the said *John Doe* owes to the said plaintiff, and unjustly detains from him. And thereupon the said plaintiff saith, that heretofore, and in the lifetime of one *William West*, who is since deceased, to wit, on the *twelfth* day of *December*, 1817, at the said county of *Albemarle*, the said *John Doe* and the said *William West*, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of \$16,000, for the payment of which, well and truly to be made, they bound themselves, and each of their heirs, executors and administrators, in the penal sum of \$32,000, which said writing obligatory was, and is, subject to a certain condition thereunder written, whereby, after reciting to the effect following, to wit, that the said plaintiff had, on the said *twelfth* day of *December*, 1817, delivered over scrip for stock in the bank of the *United States* (meaning a certain bank incorporated by the name and style of the president, directors and company of the bank of the *United States*), amounting to \$10,000, to the said *John Doe*, with full power and authority to take out certificates for the same, in his own name, it was provided that if the said *John Doe* should, well and truly, pay over to the said

1. Verification. — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

plaintiff, his heirs, executors or assigns, all dividends arising on, and from, the said stock, as the same should be declared by the president and directors of the bank of the *United States* (meaning the president and directors of the bank incorporated by the name and style of the president, directors and company of the bank of the *United States*), and transfer the said stock to the said plaintiff, his heirs and assigns, when required thereto, then, and in that case, the said obligation should be null and void.

And the said plaintiff in fact saith, that the said *John Doe* hath not paid over to the said plaintiff all dividends arising on and from the said stock, as the same have been declared by the said president and directors of the said bank; but, on the contrary thereof, the said plaintiff saith that, although after the making of the said writing obligatory, to wit, on the *twenty-eighth* day of *July*, 1828, at the county of *Albemarle* aforesaid, certain dividends to a large amount, to wit, the sum of \$4,925, had arisen on and from the said stock, and been declared by the president and directors of the said bank, and although he, the said *John Doe*, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, had notice thereof, and was duly required to pay over to the said plaintiff the said last mentioned sum of money, yet the said *John Doe* hath not as yet paid over to the said plaintiff the said last mentioned sum of money, or any part thereof, but to pay the said plaintiff the same hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to wit, at the county of *Albermale* aforesaid.

And for assigning a further breach of the said condition of the said writing obligatory according to the form of the statute in such case made and provided, the said plaintiff in fact saith that the said *John Doe* hath not transferred the said stock to the said plaintiff when required thereto; but, on the contrary thereof, the said plaintiff saith that after the making of the said writing obligatory, to wit, on the *twenty-eighth* day of *July*, 1828, at the county of *Albemarle* aforesaid, the said *John Doe* was duly required to transfer the stock aforesaid to the said plaintiff, but the said *John Doe* did not then, nor at any time before or since, transfer to the said plaintiff the said stock, or any part thereof, but to transfer the same to the said plaintiff he, the said *John Doe*, hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to wit, at the county of *Albermarle* aforesaid.

And the plaintiff avers that neither the said *John Doe* nor the said *William West*, deceased, in his lifetime, nor any person since the death of the said *William West*, acting as the representative of the said *William West*, or in any other character or behalf, hath paid to the said plaintiff the said sum of \$16,000, wherein the said *John Doe* and *William West*, by the said writing obligatory, acknowledged themselves to be bound to the said plaintiff, but to pay the same they have, and each of them hath, wholly failed and made default; and by reason of the said breaches of the condition of the said writing obligatory, and of the said failure and default in paying the said sum of \$16,000, the said writing obligatory and the aforesaid penal sum of \$32,000 become forfeited; and the said *William West* having

departed this life, and the said *John Doe* having survived him, action hath accrued to the said plaintiff to demand and have of and from the said *John Doe* the said sum of \$32,000 above demanded.

Nevertheless, the said *John Doe* and the said *William West*, deceased, in his lifetime (although thereunto often requested), have not, nor hath either of them, as yet, paid to the said plaintiff the said sum of \$32,000, above demanded, or any part thereof, nor hath the same, or any part thereof, been paid to the said plaintiff since the death of the said *William West* by any person as the representative of the said *William West*, or in any other character or behalf, but to pay the same, or any part thereof, the said *John Doe* and the said *William West*, deceased, in his lifetime, and the representative of the said *William West* since his death, and every other person, have hitherto wholly neglected and refused, and the said *John Doe* still neglects and refuses, to the damage of the said plaintiff \$32,000, and therefore he brings suit, etc.

(Signature as in Form No. 6951.)

II. AGAINST STOCKHOLDERS AND CREDITORS BY RECEIVER OF CORPORATION TO RECOVER BACK DIVIDENDS WHICH STOCKHOLDERS HAD RECEIVED OUT OF THE CAPITAL AND TO RESTRAIN CREDITORS FROM PROSECUTING INDIVIDUAL ACTION FOR THE SAME PURPOSE.¹

Form No. 18981.²

(Precedent in *Osgood v. Laytin*, (Ct. App.) 5 Abb. Pr. N. S. (N. Y.) 3.)³

[(Title of court and cause as in Form No. 17237.)]⁴

The plaintiffs complain and allege:

I. That the *Columbian Insurance Company* was a corporation, duly organized under the general laws of the state of *New York*, in or about *August*, 1857.

II. That on the 23rd day of *January*, 1866, (certain other persons, naming them) were duly appointed receivers of all the property and effects of the said *Columbian Insurance Company*, by the *Supreme Court* of the state of *New York*, at a special term thereof, held in the city and county of *New York*, upon proceedings duly taken therefor in an action therein pending between (a third person, naming him) as plaintiff, and the said company as defendant, in which action judgment dissolving the company was duly rendered on the 2nd of *February*, 1866.

III. That afterwards, on the 24th day of *January*, 1866, the said (naming both of the original receivers) duly qualified as such receivers, and filed all the security required of them by the said court with the

1. For the formal parts of a complaint in a particular jurisdiction see the title COMPLAINTS, vol. 4, p. 1010.

Alleging Fraud. — That there was an intent in making the distribution of dividends to defraud the creditors need not be alleged. *Osgood v. Laytin*, (Ct. App.) 5 Abb. Pr. N. S. (N. Y.) 1.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3902, c. 47, § 7.

3. A demurrer to this complaint was overruled.

4. The matter to be supplied within [] will not be found in the reported case.

clerk of the *city and county of New York*, and were duly vested with all the property and effects of said corporation.

IV. That on the *2nd day of March, 1866*, the said *Supreme Court* duly discharged the said (*naming one of the original receivers*), at his own request, from his receivership, and ordered that the said (*naming the other*) should continue as the sole receiver of the said company.

V. That on the *11th day of April, 1866*, *George A. Osgood* (one of the plaintiffs) was duly appointed a receiver of all the property and effects of the said *Columbian Insurance Company*, by the said *Supreme Court*, at a *special term* thereof, held in said *city and county of New York*, to act in conjunction with the said (*naming the remaining original receiver*).

VI. That afterwards, on the *13th day of April, 1866*, the said *Osgood* duly qualified as such receiver, and filed all the security required of him by the said court with the clerk of the *city and county of New York*.

VII. That on the *29th day of June, 1866*, the said (*naming the original receiver remaining*) died, and on the *2nd of July, 1866*, by an order of the said *Supreme Court*, at a *special term* thereof, held in said *city and county of New York*, *Cyrus Curtiss* was duly appointed a receiver of all the property and effects of the said *Columbian Insurance Company*, to act in conjunction with the said *Osgood*.

VIII. That afterwards, and on the said *2d day of July, 1866*, the said *Curtiss* duly qualified as such receiver, and filed all the security required of him by the said court with the clerk of the *city and county of New York*, and the plaintiffs are now duly vested with the title to all the property and effects of the said corporation.

IX. That on or about the *2nd day of January, 1866*, the said *Columbian Insurance Company* paid a dividend upon the capital stock of the company to each of the stockholders, defendants herein, to the amount set opposite their names respectively, in the schedule hereto annexed, marked "*A*," which is made a part hereof.

X. That all the defendants except (*naming certain individuals who were joined because they were suing as creditors*) were, at the time said dividend was paid, holders of stock in the said company, and each of them respectively then owned the number of shares of the par value of *one hundred* dollars each stated in the schedule hereto annexed, marked "*A*," and received the amount of dividend upon said stock therein stated, at the time therein stated. That the defendants comprise all the stockholders of said company, except a few who did not receive said dividend.

XI. That at the time of the payment of the said dividends, the said *Columbian Insurance Company* was insolvent, and no profits had been earned upon its capital, but such dividends were paid entirely out of the capital of the company, which was then greatly impaired, so as to be insufficient for the payment of the company's debts without the return of such dividends; and shortly afterwards, the proceedings above mentioned were taken, under which the plaintiffs were appointed receivers of the said company.

XII. That the defendants (*naming those who were excepted in paragraph X*) claim to be creditors of the said company, and as such have commenced actions against a large number of the stockholders

thereof, who are among the defendants, to recover the dividends received by them as aforesaid, and threaten to sue in like manner all the stockholders who received such dividends.

XIII. That there are many other creditors of the said company who threaten to bring similar actions against its stockholders, and that such proceedings, if carried on, will result in a great multiplicity of suits, probably several hundred in number.

Wherefore the plaintiffs demand judgment:

I. That each of the defendants named in the schedule hereto annexed, marked "A," pay to the plaintiffs the sum received by him on account of dividends from the *Columbian Insurance Company* as aforesaid, as set forth in schedule "A," hereto annexed, together with interest thereon from the day upon which he received the same as aforesaid.

II. That the defendants (*naming those mentioned in paragraph XII*), and such other creditors as may hereafter bring actions of a like nature, be restrained by injunction from bringing any actions against any of the other defendants above named, or against any other stockholder of the *Columbian Insurance Company*, for the recovery of dividends received by them from the said company, and from proceeding in any such action already brought.

III. That each and every one of the other defendants be restrained by injunction from paying, or securing to be paid, any dividend received by him from the *Columbian Insurance Company* to any person other than the plaintiffs.

[(Signature and verification as in Form No. 5926.)]¹

III. ACTION BY STOCKHOLDER, SUBSCRIBER TO STOCK, OR PERSON HOLDING CERTIFICATES OF STOCK.

1. Against Corporation.

a. To Compel Issuance of Certificate of Stock to Replace Lost Certificate.

(1) COMPLAINT.²

Form No. 18982.³

[<i>Superior</i>]⁴ Court of the city of <i>New York</i>. <i>Alexander P. W. Kinnan</i>, as Executor of the Last Will and Testament of <i>Joseph W.</i> <i>Burnham</i>, deceased, plaintiff, against <i>The Forty-second Street, Manhattanville and</i> <i>St. Nicholas Avenue Railway Company</i>, defendant.	}	Complaint.
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1. The matter to be supplied within [] will not be found in the reported case.

2. For the formal parts of a complaint in a particular jurisdiction see the title COMPLAINTS, vol. 4, p. 1019.

3. This is the form of complaint in *Kinnan v. Forty-second St., etc.*, R. Co., 140 N. Y. 183, and is copied from

the records. A judgment in favor of the plaintiff, entered upon a decision of the court on trial at special term, was affirmed at the general term of the superior court of the city of New York and in the court of appeals.

4. The superior court has been abolished.

The plaintiff above named of the defendant above named complaining alleges:

First. — That heretofore, and on or about the 24th day of June, 1884, one *Joseph W. Burnham* departed this life leaving a last will and testament, which was offered for and duly admitted to probate by the surrogate of the county of *New York*, having jurisdiction thereof, and letters testamentary upon said last will and testament duly issued to the said plaintiff, who duly qualified and entered upon the discharge of the duties of his office.

Second. — That, as said plaintiff is informed and believes, the defendant is a domestic corporation, duly incorporated under and by virtue of the laws of the state of *New York* and located and having its principal place of business at the city of *New York*.

Third. — That heretofore, and prior to or about the year 1883, the defendant made and issued to one *D. D. Conover* two certain certificates or instruments in writing for 50 shares each of the capital stock of the said defendant, and under and by virtue of which certificates the holder thereof became the owner and entitled to receive 100 shares of the capital stock of the said defendant.

Fourth. — That thereafter, and on or about the 28th day of May, 1883, the said *D. D. Conover*, for value received, sold and transferred and delivered the two certificates aforesaid to the said *Joseph W. Burnham*, who thereupon became the owner thereof and entitled to receive the said 100 shares of capital stock.

Fifth. — That said plaintiff is informed and believes that the said certificates have been mislaid and lost and this plaintiff has been unable, notwithstanding diligent effort, to discover the whereabouts of the said certificates.

Sixth. That said plaintiff requested and demanded of the said defendant to make and issue to him 100 shares of the capital stock of the said defendant as required by the said two certificates, but said defendant refused so to do unless said certificates were produced and surrendered to the said defendant.

That said plaintiff offered and still offers and is willing to indemnify the said defendant against any loss, injury or damage to which it might be exposed or might suffer by reason of the existence of the two certificates and ownership thereof by other parties than the plaintiff.

That said defendant refused to accept such indemnity and issue said stock to said plaintiff, although as said plaintiff is informed and believes the said defendant has not issued the said stock upon said certificates and still has the said 100 shares of stock under its control and in its possession.

Wherefore said plaintiff prays judgment that the said defendant may be required to make and issue to said plaintiff certificates for 100 shares of the capital stock of the said defendant corporation, and that he have such other and further relief and judgment as may be just and proper in the premises, with the costs of this action.

Hahn & Myers, Plaintiffs' Attorneys,
237 Broadway, New York City.

City and County of New York, ss.:

Alexander P. W. Kinnan, the plaintiff in this action above named,

being duly sworn, says: That the foregoing complaint is true, of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Alex. P. W. Kinnan.

Sworn to before me this *19th* day of *February*, 1890.

J. Romaine Brown, Notary Public (265)
City and County of *New York*.

(2) JUDGMENT.¹

Form No. 18983.²

Superior Court of the City of New York.

Alexander P. W. Kinnan, as Executor
of the Last Will and Testament
of *Joseph W. Burnham*, deceased,
plaintiff,

against

*The Forty-second Street, Manhattanville
and St. Nicholas Avenue Railway
Company*, defendant.

This action being at issue upon the pleadings, and having been brought on to trial before me at a *special* term of this court, held on the *first Monday* of *June*, 1890, and the parties having interposed their proofs, and the court having made its findings of facts and conclusions of law and adjudged that the plaintiff is entitled to judgment against the defendant upon the merits, with costs and an extra allowance of *one hundred* dollars, and the costs having been duly adjusted by the clerk of this court upon notice, at the sum of *ninety-five and 87-100* dollars;

Now on motion of *Hahn & Myers*, plaintiff's attorneys, it is

Adjudged and decreed, that the plaintiff execute and deliver to the defendant a bond of indemnity in the usual form with sufficient sureties, conditioned in the sum of *ten thousand* dollars: That the plaintiff (*Alexander P. W. Kinnan*, as executor, aforesaid) will indemnify, save and hold harmless the defendant (*The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company*) free from all harm, damage or injury which may result to or by reason of the issuance of the certificates or instruments in writing for the *one hundred* shares of capital stock as hereinafter provided by this judgment, and it is also

Adjudged and decreed, that within *thirty* days after the approval by one of the justices of this court of the said bond of indemnity and the sufficiency of the sureties thereon, due notice of the justification of the sureties and the presentation of the bond for approval to be

1. For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

2. This is the form of judgment in

given to the defendant's attorney, the defendant, *The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company*, make, issue, execute to the plaintiff, *Alexander P. W. Kinnan*, as executor of the last will and testament of *Joseph W. Burnham*, deceased, a paper writing or certificate in due form stating and setting forth that *Joseph W. Burnham* was and is the owner of and entitled to the one hundred shares of the capital stock of *The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company*, and it is also

Adjudged and decreed, that the plaintiff, *Alexander P. W. Kinnan*, as executor of the last will and testament of *Joseph W. Burnham*, deceased, recover of the defendant, *The Forty-second Street, Manhattanville and St. Nicholas Avenue Railway Company*, the sum of one hundred and ninety-five and 87-100 dollars, costs and disbursements of this action, and that an execution in favor of the plaintiff and against the defendant issue therefor.

Ent.

R. O'G., J.
Thomas Boese, Clerk.

b. To Compel Transfer of Stock Upon the Books of the Corporation on the Surrender of Stock Certificate.

(1) COMPLAINT.¹

Form No. 18984.²

Supreme Court, City and County of New York.

George Rice
agst.

John D. Rockefeller, Charles Pratt, Benjamin Brewster, John D. Archibold, Henry H. Rogers, Wesley H. Tilford, Henry M. Flagler, William Rockefeller, John Doe and Peter Roe, as Trustees of the Standard Oil Trust. } Complaint.

The above named plaintiff, *George Rice*, complaining of the defendants herein by *Bartlett, Wilson & Hayden*, his attorneys, respectfully shows the court:

1. This plaintiff alleges, upon information and belief, that the *Standard Oil Trust* was created by an agreement in writing dated on or about the 2d day of *January*, 1882, as modified by a supplemental agreement dated on or about *January 4*, 1882.

That the principal office of the *Standard Oil Trust* is in the city of *New York* by the express provisions of said agreement made on or about *January 2d*, 1882.

That by the terms of said last mentioned agreement the said trust was vested in *nine* trustees.

That at the time this action was commenced there was a vacancy

1. For the formal parts of a complaint in a particular jurisdiction see the title COMPLAINTS, vol. 4, p. 1019. Rice v. Rockefeller, 134 N. Y. 174, and is copied from the records. A judgment was entered in favor of the plaintiff, which was affirmed.

2. This is the form of complaint in

in the number of said trustees, the then number thereof being but *eight*, and being the defendants named in this action other than *John Doe* and *Peter Roe*, who are fictitious defendants, joined to represent any of said trustees who might have been omitted from the summons as issued herein, this plaintiff being at that time ignorant of the full names of said trustees.

2. That said agreements were made by, or adopted by, all the stockholders and members of certain corporations, and limited partnerships therein named, or that might thereafter join in the same at the request of said trustees.

Also certain individuals therein named or that might thereafter join in the same at the request of said trustees.

Also a portion of the stockholders, and members of certain corporations, and limited partnerships therein named; also stockholders and members (not being all thereof) of other corporations and limited partnerships who might join in the same at the request of said trustees.

That the said stockholders and most of the other individuals making or adopting said agreements were and are interested as stockholders or otherwise, directly or indirectly, in the mining, manufacturing, refining and dealing in petroleum and all its products, and all the materials used in said business, and the kinds of business collateral thereto, or in some one or more of the branches or departments of said business above indicated, or growing out of the same and not mentioned herein; that by and under said trust, as provided for in said agreements, said trustees received from all or certain of said parties making or adopting said agreements certain bonds, stocks, moneys or property in trust, and issued therefor to the parties so transferring the same Standard Oil Certificates transferable on the books of said trustees.

That one of the objects of said agreements creating said trust was to secure to the said trustees the general supervision so far as practicable of the affairs of the various corporations, limited partnerships, and manufactories making or adopting said agreements or corporations formed in the plaintiff thereof by electing the directors and officers thereof.

That by virtue of said agreements the said parties so surrendering their bonds, stocks, moneys and other property as aforesaid for said certificates became the beneficiaries under said trust, as did the transferees of said certificates.

That as plaintiff is informed and believes, over *ninety millions* of dollars, par value, of said certificates have been issued from time to time by the trustees of said *Standard Oil Trust*.

That the said certificates have a regular market value, and are dealt in freely in the open market in the city of *New York*, and are held, as plaintiff is informed and believes, at the present time in considerable amounts and by many persons who are transferees thereof and not parties to said agreements.

That this plaintiff, by reason of the purchase of the certificates of the said *Standard Oil Trust* as hereinafter set forth, became and is a beneficiary under the said trust, and brings this action to compel

the said trustees to recognize his rights as such beneficiary and to discharge their duties as such trustees in the premises.

3. That on or about the month of *October, 1886*, this plaintiff purchased in good faith of *Orvis Brothers & Co.*, bankers, of *44 Broadway*, city of *New York*, *Standard Oil Certificate No. 1987* for *five* shares of stock duly issued to one *L. B. Mallaby* by the said trustees of said trust in the equity of the property held by the said trustees, paying therefor in his own money *one hundred and ninety* dollars per share in cash, the said certificate being thereupon duly transferred to plaintiff by said *L. B. Mallaby*. That a copy of said certificate and transfer is hereto annexed marked "*A*" and prayed to be taken as a part of this complaint.

That plaintiff is now the lawful owner and holder of said certificate, and has continued so to be since the purchase thereof as aforesaid.

4. That after the purchase of said *five* shares of stock as aforesaid, and prior to the *20th* day of *June, 1887*, a stock dividend was declared by said trustees, that amounted to *one* share of stock, as plaintiff is informed and believes, on said *five* shares of stock, and *Standard Oil Certificate* numbered *3057* for *one* share, was issued to said *L. B. Mallaby*, and by him duly transferred to this plaintiff, who has ever since been a lawful owner and holder of the same.

That a copy of said certificate and transfer are hereto annexed, marked "*B*," and prayed to be taken as a part of this complaint.

That said last mentioned certificate was so issued to said *L. B. Mallaby* as aforesaid for the reason that the said trustee had theretofore repeatedly refused, on demand of plaintiff, to recognize him as the legal owner of *five* shares of stock or to issue to him a new certificate in his own name therefor on surrender of the old certificate.

5. That on the *20th* day of *January, 1888*, and before the commencement of this action, this plaintiff appeared at the office of the trustees of said trust, No. *26 Broadway*, city of *New York*, the principal place of business of said trust, and made a formal written demand upon said *Standard Oil Trust*, its trustees, officers and agents, requiring them to transfer said *six* shares of stock to plaintiff (certificates No. *1987*, for *five* shares, and No. *3057*, for *one* share) upon surrender of the original certificates, and to issue to him a new certificate therefor in his own name, at the same time exhibiting said original certificates and transfers.

That a copy of said written demand is hereto annexed, marked "*C*," and prayed to be taken as a part of this complaint.

That said demand was not complied with but refused, and said *six* shares of stock still remain untransferred to this plaintiff on the books of said trustees, but are permitted to stand in the name of said *L. B. Mallaby*, who has no title or interest in the same whatever.

That some of the dividends on said stock have been paid, from time to time, to said *Mallaby*, who lays no claim whatever to the same, but pays them over to said *Orvis Brothers & Co.*, who pay them to this plaintiff.

6. That it is recited upon the face of the certificates of said stock

of the *Standard Oil Trust* that the transferee thereof shall be subject to all the provisions of the agreement creating said trust, and of the by-laws adopted in pursuance of said agreement, as fully as if he had signed the said trust agreement.

That before the commencement of this action, the plaintiff, in order to advise himself as to the rights and liabilities as a stockholder of the *Standard Oil Trust*, duly demanded of the said *Standard Oil Trust*, its trustees, officers and agents, an inspection of said agreement creating said *Standard Oil Trust* and of the by-laws adopted in pursuance of said agreement, and of any amendments or alterations of the same, or of either of them.

That said demand was not complied with, but was refused, and this defendant still remains wholly ignorant of the contents of said agreement and by-laws, or of the amendments and alterations of the same, by which this plaintiff is bound as fully as if he had signed said agreement, except that since this action was commenced plaintiff has seen newspaper extracts from said agreement, which were said to have been brought out in an investigation of the Senate of the state of *New York*.

7. That this plaintiff is wholly unable to secure the legal recognition of his rights as a stockholder as aforesaid by the trustees of said trust, and is utterly remediless in the premises unless a court of equity will compel said trustees to do what is right and just in the premises.

And this plaintiff is now deprived of the right of voting upon said stock, of attending meetings of the holders of said certificates and of enjoying sundry other valuable rights to which he is by law entitled.

Wherefore this plaintiff prays for the judgment of this court granting him the following relief, viz.:

1. That the said trustees of the said *Standard Oil Trust* be compelled to forthwith transfer to this plaintiff on the books of said trustees the aforesaid *six* shares of stock in said *Standard Oil Trust* on surrender to them of said certificates No. 1987 for *five* shares and No. 3057 for *one* share, hereinafter referred to, and to issue forthwith to this plaintiff, in his own name, a new *Standard Oil Trust* certificate for *six* shares of the said stock.

2. That said trustees hereafter pay to this plaintiff, or his lawful transferee, all dividends accruing on said *six* shares of stock, and accord to him all his legal rights as a certificate holder.

3. That said trustees, officers and agents permit this plaintiff to forthwith inspect the said agreement and by-laws referred to in the certificates of stock of said *Standard Oil Trust*, and any amendments and alterations of the same or every of them, and to take copies of such portions of the same as he may desire.

4. That this plaintiff recover of the defendants, as such trustees, his costs and disbursements of this action.

5. That this plaintiff have such other and further relief in the premises as may be just.

Bartlett, Wilson and Hayden,
Attorneys for Plaintiff,
48 Wall Street, *New York*.

State of *New York*,
City and County of *New York*. } ss.

George Rice, the plaintiff above named, being duly sworn, says: That the foregoing complaint is true, to the knowledge of the deponent, except as to the matters stated to be alleged on information and belief, and that as to those matters he believes it to be true.

George Rice.

Sworn to before me this *19th* day of *March*, 1888.

M. A. Potter, Notary Public,
New York County.

(2) JUDGMENT.¹

Form No. 18985.²

Supreme Court, City and County of New York.

George Rice

agst.

John D. Rockefeller, Charles Pratt, James McGee, John D. Archibold, Henry H. Rogers, Wesley H. Tilford, Henry M. Flagler, William Rockefeller and Oliver B. Jennings of the Standard Oil Trust. } Judgment.

The issues in this action having been regularly brought on for trial before Mr. Justice *Morgan J. O'Brien*, at a *special* term of this court, held on the *13th* day of *November*, 1889, and subsequent days of said term, at the county court-house, in the city of *New York*, and the summons in this action having been personally served on the defendants herein, *John Archibold, Benjamin Brewster and Henry M. Flagler*, and the other defendants having voluntarily appeared, viz.: *John D. Rockefeller, William Rockefeller, Henry H. Rogers, Wesley H. Tilford and Charles Pratt*; and all the said defendants having duly answered herein, and the court having heard the allegations and proofs of the parties and the argument of counsel, and after due deliberation having duly made and filed on the *14th* day of *January*, 1890, a decision in favor of the plaintiff against the defendants as trustees of the *Standard Oil Trust*, containing a statement of the facts found and the conclusions of law thereon, directing judgment as hereinafter stated; and the plaintiffs' costs and disbursements having been duly adjusted at *one hundred and fifty-five 67-100* dollars, and the summons and complaint having been duly amended by order of the court on the trial in pursuance of the stipulation of the parties hereto made in open court by inserting as defendants the name of *James McGee* in the place of *Benjamin Brewster*, and also adding as a ninth trustee of said *Standard Oil Trust* the name of *Oliver B. Jennings*;

Now, on motion of *Bartlett, Wilson and Hayden*, attorneys for the plaintiff, it is adjudged as follows, viz.:

1. That plaintiff purchased *Standard Oil Stock* certificate No. *1987*

1. For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645.

2. This is the form of judgment in *Rice v. Rockefeller*, 134 N. Y. 174, and is copied from the records. The judgment was affirmed.

for *five* shares in good faith for his own account, and has been ever since said purchase, and is now, the lawful owner and holder of the same.

2. That plaintiff has been ever since on or about the *20th* day of *June*, 1887, and is now, the lawful owner and holder of *Standard Oil Trust* stock certificate No. 3057 for *one* share.

3. That the plaintiff, by reason of his ownership of said *six* shares of *Standard Oil Trust* stock as aforesaid, became and is a beneficiary under said trust, and was and is entitled, on surrender to said trustees of said stock of the said *two* certificates representing said *six* shares of said stock, to have issued to him forthwith, and in his own name, a new certificate for *six* shares of said stock, and to have all necessary entries made on the books of the said trustees to effect and complete said transfer to him.

And the said defendants herein, as trustees of the *Standard Oil Trust*, are hereby ordered and directed to forthwith do and perform each and every act necessary to perform said stock to said plaintiff on the books of said trustees, and to constitute said plaintiff a record certificate holder in said *Standard Oil Trust* as the owner of said *six* shares of stock.

4. That said plaintiff, when accorded his rights as a transferee of said *six* shares of stock, will be subject to all the provisions and entitled to all the benefits and privileges of the agreement creating said trust, and of the by-laws adopted in pursuance of the said agreement.

5. That the trustees of said *Standard Oil Trust* must hereafter pay to the plaintiff all dividends accorded or accruing on said *six* shares of stock, and accord to him all his legal rights as a record certificate holder in said trust.

6. That there is nothing in the relation of plaintiff to the defendants and the *Standard Oil Trust* that should, as matter of law, prevent the transfer to him on the books of said trustees of said stock.

7. That the plaintiff do recover of said defendants, as trustees of the *Standard Oil Trust*, the sum of *one hundred and fifty-five* 67-100 dollars, costs and disbursements taxed as aforesaid.

New York, January 14, 1890.

Edward F. Reilly, Clerk.

c. To Recover Back Money Paid for Stock which Defendant Refused to Deliver.

Form No. 18986.

(Precedent in *Eaton v. Pacific Nat. Bank*, 144 Mass. 261.)¹

[(*Title of court and cause as in Form No. 6942.*)]²

The plaintiff says that on the *twenty-eighth* day of *September*, 1881, she paid to the defendant *four thousand* dollars, which it then agreed

1. There was a judgment for the plaintiff for four thousand dollars with interest from January 10, 1882, the date of her demand. 2. The matter to be supplied within [] will not be found in the reported case.

to apply in payment for *forty* shares, of the par value of *one hundred* dollars each, of capital stock in the *Pacific National Bank* in an increase of said capital stock in the amount of *five hundred thousand* dollars, which increase of *five hundred thousand* dollars it then agreed to make, and to issue to her, within a reasonable time after the said *twenty-eighth* day of *September*, *forty* shares of said increase of capital of the par value of *one hundred* dollars each. And the plaintiff says that the defendant did not so apply said *four thousand* dollars for the use and benefit of the plaintiff, as it was bound to do, and it did not, within a reasonable time thereafter, issue and give to her, nor has it at any time issued or given to her, *forty* shares of said stock, of the par value of *one hundred* dollars each, in an increase of *five hundred thousand* dollars of said capital stock, as it agreed to do, but has wholly failed so to do, and it owes her said *four thousand* dollars, with interest thereon since the same was paid to it as aforesaid.

[(Signature as in Form No. 6942.)]¹

d. To Recover Damages for a Refusal to Issue Certificates of Corporation Stock in Lieu of Certificates of Shares of an Unincorporated Association Out of Which Corporation was Formed.

Form No. 18987.

(Precedent in *Baltimore City Pass. R. Co. v. Sewell*, 35 Md. 240.)²

[[Commencement as in Form No. 6941]]¹ for that whereas heretofore, to wit, on the *11th* day of *May*, in the year *1860*, a certain *Jonathan Brock* (and others, naming them), being the assignees of certain city passenger railway franchises, acquired under an ordinance of the Mayor and City Council of *Baltimore*, entitled "An Ordinance empowering William H. Travers, and others, to build and lay down tracks for a Passenger Railway on Baltimore and other streets," approved March 28th, 1859, and being also the holders of certain estate and property, real and personal, in the city of *Baltimore*, did by certain articles of agreement, under seal, bearing date on the day and year aforesaid, and duly executed, acknowledged and recorded to affect real estate in the city of *Baltimore*, constitute themselves into an association, under the name of the *Baltimore City Passenger Railway Association*, for the purpose of using and operating the railway franchises, conferred by said ordinance, under the provisions, terms and stipulations contained in said articles; and did, thereby, among other things provide that the beneficial interest in the properties, rights and franchises of said association should be divided into *forty thousand* equal parts or shares, of the par value, when paid up, of *\$50* per share; which parts or shares should be, and they were thereby declared to be personal estate, and transmissible as such to the personal representative of a deceased shareholder and transferable only

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the first of the three counts in the declaration, all in the same form,

but upon different certificates. There was a verdict for the plaintiff and a motion in arrest of judgment was overruled.

on the books of said association, in person or by attorney, as the by-laws of said association might provide; and did thereby apportion to the said *Jonathan Brock*, as representing fully his separate interest in said association, *six thousand eight hundred and forty* of said parts or shares, and did thereby prescribe the form of certificate, to be issued by said association, for a share or shares of said stock; which form of certificate was so framed as to make the certificates, which might be issued for a share or shares of said stock, transferable only in the manner and under the conditions and qualifications set forth in a certain deed executed by *William S. Taylor* to *Jonathan Brock* and others, and which deed, the plaintiffs aver, bears date (*alleging date*).

And the plaintiffs further say, that in and by said deed it is provided that said certificates shall be transferable only on the books of the association, in person or by attorney, as the by-laws of said association might provide. And that in and by said by-laws it was provided that certificates of stock should be issued to the stockholders, and transfers made when required, said certificates to be signed by the president and treasurer, and authenticated by the seal of said company. And that in and by said articles of agreement provision was made for procuring the passage, by the General Assembly of *Maryland*, of an act incorporating the said association; upon the passage of which, and the acceptance thereof, by shareholders holding a majority of the shares, all the parties to said articles of agreement were, by the terms thereof, to be bound by such acceptance, and to unite in all such acts and proceedings as might be necessary to the incorporation of said association, and its efficient action as such.

And thereupon, afterwards, to wit, on the *21st* day of *May*, in the year 1860, the said *Baltimore City Passenger Railway Association*, under and by virtue of, and in conformity with, said articles of agreement, did issue and deliver to the said *Jonathan Brock* a certificate in the form prescribed in said articles, sealed with the seal, and signed by the president and treasurer of said association, numbered *195*, for *twenty* shares of the capital stock of said association, in which it was acknowledged that upon each of said shares the sum of *\$15.75* had been paid. And thereupon, afterwards, to wit, on the *20th* day of *August*, in the year 1860, the said *Jonathan Brock* [for a valuable consideration],¹ by a certain assignment under his hand and seal, did authorize the plaintiff to transfer to any person or persons *forty* shares of said capital stock, and did then deliver the said certificate and another like certificate for other *twenty* shares of said

1. The words within [] have been supplied to satisfy an objection made by the defendant to the declaration that it did not appear that the plaintiffs were bona fide assignees. The court said of this declaration: "It may be true that the [plaintiffs] must be bona fide assignees to entitle them to recover, but where the declaration avers an assignment under seal, accompanied

by a delivery of the certificates of stock, the Court will, on a motion in arrest of judgment, presume that the assignment was made for a bona fide consideration, and that the jury so found. We are not to be understood, however, as intimating that the declaration would have been bad on demurrer because it does not aver an assignment for a valuable consideration."

capital stock, numbered 196, with the said assignment attached thereto, to the plaintiffs. And afterwards, by a certain act of the General Assembly of *Maryland*, passed on the 13th day of February, in the year 1862, entitled "An Act to incorporate the Baltimore City Passenger Railway Company," certain *Henry Tyson*, and others, their associates, assignees of all the rights, powers and privileges conferred by the aforementioned ordinance of the Mayor and City Council of *Baltimore*, were incorporated by the name and style of the *Baltimore City Passenger Railway Company*, for the purposes and with the powers and subject to the restrictions and limitations set forth in said act; and it was by said act declared, that, upon the acceptance thereof by the said persons last named and others, their associates, all the property of every description acquired and held by them, for the purposes mentioned in, and to carry out the provisions of the aforesaid ordinance, should become vested in said corporation. And it was also thereby enacted, that the capital stock of said corporation should consist of *forty thousand* shares of the par value of \$25 per share, to be distributed among the persons last named and others, their associates, in proportion to their respective interests in and under the said ordinance, to be by them ascertained at the time of their acceptance of said act, and that the property of the persons last named and others, their associates, by said act vested in said corporation, should be estimated as of the value, and taken and accepted by said corporation as a payment of \$15.75 per share on the capital stock of said corporation, and that the said corporation should have power from time to time to call in such further instalments on said capital stock, but none other, as should be found necessary to carry into effect the purposes of said act, the said instalments to be paid by the holders of the said capital stock at the time and times at which such calls should be actually made; provided such further instalments, with the payment of \$15.75, to be made by the transfer of the property of the said persons last named and others, their associates, as aforesaid, should not exceed in the whole the sum of \$25 per share. And it was thereby also further enacted that the said act should go into operation immediately after the passage thereof, and after the said persons last named and others, their associates, or their attorneys or agents, should declare their acceptance thereof by writing under their hands, or the hands of their attorneys or agents, to be execute' in duplicate, and should file one of said duplicates with the clerk of the *Superior Court of Baltimore city* for enrollment among the Land Records of said city, and deliver the other to the register of the city of *Baltimore*.

And the plaintiffs further say, that the said Act of Assembly was afterwards duly accepted as required thereby, and all the prerequisites to making the same operative, and constituting the said *Baltimore City Passenger Railway Company*, which is the defendant in this action, a body corporate, clothed with the powers, rights and liabilities contemplated by said act, were duly complied with, and by reason thereof all the franchises, property and interests represented by the shares of stock, for which certificates had been issued by the *Baltimore City Passenger Railway Association*, became and were

vested in the defendant. And that subsequent to its incorporation as aforesaid, and prior to the *11th* day of *October*, in the year 1862, the defendant, as authorized by said act of incorporation, did call in a further instalment of \$1 per share upon its capital stock, and did, subsequent to such call, to wit, on the day last named, receive from the plaintiffs in respect of the *twenty* shares of said capital stock, to which they were entitled by reason of the assignment to them as aforesaid of the said certificate No. 195 for *twenty* shares of capital stock of the *Baltimore City Passenger Railway Association*, and the transfer to the plaintiffs, as hereinbefore stated, of the property and franchises represented by said *twenty* shares of stock, the said sum of \$1 per share, and did, by its treasurer, indorse a receipt for the same upon said certificate, thereby recognizing the plaintiffs as the rightful holders or owners of *twenty* shares of the capital stock of the defendant. And the plaintiffs thereupon, afterwards, to wit, upon the *24th* day of *June*, in the year 1867, and on divers days thereafter, and before the bringing of this suit, being at said times the holders of the certificate aforesaid, did apply to and require the defendant to issue to them in lieu of said certificate, which they then offered to surrender, a certificate for an equal number of shares of the capital stock of the defendant, in accordance with the formalities required by its charter, which they then offered and expressed their willingness in all things to observe, and did also then require the defendant to pay to them all dividends declared by it upon said shares of stock; but the defendant not regarding its duty and liability in the premises, did wholly refuse at the respective times of such application and requirement, and still doth refuse to issue and deliver to the plaintiffs a certificate for the said *twenty* shares of its capital stock, or to pay to them the dividends declared thereon. [And the plaintiff (*concluding as in Form No. 6941*).]¹

e. To Recover Damages for a Refusal to Receive Certificates of Its Stock and to Transfer on its Books Stock Represented by such Certificates.

Form No. 18988.²

Supreme Court, New York County.
The Fifth Avenue Bank of New York, Plaintiff, }
 vs. }
The Forty-second Street and Grand Street Ferry }
Railroad Company, Defendant. }

The complaint of the *Fifth Avenue Bank of New York*, the above named plaintiff, respectfully shows to this court and avers on information and belief:

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the form of complaint in *Fifth Ave. Bank v. Forty-second St., etc., R. Co.*, 137 N. Y. 231, and is copied from the records. The defense of the defendant was that the certi-

icates were spurious and that the signatures thereto of the defendant's president had been forged by his secretary, Allen. There was a judgment in favor of plaintiff on the verdict directed by the court, which was affirmed in the court of appeals.

1st. That the plaintiff and the defendant are each domestic corporations, and were such corporations at all the times hereinafter mentioned, the plaintiff carrying on a general banking business, and the defendant owning and operating a street railroad in the city of *New York*.

2d. That the capital stock of said defendant is *seven hundred and fifty thousand* dollars, divided into *seven thousand five hundred* shares of *one hundred* dollars each.

3d. That said defendant has for many years issued its said stock upon engraved certificates, taken from its stock certificate book, in a form approved by it, and with a blank form of transfer and power of attorney endorsed thereon, likewise approved by it, said certificates being subscribed by or with the name of the president of said company and countersigned by the treasurer and transfer agent of said company and evidenced by its corporate seal affixed thereto.

4th. That, during the years 1884 and 1885, *Charles Curtis* was the president of the defendant and *Eben S. Allen* was its secretary and treasurer and transfer agent and, also, a director thereof.

5th. That said *Eben S. Allen*, as such officer of defendant, was entrusted by said defendant with the custody of its corporate seal and stock certificate book, and stock certificates signed in blank by its president, and its other books and papers, and with the care, custody and management of its office and business, and was authorized and allowed by defendant to fill out, sign, seal and issue certificates of its stock and to receive and make transfers thereof, and to answer inquiries in respect to said stock and transfers thereof, and generally to do and perform on behalf of said company all acts and things necessary or convenient for the management of its office and official business, and said *Allen* did all of said acts during the time that he had held such offices, with the knowledge and acquiescence of the defendant.

6th. That on the *2d* day of *October*, 1884, the said defendant duly issued its stock certificate No. 998 upon one of said engraved forms, signed by its said president and countersigned by its said treasurer and transfer agent and sealed with its corporate seal, to one *F. W. Hofele* named therein, for *fifty* shares of its capital stock, and said treasurer and transfer agent thereupon delivered said certificate to said *Hofele* for value.

7th. That on the *sixth* day of *February*, 1885, the said defendant duly issued its stock certificate No. 1002 upon one of the said engraved forms, signed by its president, and countersigned by its said treasurer and transfer agent, and sealed with its corporate seal, to said *F. W. Hofele* named therein, for *one hundred and sixty* shares of its said capital stock, and said treasurer and transfer agent thereupon delivered said certificate to said *Hofele* for value.

8th. That subsequently the said *F. W. Hofele* applied to this plaintiff for loans of money and offered to hypothecate the said shares of defendant's stock then held by him as security therefor, and presented said certificates therefor, as evidence of his ownership thereof. That before loaning any money to said *Hofele*, said

plaintiff duly inquired of defendant, at its said office, whether said stock was owned by said *Hofele*, and at the same time presented to defendant the said certificate No. 1002 for *one hundred and sixty* shares and duly inquired of said defendant whether the said certificate was genuine and valid, and informed defendant that such inquiry was made because a loan had been applied for upon the security of said stock, and said defendant thereupon stated to plaintiff that said certificate was genuine and valid and that said *Hofele* was the owner of said stock. That plaintiff believed said statements to be true, and relying upon said statements, and, also, upon said certificate and the statements contained therein, and, also, upon said certificate No. 998 for *fifty* shares of said stock, which was subsequently hypothecated to plaintiff as additional security, and upon the statements contained therein, the plaintiff, in good faith, loaned large sums of money to said *Hofele* upon the security of said stock and certificates, and received from him his note or written obligation to repay the same, and, as collateral security therefor, the said certificates of stock with a power of attorney to transfer and assign the same and authority to sell said stock for the payment of said loans with interest; and, from time to time, plaintiff renewed said loans upon the said belief and reliance, and in good faith and in like manner, and upon the same security, so that in the month of *August*, 1889, the said *Hofele* was unjustly indebted to this plaintiff, upon such loans made, renewed and secured as aforesaid, in the following sums, viz.:

Note dated <i>June 11</i> , 1889, due <i>Sept. 10</i> , 1889.....	\$28,000
“ “ <i>July 15</i> , 1889, due <i>Sept. 10</i> , 1889.....	500
“ “ <i>July 27</i> , 1889, due on demand.....	2,000

9th. That, on the *5th* day of *August*, 1889, this plaintiff at the request of said *Hofele*, and in good faith, acting in the belief and reliance aforesaid, offered the said *two hundred and ten* shares of stock for sale for the sum of \$209.12 1-2 per share, which was the market value of the stock of said defendant of that day, and found a purchaser therefor at that price, who, in good faith, and in belief induced by the said certificates, and the statements contained therein, that the same were genuine and valid, and in reliance thereon, paid to plaintiff the sum of \$43,916 25-100 therefor, and received from plaintiff the said certificates, with the power of attorney to transfer or assign the same. That said purchaser thereupon duly applied to the defendant for the transfer thereof, but said defendant refused to transfer the same, or to recognize said stock, or certificates, as valid, alleging, as its reason therefor, that said *Hofele* was not and never had been a stockholder in said company, and that said certificates were spurious; and thereupon the said defendant caused the words “no good” to be written across the face of said certificates, and with said writing thereon returned them to said purchaser. That, in the meantime, acting in the belief and reliance aforesaid, and in good faith, this plaintiff had expended the said sum of \$43,916.25 as follows:

For broker's commissions on said sale.....	\$26 25
For note of <i>June 11</i> , 1889, due <i>Sept. 10</i> , 1889.....	28,000 00

For note of <i>July 15</i> , 1889, due <i>Sept. 10</i> , 1889.....	500 00
	\$28,500 00
Less rebate of interest.....	166 25
	\$28,333 75
For note due <i>July 27</i> , 1889, and interest.....	\$2,003 00
For <i>F. W. Hofele</i>	13,579 50

That immediately upon the refusal of the defendant to recognize or transfer the said stock, or certificates, said purchaser tendered back to this plaintiff the said stock certificates, with the power of attorney to transfer and assign the same indorsed thereon, and the said declaration written upon the face thereof, and demanded restitution of said sum of \$43,916.25, with interest, from this plaintiff, on the ground of defendant's repudiation thereof, and plaintiff repaid to said purchaser the said sum of \$43,916.25, with interest from *August 5*, 1889, and received said dishonored certificates.

10th. That the said purchaser of said stock thereupon assigned and transferred to this plaintiff all his costs of action, claims and demands against the defendant arising out of the transactions aforesaid.

11th. That subsequently plaintiff duly presented said certificates, with power of attorney to transfer or assign the same indorsed thereon, to the defendant, and duly demanded of defendant a transfer of said stock to this plaintiff, and that this plaintiff be admitted as a shareholder in said corporation defendant of said *one hundred and sixty* shares, respectively, but said defendant has refused each of said demands, and insists that said stock and certificates are spurious and void.

12th. That by reason of the premises plaintiff has suffered damage in the sum of *forty-three thousand nine hundred and sixteen* dollars and *twenty-five* cents (\$43,916.25), with interest from *August 5th*, 1889.

Wherefore plaintiff demands judgment against the defendant for *forty-three thousand nine hundred and sixteen* dollars and *twenty-five* cents, with interest from *August 5th*, 1889, besides the costs of this action.

Edward C. James, Attorney for Plaintiff,
No. 31 Nassau Street, New York.

State of *New York*,
City and County of *New York*. } ss.:

A. R. Frissel, being duly sworn, says that he is president of the *Fifth Avenue Bank of New York*, the above named plaintiff; that the reason why this verification is not made by the plaintiff is because it is a corporation; that deponent has read the foregoing complaint, and knows the contents thereof, and the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. R. Frissel.
Volume 17.

Subscribed and sworn to before me this 16th day of November, 1889.

Thos. W. Adams, Notary Public,
New York County.

**f. To Rescind Subscriptions to Stock and to Recover Instalments
Paid Thereon on the Ground of False Representations.**

Form No. 18989.¹

Supreme Court of New York.

Place of trial, county of *Kings*.

John F. Talmadge

vs.

} Amended Complaint.

The Sanitary Security Company.

The plaintiff, by *James McKee*, his attorney, complains of the defendants, and thereupon alleges:

First. — On his information and belief, that said defendants are a domestic corporation; that a certificate of incorporation was filed on or about *July 10, 1894*, in the office of the Secretary of State, at *Albany*, and in the office of the county clerk, in the *city and county of New York*.

Second. — That thereafter said corporation, by their authorized agents and incorporators, proceeded to solicit subscriptions to their capital stock.

Third. — That on or about *January, 1895*, at various days of said month, the defendants, by their authorized agents and promoters, represented to plaintiff that said corporation had been in all respects duly and legally incorporated under and pursuant to the statutes of this state; that they had then entered upon the transaction of business, which was already upon a foundation assuring success; that the capital stock of the company had been substantially all subscribed for and taken; that a limited number of shares had been reserved which said corporation and their promoters desired taken by business men residing in *Brooklyn*, which city was to be a large field of the company's business; that the stock was so far taken and was in such demand that no more than \$10,000 in par thereof could be obtained by plaintiff and certain other gentlemen named residing in *Brooklyn* who the company desired to become stockholders; that a certain amount of stock which was fully paid and of lawful issue was so far controlled by the corporation, and that it would be distributed as a bonus in addition to stock which might be subscribed for and fully paid for in cash; that among the original subscribers to the stock of the corporation were Doctor *Joseph H. Raymond*, formerly health officer of the city of *Brooklyn*, and *George E. Waring, Jr.*, commissioner of public works in the city of *New York*.

Fourth. — In reliance upon said representations, and in the belief that they were true, plaintiff, on or about *January 8, 1895*, subscribed for *twenty* shares of the stock of said corporation of the par value of

1. This is the form of complaint in from the records. Judgment was entered in favor of the defendant, which N. Y. App. Div. 498, and is copied was reversed and a new trial granted.

\$50 each, and in like reliance and belief paid to said corporation on account of such subscription the sums of \$100 on or about *January 8, 1895*, \$100 on or about *February 7, 1895*, \$100 on or about *March 9, 1895*, \$100 on or about *April 2, 1895*, and \$100 on or about *May 5, 1895*, and in all \$500.

Fifth. — On his information and belief, plaintiff alleges that said representations so relied upon were in material respects false, in that in fact at the time said subscription was made and said corporation had not lawfully engaged in any business whatever, half of their capital stock not having been subscribed and no certificate having been filed pursuant to the statute in such case made and provided, that *one-half* of their capital stock had been in good faith subscribed, and in that they had not lawfully or otherwise got their business upon a foundation assuring success, and in that the capital stock had not been substantially all subscribed for and taken, but a very small portion thereof had been subscribed for, and there was a large amount of stock, much exceeding \$10,000, for which the corporation was seeking subscribers; and in that there was no other paid stock lawfully or rightfully issued which could be distributed as a bonus, and that neither said *Joseph H. Raymond* nor said *George E. Waring, Jr.*, were original subscribers to the stock of the corporation, but they were merely holders of a few shares each, which had been bestowed upon them gratuitously to induce and qualify them to act as directors. And on his information and belief, plaintiff further alleges that said representations were known by defendants to be false, and were, together with the concealments hereafter set forth, made with intent to deceive and mislead plaintiff.

Sixth. — Plaintiff further charges and alleges that at the times said representations were made the plaintiff paid said amounts to the said corporation, and their agents and promoters were in duty bound to make known and disclose all the circumstances of the organization, whereas besides making and suffering to be made the various representations above set forth, as plaintiff is informed and believes, were wrongfully concealed and suffered to be concealed from him material facts which, if made known, would have led plaintiff to refrain from making such subscription, among other facts so concealed that the president and chief promoter of said corporation, being the owner of said patent right or rights of doubtful and unknown value, had transferred the same to a third party upon a nominal consideration, who in turn assigned the same to said corporation in exchange for \$30,000 of stock of the corporation upon an understanding that said stock be given or distributed as a bonus to induce cash subscriptions, and that the president and secretary claimed \$20,000 against said corporation for labor done, and for which stock in that amount was issued to them. And, on his information and belief, plaintiff alleges that said stock issued for said patent right or rights was so issued for less than its par value, and said stock issued for said alleged labor done was so issued for less than its par value, and that the labor which was made a basis for said issue of stock was labor done before said corporation was authorized to engage in the transaction of business, and for which the corporation had come under no lawful obliga-

tion. And on his information and belief, plaintiff alleges that the arrangements and transactions under which said stock was issued for said patent rights and for said labor were by the wrongful and unlawful procurement of the officers and promoters of said corporation. Nevertheless, as plaintiff is informed and believes, on or about *February 7, 1895*, said corporation, by their officers, caused to be filed a certificate in the office of the clerk of the county of *New York* setting forth that *one-half* of the capital stock of said company had been in good faith subscribed, whereas, as plaintiff is informed and believes and alleges, at the time of filing said certificate, less than *\$25,000* of the nominal capital of *\$100,000* had been in good faith subscribed.

Seventh. — On his information and belief, that the certificate purporting to incorporate said company was filed on or about *July 10, 1894*, but no certificate was filed, in pursuance of the statute in such case made and provided, certifying that *one-half* the capital had been paid in within *one* year, and such payment was not in fact so made, by reason whereof said corporation has become liable to dissolution.

Eighth. — That notwithstanding the facts set forth in the foregoing paragraphs, the said defendants, as plaintiff is informed and believes, are continuing business as such corporation and incurring liabilities, and are claiming and asserting that plaintiff is a subscriber to the stock to the extent of *twenty* shares thereof, and are suffering plaintiff's name to remain on the books as a subscriber to such stock, so as to appear to creditors to make plaintiff liable as such stockholder; and the commission and continuance of such acts during the pendency of the action will produce injury to the plaintiff. That plaintiff has tendered back and returned to said defendants all certificates of stock issued to him, and has duly demanded a rescission of his agreement to take such stock, and a return of the money paid by him on account thereof.

Wherefore plaintiff asks judgment that the subscription made by him for said stock of said *Sanitary Security Company* be canceled and adjudged null; that the defendants account to plaintiff and pay over the *\$500* paid in by him on account of said subscription; that the defendants be enjoined and restrained from incurring any liabilities of such corporation while retaining said plaintiff's subscription, and for such other and further relief as may be just, besides costs.

(Verification.)¹ *James McKee*, Plff's Atty.,
32 Nassau Street, New York City.

g. To Restrain Forfeiture of Shares of Stock for Alleged Nonpayment of Assessment.

Form No. 18990.²

Supreme Court, Queens County.

Louis Schuetz

against

The German-American Real Estate Company. }

The complaint of the plaintiff alleges:

1. Verification. — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the form of complaint in *Schuetz v. German-American Real Estate Co.*, 21 N. Y. App. 163, and is

First: That the plaintiff resides at *Hollis, Queens county, New York*, and that the defendant is a domestic corporation duly incorporated under the laws of the state of *New York*, and doing business in the counties of *Kings* and *Queens* under the corporate name of "*The German-American Real Estate Company*."

Second: That plaintiff is a stockholder in said defendant corporation and owns *145* shares of its capital stock.

Third: That since the organization of said company in *May, 1892*, there has been a running account between the plaintiff and the defendant, the defendant becoming and being indebted to plaintiff for the purchase price of land, and for various sums of money advanced and paid out by the plaintiff, for and on account of the defendant and for services rendered by the plaintiff to the defendant, and the plaintiff has become indebted to the defendant upon various assessments or calls on account of his subscription to shares of stock of the defendant corporation.

Fourth: That plaintiff has been unable to obtain a statement of the account existing between plaintiff and defendant, although the same has been duly demanded, and while plaintiff claims that the defendant is indebted to him the defendant claims that plaintiff is indebted to it, in the sum of *\$825.13* on account of the assessment called in the month of *May, 1893*, and the said defendant threatens that unless the said sum of *\$825.13*, be paid by the plaintiff to defendant on or about the *12th* day of *September, 1893*, that it, the defendant, will forfeit all of plaintiff's holdings in said company, notwithstanding the fact that plaintiff has paid to and said defendant has received on account of assessments called since *May, 1893*, the sum of *\$3,600* in cash.

Wherefore plaintiff demands judgment.

First: That an accounting be had of the transactions between the plaintiff and defendant.

Second: That plaintiff have judgment against defendant for the sum found due him upon said accounting.

Third: That defendant be enjoined and restrained from taking any action to forfeit plaintiff's stock, or the subscriptions paid thereon.

Fourth: That plaintiff have such other and further relief as may be just, including the costs of this action.

Dated *November 4th, 1893*.

F. H. Van Vechten, Plaintiff's Attorney.

Office and P. O. Address, *44 Broadway, New York City*.

(*Verification*).¹

copied from the records. There was a judgment in favor of the plaintiff, which was affirmed.

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. Against Corporation and Its Officers.

- a. To Charge Officers with Money which They Unlawfully Voted Themselves and with Damages Caused by Fraudulent Sale of Land.

Form No. 18991.¹

Supreme Court, Kings County.

Charles C. Young

agst.

William F. Drake, Albert L. Pritchard,
Charles Curtiss and The Smith and
Parmelee Gold Company. }

The complaint of *Charles C. Young*, the owner of *one thousand* shares of the capital stock of the *Smith and Parmelee Gold Company*, in behalf of himself and of all the other stockholders who will join herein, shows:

First. That the *Smith and Parmelee Gold Company* was organized as a mining corporation, under and by virtue of the General Laws of the state of *New York* relating to mining corporations, in the month of *January, 1864*, with a capital of *\$2,500,000* divided into *125,000* shares of *\$20* each, having *five* trustees to manage the business of the company, and the principal place of business being the city of *New York*.

Second. That defendants *William F. Drake* and *Albert L. Pritchard*, were elected trustees of said company in the month of *September, 1868*; and defendant *Charles Curtiss* in the month of *January, 1869*; two other trustees, *Rufus Hatch*, being elected in *January, 1870*, and *Jacob B. Jewett*, in *January, 1871*; all of whom have been re-elected and remained such trustees, and now are, and on the *11th* day of *January, 1869*, the said *A. L. Pritchard* was elected president, and the said *W. F. Drake*, treasurer thereof, and have ever since continued to hold said offices. And at the time of said election, no salary was attached to either office, and, as plaintiff is informed and believes, never had been.

Third. That at the meeting of the trustees of said *Smith and Parmelee Company*, on the *26th* day of *September, 1870*, at which were present the said defendants, *Drake, Pritchard* and *Curtiss*, the said *Hatch* and *Jewett* not being present and the attendance of the said *Drake* being necessary to make a quorum for the transaction of business, it was resolved that on some pretense of business, defendant *Drake* should be allowed his expenses in visiting *Colorado*, which were by him claimed to amount to *two hundred and seventy-five* dollars.

Fourth. That at the meeting of the trustees on the *30th* day of *November, 1870*, at which were present the defendants *Drake, Pritchard* and *Curtiss* only, and the attendance of *Pritchard* being necessary to make a quorum for the transaction of business, it was resolved that the said *Pritchard* should receive a compensation of

1. This is the form of complaint in *Young v. Drake*, 8 Hun (N. Y.) 61, and is copied from the records. A demurrer to the complaint was overruled.

three hundred and fifty dollars for some pretended services in exchanging capital stock for stock of the *New York Gold Mining Company*.

Fifth. And at another meeting of the said trustees on the 9th day of *January*, 1871, at which were present the said *Drake*, *Pritchard* and *Curtiss* only, and the presence of the said *Pritchard* and *Drake* being necessary to make a quorum, it was voted that the said *Pritchard* and *Drake*, who were the president and treasurer of the company, should be allowed two years' salary from *January* 11, 1869, to *January* 9, 1871, at one thousand dollars each per annum, and the treasurer was directed to pay the same.

Sixth. That in pursuance of such resolutions the said *Pritchard* received from the treasurer on or about the same day the sum of \$350, and also the further sum of \$1,150 on account of salary, and the said *Drake* took from the company funds in his hands as treasurer the sum of \$275, and the further sum of \$1,150 on account of salary.

That the said *Pritchard* and *Drake*, for the \$850 balance of salary respectively and also for the further sum of \$166.66 added thereto by each for salary beyond the time specified in said resolutions, with the knowledge and assent of the said *Curtiss*, procured judgment against the company in the *District Court of Gilpin county, Colorado*, where the company's mining lands were situated, which judgments were entered in *May* term, 1871, each for the sum of \$1,066.66. That executions were issued thereon to the sheriff of the county aforesaid under which sales were made of the mining lands, mills and machinery of said *Smith and Parmelee Company* in *Colorado*, aforesaid, in 1871, of great value but on a single bid only in the interest of the plaintiffs in the judgments to an amount sufficient only to cover or pay the said judgments. Whereby the said *Smith and Parmelee Company* were divested of the lands, etc., so sold, and sustained great damages by reason thereof. The plaintiff avers that the said judgments were recovered and enforced by the said *Pritchard* and *Drake* in collusion each with the other, and the defendant *Curtiss* had knowledge of all the proceedings and concurred therein, the third making a majority of the trustees.

Seventh. Plaintiff claims and insists that the resolutions of the trustees by which the sums aforesaid were given to the said *Pritchard* and *Drake* were void in law, and that the said defendants *Pritchard*, *Drake* and *Curtiss* are liable for the amounts so unlawfully voted and paid to said *Pritchard* and *Drake*. That the recovery of judgments for the residue claimed under said resolutions for the additional sum of \$166.66 added thereto without any authority whatever was invalid, and that the said *Pritchard*, *Drake* and *Curtiss* ought to answer for the loss to the company of the property sold under executions issued upon such judgments.

Plaintiff avers that he is the owner of one thousand shares of the capital stock of the *Smith and Parmelee Gold Company*.

Plaintiff therefore claims judgment against defendants *Pritchard*, *Drake* and *Curtiss*:

1. For the amounts respectively paid to the said defendants *Pritchard* and *Drake*, under the resolutions aforesaid, viz., the sum

of \$1,500 paid to said *Pritchard*, and the sum of \$1,425 paid to said *Drake*, with interest thereon from the 9th day of *January*, 1871.

2. That the said defendants *Pritchard*, *Drake* and *Curtiss* be also charged with the amounts realized upon the sale of the lands aforesaid in satisfaction of the said judgments and with the damages which have been sustained by the company by reason of the sale of the lands, etc., under such judgments in manner hereinbefore stated.

3. That a receiver be appointed to whom shall be paid the money that by the judgments of this court defendants *Pritchard* and *Curtiss* shall be held liable for by reason of the fraudulent transactions herein set forth, and that proper directions to such receiver for the distribution of such moneys or property or its proceeds to the stockholders as they should be respectively entitled.

And that judgment be rendered therefor for such further and other relief as upon the facts proved shall be deemed just.

A. H. Dana, Att'y for Plff's.

(*P. O. and office address.*)

(*Verification.*)¹

b. To Restrain Payment of Money Voted by Officers to Themselves as Salaries, and for an Accounting.

Form No. 18992.³

Supreme Court, Kings County.

William Zeigler
against

Joseph C. Hoagland, Cornelius Hoagland,
Raymond Hoagland and the Royal
Baking Powder Company.

The plaintiff complains:

1. That the *Royal Baking Powder Company* above named is a domestic manufacturing corporation, having been duly organized on or about *March*, 1873, under chapter 40, of the Laws of 1848; and it has ever since been and now is engaged in the manufacture and sale of baking powder, an article of culinary use.

2. That the plaintiff and the defendants *Joseph C.* and *Cornelius N. Hoagland* and one *John H. Seal*, since deceased, were the incorporators of the said company, and at the beginning owned all of its capital stock, which was and is divided into 1,600 shares of the par value of \$100 each.

3. That the plaintiff worked hard from the beginning in establishing the business of the said company, and enlarging and developing the same. He traveled through the whole country introducing its goods into market and use, to that end even distributing free samples from house to house. The result of his work was to create

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the form of complaint in *Zeigler v. Hoagland*, 52 Hun (N. Y.) 385, and is copied from the records. There was a judgment for the plaintiff, which was affirmed.

a demand for the said goods and increase the same from year to year, so that the business of the said company was firmly established, and increased and prospered up to *January*, 1887, when the plaintiff was deprived of all participation in the management of the said company as hereinafter set forth.

4. That during all the said time the plaintiff was a trustee of the said company, and he was secretary thereof up to 1876, when he became treasurer of the company, which latter office he continued to hold until *January*, 1887, and that during such connection with the management of the said company he devoted his efforts honestly to advancing the property of the said company. He systemized its business, and placed it in such easy working order that the work of its officers was and is reduced to a mere supervision; and the said company did and does employ agents and superintendents to do its active and skilful work.

5. That up to *January*, 1887, the officers chosen by the trustees of the said company were a president, a secretary and a treasurer, and the salaries of the said officers were \$1,800 per year each, which was deemed by the trustees a reasonable compensation for the duties performed. The defendant *Joseph C. Hoagland* was president, the plaintiff was treasurer, and *Jacob D. Dettmer* was secretary until in 1886, when he sold his stock to the plaintiff and retired from the said company. The only other stockholder of the said company was the defendant *Cornelius N. Hoagland*, who retired from all work or active management in the said company in 1876, and has never since taken and does not now take any part in the work or management of the said company except as a participant in the conversion and larceny of the funds of the said company hereinafter set forth.

6. That in or about *December*, 1886, and for about one year prior thereto, the plaintiff and the defendants, *Joseph C. Hoagland* and *Cornelius N. Hoagland* (who were brothers), were the only stockholders in the said company, all of its stock being issued, of which the defendant *Joseph C. Hoagland* held 500 shares, the defendant *Cornelius N. Hoagland* 410 shares and the plaintiff 690 shares.

7. That in or about *December*, 1886, the defendant *Joseph C. Hoagland* placed eight shares of his said stock in the name of his son, the defendant *Raymond Hoagland*, for the purpose of having him assist in the carrying out the wrongs hereinafter mentioned. That thereupon the defendants, led by the defendant *Joseph C. Hoagland*, entered into a combination, agreement and conspiracy to withhold from the plaintiff all information and knowledge concerning the said company, its management, finances, books and affairs, and to prevent him from obtaining the same, or seeing the books and workings of the said company, and also to appropriate the funds of the said company to their own use, in order to prevent the plaintiff from getting his just and lawful share thereof, and with the intent and avowed object of thus appropriating to their own use the funds of the said company until the plaintiff was willing to sell to them his said stock, or sufficient thereof to reduce his holdings to less than one-third of all the stock of the said company, at a price named by them, and of coercing him into selling his said stock.

8. That thereupon, at the annual meeting of the stockholders of the said company in *January, 1887*, the said defendants, father, son and brother, by the united vote of their said stock, voted the plaintiff out of the board of trustees of the said company, and elected themselves the trustees of the said company, whereupon, acting as such trustees, they chose the defendant *Joseph C. Hoagland*, president, and defendant *Cornelius N. Hoagland*, vice-president, the defendant *Raymond Hoagland*, treasurer, and appointed *William Hoagland* (a nephew of the defendants *Joseph C.* and *Cornelius N. Hoagland*) secretary, and then speedily and greedily, in violation of their duties as trustees of the said company and of this plaintiff, and conspiring together to wrong the plaintiff, and unlawfully and corruptly, and with intent to appropriate to themselves the funds of the said company and to take from the plaintiff and unto themselves his just and lawful share thereof, voted to themselves and afterwards received out of said funds excessive annual salaries as follows: To the said president \$25,000, to the said vice-president (a new office not theretofore existing) \$10,000, to the said treasurer, who had only just come or was about to come of age, who had never done any work or business, and had no business training or experience whatever, \$2,500, and to the said secretary, \$1,000; thus paying \$38,500 per year for work which had theretofore been done for \$5,400 per year, and which was a fair and reasonable compensation thereof; to all of which the plaintiff objected.

9. That not content with the wrong already done in appropriating the said funds to themselves as aforesaid, the defendants did, at the annual meeting of the stockholders of the said company, in *January, 1888*, re-elect themselves the trustees of said company, and then, in still greater greed and wrongfulness, and still pursuing the said conspiracy, in violation of their said trust, also concerting and acting together as such stockholders to wrong the plaintiff, and for the purpose of further wrongfully appropriating to themselves and stealing the funds of the said company and of the plaintiff, and of taking from the plaintiff and unto themselves his just and lawful share thereof, voted to themselves, out of the said funds, the following excessive annual salaries, to be paid in monthly installments, to wit: To the said president \$50,000, to the vice-president, who did and does no work whatever for the said company, \$30,000, to the said treasurer \$6,000, and to the said secretary \$3,000; thus wrongfully and corruptly absorbing to themselves out of the funds of the said company, which their duty as trustees and as stockholders requires them to husband carefully and honestly for the benefit of the stockholders, ratably, the total sum of \$89,000 per annum; all of which, as the plaintiff is informed and believes, is larceny as defined by section 528 of the Penal Code, for which the defendants are liable to indictment and imprisonment.

10. That the defendants have also, with the same intent and purpose aforesaid, since *January, 1887*, refused to allow the plaintiff to look at the books of the said company, and still refuse so to do, or furnish the plaintiff with information concerning the business and transactions of the said company, though he has demanded to see

said books, and asked for such information, and have also refused and neglected to divide the earnings of the said company among the stockholders; and the plaintiff is informed and believes that the defendants have also used large amounts of the funds of the said company, in addition to the said so-called salaries, for their own benefit and for illegal purposes; that they have been and are paying large sums nominally for advertising and for merchandise, but in fact excessive sums, part of which is paid back to them or to some of them and corruptly kept by them; and that they have paid money to influence legislation in the Legislature of this state and paid the same out of the funds of the said company; and furthermore, that the said defendants, knowing that the plaintiff is about to bring this action, have determined and do intend to retain and pay attorneys for counsel out of the funds of the said company to defend them in the wrongs, larcenies and violations of trust herein charged, though the said company is not chargeable therewith.

Wherefore the plaintiff prays judgment that the said trustees, defendants, be restrained by injunction from paying the said sums as salaries to themselves, and from using the funds of the said company to defend this action, or retain or pay attorneys or counsel herein, that an account be taken of their acts as trustees, and that they be charged with all moneys that they have wrongfully appropriated, and be required to account for the same ratably to the stockholders or to the said company; that they be removed from office, and for such other relief as may be just.

Wm. J. Gaynor, Plaintiff's Attorney.

(Verification.)¹

c. To Set Aside Illegal Conveyance Made by Officers.

Form No. 18993.²

Supreme Court of the State of *New York*.

Franklin G. Taylor

against

*Jonathan Earle, George B. Earle, The
Burlington Cotton Mills, and the
Burlington Cotton Mill Company.*

Trial to be Held in the
County of *Kings*.

The plaintiff complaining on behalf of himself and all other stockholders in the said *The Burlington Cotton Mills*, who should come in due time and seek relief by and contribute to the expenses of this action, shows to this court:

I. That the defendant, *The Burlington Cotton Mills*, is a corporation created and incorporated by and under the laws of this state, and organized on or about *August 14, 1866*, pursuant to an act of the legislature entitled "An Act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February 17, 1848, and the acts amending the same.

1. Verification. — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

Taylor v. Earle, 8 Hun (N. Y.) 1, and is copied from the records. A judgment dismissing the complaint was reversed.

2. This is the form of complaint in

II. That in and by the certificate made and filed by said *The Burlington Cotton Mills*, as required by said act and the amendments thereto, the principal place of business of said corporation was fixed and stated to be the city and county of *New York*.

III. That said corporation, about the time of its incorporation as aforesaid and afterwards, purchased certain real estate, and buildings thereon erected, water rights, mill privileges and machinery, etc., necessary and proper for its business, situated at *Burlington*, in the state of *Vermont*, of which real estate, water rights, mill privileges, buildings, machinery, etc., said corporation has been the real owner and in possession of ever since on or about said *August 14, 1865*, and still is the real owner thereof.

IV. That on or about *January 20, 1875*, the defendant *Jonathan Earle* was the president, and the defendant *George B. Earle* was the secretary and treasurer of said *The Burlington Cotton Mills*, and said *Jonathan Earle* and *George B. Earle* then owned or had the control of a majority of the capital stock of said *The Burlington Cotton Mills*.

V. That said *Jonathan Earle* and *George B. Earle*, owning or controlling a majority in amount of the capital stock of said *The Burlington Cotton Mills*, and with the intent and for the purpose of making and securing certain supposed advantages to themselves and to the persons whose stock they controlled as aforesaid, over the other stockholders in said corporation, caused a special meeting of the stockholders of said corporation, *The Burlington Cotton Mills*, to be called and held at its office in the city of *New York*, on or about *January 9, 1875*, to consider and act upon the proposition of selling all the property, real and personal, franchises, and rights of property of which it was the owner.

VI. That said meeting was held on or about said *January 9, 1875*, and adjourned to on or about *January 20, 1875*, at which time a resolution was presented, voted upon and declared carried, directing the sale by the defendant, *The Burlington Cotton Mills*, to the defendant, *The Burlington Cotton Mill Company*, of all the property, real and personal, franchises and rights of property of said *The Burlington Cotton Mills*.

VII. That immediately upon the passage of said resolution, the defendant *Jonathan Earle*, as president of the defendant *The Burlington Cotton Mills*, in pursuance of said resolution, and without any other or further right or authority than the resolution and vote aforesaid, executed and delivered to the defendant *The Burlington Cotton Mill Company* a deed, assignment and transfer of its property, real and personal, and rights of property.

VIII. That the capital stock of each of said *The Burlington Cotton Mills* and *The Burlington Cotton Mill Company* was \$200,000, divided into 2,000 shares of \$100 each. That by the said laws of this state stockholders holding five per cent. of the capital stock of such manufacturing corporations can require the treasurer thereof to furnish a written statement of the financial affairs and condition of the corporation, and keep the same open for the inspection of its stockholders. That for a long time previous to the calling of said meeting no report had been made to the stockholders of *The Bur-*

lington Cotton Mills of its financial affairs and condition, and the requisite amount of its stockholders had demanded of the defendant *George B. Earle*, who was then the secretary and treasurer of *The Burlington Cotton Mills*, in the manner required by law, that he furnish such statement, and had notified him that, if he failed so to do, they would hold him liable for the penalties provided by said law; and that said *George B. Earle* had failed to furnish such statement. That there is no similar law in the state of *Vermont*.

IX. That the defendants *Jonathan Earle* and *George B. Earle*, together with other stockholders of *The Burlington Cotton Mills*, after the demand had been made upon said *George B. Earle*, as aforesaid, and shortly before the calling of said meeting of *January 9, 1875*, had organized a corporation under the laws of the state of *Vermont*, to be located at *Burlington*, in said state of *Vermont*, and to carry on the same kinds of business as *The Burlington Cotton Mills*, under the name of *The Burlington Cotton Mill Company*, and which is one of the defendants herein, and the defendants *Jonathan Earle* and *George B. Earle* had been elected to the same offices in *The Burlington Cotton Mill Company* which they then held in *The Burlington Cotton Mills*, namely, the said *Jonathan Earle* to the offices of director and president, and the said *George B. Earle* to the offices of director, secretary and treasurer, and composed a majority of the directors of *The Burlington Cotton Mill Company*.

X. That, ever since the calling of said meeting, the defendants *Jonathan Earle* and *George B. Earle* have continued to hold, and now hold, respectively, the said office in each of said corporations, and ever since said pretended sale, *The Burlington Cotton Mill Company* has had an office, for the transaction of its business, in the office of *The Burlington Cotton Mills*, in *New York City*.

XI. That the consideration alleged to have been paid by *The Burlington Cotton Mill Company* to *The Burlington Cotton Mills*, for said deed, assignment and transfer, was *1,747* shares of the capital stock of *The Burlington Cotton Mill Company*, and no other or further consideration was ever paid by *The Burlington Cotton Mill Company* for such deed, assignment and transfer.

XII. That no stockholder of *The Burlington Cotton Mills* was present at either of said meetings and voted for said resolution, except the defendants *Jonathan Earle* and *George B. Earle*, although said defendants claimed to hold proxies to vote for said stockholders; but one or more stockholders attended said meetings and protested against the passage of said resolution as unlawful, and in excess of the powers of any number of such stockholders against the will of those stockholders who objected thereto. That plaintiff then resided in *New York City*, but was not served with a notice of said meeting, and never consented or assented to said resolution, or the acts done thereunder, but objected to the same as soon as he learned what had been done; and that persons owning stock in said *The Burlington Cotton Mills* to the amount of over *\$20,000*, at the par value thereof, have always, since they learned of the said resolution and the acts done thereunder, objected to each and every thereof. That plaintiff is a stockholder in *The Burlington Cotton Mills* to the amount, at the

par value thereof, of \$10,000 by virtue of a certificate for *one hundred* shares of said stock issued to plaintiff by said corporation on *October 18, 1873*.

XIII. That the defendants *The Burlington Cotton Mills* and *The Burlington Cotton Mill Company* are, and each of them is, insolvent, and have already executed, or are about to execute, mortgages upon said real estate and machinery to a large amount and without any real consideration paid or to be paid, to either of said corporations.

XIV. That plaintiff has applied to said *The Burlington Cotton Mills*, and has requested it to bring, or cause to be brought, an action against the defendant *The Burlington Cotton Mill Company*, to set aside as illegal and void the said conveyance, assignment and transfer from *The Burlington Cotton Mills* to *The Burlington Cotton Mill Company*, but the said *Burlington Cotton Mills* refused so to do.

XV. That plaintiff is remediless at law, and the exercise of the equitable powers of this court is necessary to redress the plaintiff's wrongs and injuries aforesaid.

Wherefore plaintiff prays the judgment and decree of this court: First, that the said conveyance, assignment and transfer by the defendant *The Burlington Cotton Mills* to the defendant *The Burlington Cotton Mill Company*, be decreed to be set aside as illegal and void, and that the defendant *Jonathan Earle*, as president, and the defendant *George B. Earle*, as treasurer, of said *The Burlington Cotton Mill Company*, be decreed to reconvey, assign and transfer to said *The Burlington Cotton Mills*, or to the receiver of said *The Burlington Cotton Mills* hereinafter mentioned, all the real estate, machinery and property aforesaid. Second, that a receiver of all the property and rights in or to property of said defendant *The Burlington Cotton Mills*, including the property conveyed, assigned and transferred as aforesaid, be appointed, and that said *The Burlington Cotton Mills*, and its proper officers, agents and employees, convey, transfer, assign and deliver all such property, and rights to or in the property, to said receiver. Third, that the defendants, and each of them, their and each of their officers, agents, and employees be enjoined and restrained from disposing of, or in any manner interfering with any of said property except to preserve the same, and also except to deliver, assign, transfer or convey the same to said receiver. Fourth, and that the plaintiff have such other and further relief as to the court may seem proper, together with his costs of this action.

A. T. Brown, Plaintiff's Attorney.

(*Verification.*)¹

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

d. Where Plaintiffs were Induced to Purchase Stock by Fraudulent Representations of Corporation's Officers.

Form No. 18994.

(Precedent in *City Bank v. Bartlitt*, 71 Ga. 799.)¹

[*Georgia — Bibb County.*

To Honorable *Samuel Jones*, Judge of the *Superior Court* of the *Macon Circuit*, and holding and exercising jurisdiction in chancery therein:

Your orators and oratrix (*naming them*), who exhibit this bill, show unto your honor that]² on the *8th* day of *October*, 1868, the *City Bank of Macon* was chartered by the general assembly of the state of *Georgia*, and was duly organized under said charter, with a capital stock authorized of \$200,000, with the power in the stockholders to increase the same to the amount of \$500,000, and duly commenced business as a private joint stock company, in the city of *Macon*, county of *Bibb*, and said state, according to the charter; that on or about the *first* day of *January*, 1874, the said *City Bank of Macon*, pretending that it had paid up its original capital stock, passed a resolution, as your orators and oratrix hereinbefore named are informed and believe, increasing their capital stock to \$300,000, and for that purpose secured the general assembly of *Georgia* to enact an additional charter, approved *February 28*, 1874, authorizing the capital stock of said bank to be \$300,000, with power in the stockholders to increase the same to \$1,000,000; that at that time, to wit, on the *first* day of *January*, 1874, when said action by the then stockholders and directors and president of said bank was taken as aforesaid, *Charles A. Nutting* was president of said *City Bank of Macon*, and a director and stockholder thereof, and *William P. Goodall* was the cashier thereof, who was also a stockholder in said bank, and that *John J. Gresham*, *William S. Holt*, *William B. Johnston*, *John E. Jones* and *J. B. Ross*, all of the county of *Bibb* and state aforesaid, were directors thereof; that the above persons named as directors were stockholders in said bank, [and the following persons (*naming them*) were also stockholders in said bank.]

That the then directors of said bank above stated, falsely pretending that said *City Bank of Macon* was not only solvent, but in a highly prosperous condition, besides paying large dividends to the stockholders in cash, and additional stock from the time of its organization to the time of said authorized addition to and increase of their capital stock, but that it actually had a large surplus fund, to-wit, \$125,000, or some other large sum of money; and upon said pretenses gave notice, through the directors and officers of said bank, of an increase of said capital stock to the amount of \$100,000, the whole of which amount of money the said officers of said bank, who were its legally authorized agents for the purpose of having said \$100,000 of new or increased stock subscribed for, to-wit, its

1. This bill was filed under the former equity practice in Georgia and was held sufficient against demurrer.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

president, *Charles A. Nutting*, and *W. P. Goodall*, its cashier, assured orators would all be paid in in cash before any stock certificates would be issued; that as the stock was taken and paid for, the bank would receipt therefor, and issue the certificates when the whole \$100,000 had been taken and paid, and not before, and that upon the failure to have all the \$100,000 subscribed and paid for in cash, no certificates were to be issued, but the subscriptions were to be void, and the money paid in returned. Your orators thereupon, at the time aforesaid, to-wit, on the *first of January, 1874*, subscribed for said stock in the amounts hereinafter set out, and paid for the same then and there, on the days of the dates and the amounts of their several certificates of stock, hereinafter more fully set out and explained, received said certificates, at which time said *Nutting*, president, and *Goodall*, cashier, of said bank, assured orators that every dollar of the \$100,000 of stock so increased had been subscribed for and paid for in cash, and therefore the stock certificates could be issued in accordance with the plan of said increase of stock. And your orators allege and charge, and expect to prove, that at that time, when said certificates of stock were issued, only about \$40,000 of the \$100,000 had been paid in or has ever been paid in; that instead of complying with said agreement as above stated, and informing your orators that the whole of said stock had not been subscribed for and paid in, said officers of said bank, to-wit, its president and directors, issued to the original or old stockholders, stock certificates for \$50,000, without requiring them to pay *one* dollar or any sum whatever therefor, and without any notice thereof being given to orators and the other new subscribers for stock, who had paid their money therefor into said bank as aforesaid, whereas in fact and in truth your orators are informed and believe, and expect to prove, and so charge, that said bank, at the time and long before said action enlarging its capital stock as aforesaid, was utterly insolvent, and that said insolvency was well known to said officers, directors, and many of the stockholders, and the whole scheme of the enlargement of the capital stock and the sale of the same to innocent persons, and the issuing of the \$50,000 of said stock to the old stockholders, as above set out, was a naked fraud to cheat and deceive the public, and especially the persons who might from said statements above alluded to and set out, be induced to take said new stock, when both the old and new stock was utterly worthless and of no value, by reason of the large insolvency of said bank, and the wrongful, illegal and fraudulent issue of said \$50,000 of stock to the old stockholders.

And your orators and oratrix aver that they have been informed and believe that a large portion of the dividends declared by the said bank was never in truth made, but the said pretended cash and stock dividends was not from any profits of the bank, as orators have been informed and believe, consists wholly of past due and utterly insolvent papers and claims, wholly uncollectible, none of which have ever been collected or can be collected.

Your orators further charge that they are informed and believe that of the original capital stock only \$150,000 was ever in fact

paid in, by either pretended dividends or otherwise, but that but *seventy-five* cents on the dollar was all that was pretended to be paid, and that said bank issued full paid-up certificates of stock to the said stockholders, under some pretense (wholly unfounded) of their having a large uncollectible surplus of profits in the bank, consisting of insolvent debts, as above stated, which action of the officers of said bank was authorized by its directors and ratified by them, and a number of the old stockholders who received said stock certificates with a full knowledge of said facts.

And your orators and oratrix aver, and expect to prove, that *Charles A. Nutting*, the president of said bank, represented himself to be, and your orators and oratrix aver that he was, in fact and truth, the agent of said bank to sell the new stock to the purchasers and that he represented to each of your orators, personally, or to their agents who purchased the stock for them, that said bank was in a sound and prosperous condition; that it had been paying from *fifteen to twenty-five* per cent. profits; that it was, at the time of said sales of new stock to each of your orators, respectively, in a more prosperous condition than ever, and would doubtless continue to pay large profits and dividends, when, in fact and in truth, said bank was wholly insolvent and its entire capital absorbed by bad debts and fraudulent dividends, and it was then unable to pay even its depositors, all of which facts were well known to the then directors of said bank and many of the stockholders, of all of whom, stockholders of said bank, and of the bank itself, the said *Nutting* was the legal agent and representative; and the directors of the bank and all of its stockholders are bound by his fraudulent action in the premises, as well as their own action.

Your orators and oratrix further aver that none of them had the slightest knowledge of the affairs of the bank, and wholly relied upon the statements of said *Nutting* in relation thereto, he being then the president and agent of the bank in the matters of the sale of the stock; and that each of your orators paid at the time of sale of said stock to them the full amounts in their respective certificates of stock, bona fide, and without any knowledge or even suspicion of the falsity of the statements made to them by said *Nutting*, and with entire confidence in the truth of said false and fraudulent statements.

Your orator, *Joseph M. White*, is informed that he purchased the stock so fraudulently issued to *C. A. Nutting*, but of this he had no notice, but bought the same in good faith and paid for the same dollar for dollar.

And your orators further state that, without any knowledge of these facts, they accepted *two* dividends on said stock, which was declared by said directors, as did all the rest of the stockholders, old and new, as far as your orators are informed and believe; that they received the same in the utmost good faith, and without any knowledge of the facts and frauds herein alleged.

And your orators further allege that some time during the month of *October, 1875*, said *Charles A. Nutting* retired from the bank, sold out his stock, as your orators are informed, still owing said bank *\$12,500* for stock subscribed for by him and never paid for, but

for which said officers received his note for said sum, and did not require said stock paid for by him before they issued stock certificates to him therefor, and *John J. Gresham* became the president thereof, and still is such, and that *Wm. S. Holt*, *Wm. B. Johnston*, *John E. Jones* and *J. B. Ross* became directors, and still are, except *John B. Ross*, who recently, during the month of *August*, died, and whose estate is unrepresented.

That after said *Gresham* became president, your orator, *G. T. Bartlett*, acting for himself, and all of your orators, except *Jos. M. White*, some time during the month of *March* last, having heard news unfavorable to the sound condition of the bank, called at the banking house of said bank in *Macon*, and requested the permission, and then demanded the right, to inspect the books and assets of said bank with the assistance of his counsel, then present in the city, and ready to enter on said investigation, and *Gresham* then and there refused your orators' attorney to inspect said papers, or to be present at said investigation; that he also refused to show to orator *G. T. Bartlett* the report of the directors to the stockholders, or to permit said *Bartlett* to read the same; that said *Gresham*, president, as aforesaid, also failed and neglected to make and publish a report of the condition of said bank, as required by law. Your orators further charge and allege that some time during the month of *May*, 1877, to-wit, on the 12th day of *May*, 1877, that said president *Gresham*, and said directors of said bank, made an assignment of all its assets of every nature whatsoever to *Thomas B. Gresham*, the son of said president, as assignee of said bank, and closed its doors, and that previously to that time said president and directors had sold and conveyed to *John B. Ross*, one of the directors of said bank, the banking house of said bank, in the city of *Macon*, for the sum of \$15,000, when it was worth a great deal more, and cost the sum of \$30,000, and which was the only real estate owned by the bank, at least the only real estate the least valuable.

And your orators aver that these acts and doings of said old stockholders, the presidents, *Nutting* and *Gresham*, and directors, and said bank, are contrary to equity and good conscience. And as your orators are wholly without an adequate and complete remedy at law, but can only have relief in your Honor's court of equity, where such matters are cognizable and relievable, they pray your Honor that the said old stockholders who have not bona fide paid up the cost of their original stock, or the stock held by them when they accepted said pretended and fraudulent stock dividends, may be compelled to pay up the same, and also that they may be compelled, by a decree of this honorable court, to refund to the bank, for the use of the creditors, and the new stockholders who have paid up their stock bona fide, the full amount; and that they may account; and that said bank shall account to your orators for the same, to the full extent of their liability, if necessary, after exhausting the funds of the bank; and that said directors shall be held liable, and account to your orators and oratrix for all the losses your orators and oratrix have sustained either by their fraudulent or negligent conduct, and that said *C. A. Nutting*, one of the directors and president of said

bank when these wrongs were inflicted, shall also be held to account for the same; and that, by a decree of this court against the said bank and its old stockholders and its directors and said *Nutting*, all the contracts for the sale of said stock to your orators and oratrix be declared null and void, and be rescinded, and that your orators and oratrix may have such other and further relief as the nature of their respective cases may require, and as is in accordance with the principles of equity and good conscience. Your orators and oratrix expressly waiving any discovery or answer from either or any of said defendants.

[*Lamis and Anderson*, Complainants' Solicitors.]¹

3. To Restrain Directors of Building and Loan Association from Closing Out a Series of Its Shares Before Their Maturity.

Form No. 18995.²

(Precedent in *Fisher v. Patton*, 134 Mo. 37.)³

[(*Title of court and cause as in Form No. 5921.*)]⁴

Plaintiff, for his amended statement of cause of action, states: That the *Richmond Building and Loan Association*, one of the defendants herein, was incorporated under the laws of the state of *Missouri*, article 9, entitled "Mutual Fund, Loan and Building Associations," Revised Statutes, 1897, in the month of *October*, A. D. 1886, and has ever since its organization been transacting business in *Ray* county, *Missouri*; that *W. C. Patton*, *Jas. A. Davis*, *William Bernard*, *Jas. E. Ball*, *John W. Shotwell, Jr.*, *W. W. Brown*, *J. A. Anderson*, *T. N. Lavelock*, *W. M. Allison* and *John T. Patton* were the duly elected and legally constituted board of directors of said *Richmond Building and Loan Association* at the institution of this suit on *August 21*, 1894, and such were intrusted by law with the management of the affairs of the association; and that said directors, since the filing of the original petition in this case, were re-elected as directors of said *Richmond Building and Loan Association*, and as such are by law entrusted with the management of the affairs of the association; that *W. C. Patton* was the president thereof, and that *Geo. W. Schweich* is secretary of said *Richmond Building and Loan Association*.

Plaintiff further states that at the date of its incorporation as aforesaid the capital stock of said association, defendant, was *one hundred thousand* dollars, which said capital stock was divided into shares of the par value of *two hundred* dollars each, making *five hundred* shares in all; that prior to the incorporation of the defendant association as aforesaid, those wishing to take stock on shares, including the plaintiff, pursuant to the laws in such cases made and

1. The matter enclosed by [] will not be found in the reported case.

2. *Missouri*. — Rev. Stat. (1899), § 1356 et seq.

3. It was held on demurrer that the allegations of this petition were suf-

ficient to show a proper case for equitable interference.

4. The matter to be supplied within [] will not be found in the reported case.

provided, filed articles of agreement and association of the *Richmond Building and Loan Association* with the recorder of deeds within and for the county of *Ray*, and state of *Missouri*; that by the terms of article *three* of said agreement the capital stock and shares were fixed as follows, as will more fully appear by a recital thereof, which is as follows: "Article III. The capital stock of this corporation shall be *one hundred thousand* dollars, divided into *five hundred* shares of the par value of *two hundred* dollars each, of which number *three hundred* shares have been subscribed and the entrance fees thereon have been paid in;" that by the terms of article *seven* the object and purpose of the corporation was expressed to be as follows: "Article VII. The object and purpose of this corporation shall be the accumulation of a fund to be loaned to its stockholders or others, with which to purchase or improve real estate, or for other purposes, the loans to be secured by real estate;" that said association, by virtue of the authority given by law, before the issuance of any certificates or shares of stock, adopted certain by-laws for its government, and for the proper and just protection of the property rights of others connected with said association as shareholders; that the funds of said *Richmond Building and Loan Association*, under the laws of its creation, as well as under section *seven* of the by-laws aforesaid, was to be formed by "payment of entrance fees, monthly dues, premiums on loans, interest on loans, fines, and from other sources;" that by section *46* of the by-laws aforesaid, under the title of dissolution, provided among other things that when the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, etc., the directors shall then proceed to pay, satisfy, and discharge first the debts and liabilities of the association, and then to pay over to the owner of each share not having obtained a loan the sum of *two hundred* dollars for each and every share of stock held by him or her; all of which will more fully appear from a recital of section *46*, which is as follows, to wit:

"Dissolution.

Section *46*. When the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, and there shall be funds enough in the treasurer's hands, with loans and with advances made to shareholders, to pay that amount to the shareholders after paying all debts of the association, the directors shall then proceed to pay, satisfy, and discharge, first the debts and liabilities of the association, and then they shall pay over to the owner of each share not having obtained a loan from the association for the purpose hereinbefore specified, the sum of *two hundred* dollars for each and every share of stock held by him or her upon which no loan had been made by the association; and thereafter no further monthly dues or interest shall be payable by the stockholders, except that all arrears shall be fully paid up, and the association shall deliver to each shareholder, mortgagor, who has in other respects fully complied with the conditions of his mortgage or deed of trust, a discharge thereof, and any balance remaining in the treasury shall

be distributed to the shareholders of this corporation, in proportion to the number of shares held by each. After the performance of the foregoing duties, this association shall cease to exist, and it shall not sooner be dissolved."

Plaintiff further states that the amount of entrance fee was fixed by the by-laws at *fifty* cents on each share, and that the monthly dues aforesaid required to be paid into the association by each shareholder upon every share of stock held by him was by the by-laws aforesaid fixed at *one* dollar, as will fully appear from section *five* of said by-laws, which is in words and figures as follows, to wit:

"Monthly Dues.

Section *V*. Each and every stockholder, for each and every share of stock that he or she holds in the association, shall pay the sum of *one* dollar on the *second Tuesday* in *October*, 1886, and on the *second Tuesday* in every month thereafter, to the secretary of the association."

Plaintiff further states that he was a subscriber to said articles of agreement, and became the purchaser of *fifteen* shares of said capital stock, issued soon after the incorporation of defendant association, and now designated and known as series "*A*," and that said association caused to be delivered to plaintiff herein, pursuant to the articles of agreement and incorporation aforesaid, and pursuant to the by-laws of said association, *three* certificates, representing in all *fifteen* shares, as aforesaid, of the par value of \$200 each, and duly signed by its president and secretary. Said certificates, omitting numbers, name, date, and signature, were in the following form, to wit:

"No. _____. *Richmond Building and Loan Association*. Shares

Capital stock, \$100,000. *Richmond, Mo.* Shares each \$200.

This certifies that _____ is the owner of _____ shares of capital stock of the *Richmond Building and Loan Association*, organized under, and according to, the laws of *Missouri*, and is entitled to all the privileges and subject to all obligations set forth in the constitution and by-laws of said association.

Transferable only on the books of the association in the presence of the secretary, either in person or by attorney duly authorized according to the by-laws.

Richmond, Mo., _____, 18____.

_____, President.

_____, Secretary."

Which said certificates were duly filled out and delivered to plaintiff as aforesaid, and are not filed as an exhibit herein, because they are temporarily hypothecated as collateral security with other persons; that plaintiff has kept the dues paid thereon, as by the terms of the by-laws of said association he was required to do, from and after the *second Tuesday* in *October*, A. D. 1866, up to the time when the directors aforesaid refused to permit any further payments on said shares of stock, as will hereafter appear, and has, since the date of such action complained of, promptly tendered to the secretary of said association all dues accruing to said association up to the present time, and is still willing and anxious to continue the payments

thereon until the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of said capital stock worth in cash the sum of *two hundred* dollars, and until there shall be funds enough in the treasurer's hands, with loans and with advances made to shareholders, to pay that amount to the shareholders after paying all debts of the association.

Plaintiff further complains and states that the directors aforesaid have the management and control of the business of said association defendant as aforesaid, have illegally and wrongfully directed that no further interest and dues be collected on stock of shareholders in said series "*A*," and unlawfully refused to collect from such holders any sum or sums whatever upon any such shares, as by law they are required to do; that the said shares are not now worth the par value, as declared by the by-laws of said association they should be before dissolution of said corporation or *first* series of shares; that although the said association has not cash on hand sufficient to pay off and discharge the debts of said association, and to pay the holders of free and unborrowed shares the par value of said stock, the said directors have unlawfully and illegally directed that all mortgages and deeds of trust given by the borrowers in said series "*A*" to the *Richmond Building and Loan Association* be duly satisfied of record; that said officers as aforesaid are about to unlawfully and illegally cancel, satisfy and release said mortgages and deeds of trust and other obligations and evidence of indebtedness due said association on the part of the shareholders thereof, when the same has not been paid, satisfied or in any manner liquidated; that said board of directors aforesaid, defendants herein, undertook by improper and unlawful action, on or about the *tenth* day of *August*, A. D. 1894, to declare that the assets, funds and property belonging to series "*A*," as then denominated, and intended to refer to the shares issued to plaintiff upon the organization of said association in the first instance, was sufficient to pay the face value of the free shares, or shares on which no loans had been made by the association, by a method repugnant to the laws governing said association at the date of the organization of said association defendant, and not provided for in the articles of agreement, and in violation of the provisions of section 46, aforesaid, of the by-laws and constitution of said association, as aforesaid, to wit: by charging the holder of each free share in the series aforesaid denominated series "*A*" with the sum of *forty-two* dollars on each share of the association defendant's stock, and by promising to give the holder thereof, including plaintiff, only *one hundred and fifty-eight* dollars, when the money may be collected on other shares belonging to other and different series of the defendant's creation — all of which wrongful and illegal threatened acts will more fully appear from the order or resolution passed by the board of directors aforesaid, at the date aforesaid, as follows, to wit:

"Whereas, it appears from the *July* statement of the secretary of this association that the value of the shares of stock of series '*A*' then was \$158.01 per share, and that the average premium paid by borrowers of this association up to date of statement was \$42 per share; and,

Whereas, it appears to the satisfaction of the board of directors of said association that the assets, funds and property belonging to series 'A' of said association are sufficient after payment of debts to pay the face value of the free shares in said series, less the average premium paid by borrowers of the association; therefore be it

Resolved, that we declare the stock in series 'A' has reached the maturity value thereof as provided by section 2617, Revised Statutes of Missouri (1889), and that the deeds of trust of borrowers upon which all interest, dues and fines are paid, be released at cost of borrower, upon surrender of certificates of stock, and that free shares be settled according to the provisions of the act of the legislature of Missouri, approved March 31, 1893, relating to the payment of free or unpledged shares of stock in such association."

Plaintiff further states that the directors aforesaid are still threatening to carry said order as aforesaid into execution, and to release all mortgages due the association aforesaid whereon all dues and fines have been paid up to the date of the passage of said resolution, and to deprive the plaintiff of his just rights under the articles of agreement as aforesaid and the by-laws governing said association, fixing the rights, duties and obligations of both defendant association and plaintiff, and to deprive plaintiff of the benefits of his full contract rights.

Plaintiff further states that he, as the owner of the shares aforesaid, is entitled to the sum of *two hundred* dollars in cash upon each share so held by him in said series before dissolution of said association, or of said series now denominated as series "A," as aforesaid, and before the deeds of trust taken by the association to secure the loans made to shareholders can or ought to be released under the laws authorizing its issue and under the corporate by-laws aforesaid in relation to dissolution, etc.; that such threatened acts on the part of the directors are illegal, and that the resolution passed as aforesaid was without warrant or authority in law, as he believes; that many of the borrowers in series "A," as aforesaid, are wholly insolvent, and should such wrongful and illegal action be taken by the board of directors as aforesaid, great and irreparable loss would be sustained by plaintiff as shareholder.

Plaintiff further states that, if the directors as aforesaid are permitted to carry out such threatened acts, they would violate the contract between plaintiff and defendant association, and put plaintiff's right in great jeopardy, and that such unlawful action would affect the value of the plaintiff's shares to a very great extent — so much so that accurate computation cannot be made, and at least to the extent of about *forty-two* dollars on each share of the *fifteen* so held by plaintiff as aforesaid — the difference between the face value of said shares and the alleged value thereof at the time of passing said resolution or order.

Plaintiff further states that many of the shares in series "A" were borrowed on at a bonus of *ten* dollars by some of the members of the board of directors, while the said board of directors wrongfully, unjustly, and inequitably are threatening and are about to unlawfully charge the plaintiff up with the sum of *forty-two* dollars, on the

theory of average bonus; that if the threatened acts of said board of directors are to be consummated, such persons who borrowed on shares in series "A" would thereby obtain an advantage of the plaintiff to the extent of *thirty-two* dollars on each share; that at the time loans were made, the association paid them the sum of *one hundred and ninety* dollars in cash on their said shares, giving to them an excess from the corporate funds over that of the nonborrower or holder of free shares of *thirty-two* dollars as aforesaid.

Plaintiff further states that said order or resolution passed or attempted to be passed as aforesaid was the result of the illegal participation in the vote on said proposition by *W. C. Patton, T. N. Lavelock, J. A. Anderson, and W. M. Allison*, who were borrowers in series "A" aforesaid, and owners of shares in said series, on account of which they were precluded by the by-laws of the association, as well as the general laws of the state of *Missouri*, and particularly section 968, Revised Statutes, 1879, from taking part in the vote, which said by-law is as follows:

"Sec. 15. No member who has borrowed money from the association shall be allowed to vote on any question affecting the claim of the association against himself."

Plaintiff further states that *Jas. E. Ball* and *Jno. W. Shotwell, Jr.*, defendants herein, voted against said proposition aforesaid, and the proposition was not legally carried by said vote, but the chairman declared the resolution carried, and pursuant thereto the board of directors are threatening and are about to carry out and intend to execute the said illegal order or resolution so voted and adopted as aforesaid, by releasing the deeds of trust, and by ceasing to collect any further dues, fines, forfeitures, and interest from the holder or holders of shares or certificates of stock in said association in said series "A" aforesaid; that although plaintiff has tendered his dues on shares held by him as aforesaid to the secretary of said association, the legally constituted and properly appointed person to collect and receive the same, yet such secretary, acting under the illegal order or resolution as aforesaid, refused and still refuses to receive the same thereon as aforesaid.

Wherefore, inasmuch as plaintiff has no adequate remedy at law, he prays for an order of injunction to issue out of this court, directed to said defendants, enjoining and restraining them, and each of them, their agents, servants and officers from releasing the deeds of trust so executed by borrowers on shares in said series "A" or other securities by said association, and especially enjoining and restraining said directors, as well as the defendant's other officers, from releasing the deeds of trust executed by *W. M. Allison, J. A. Anderson, W. C. Patton* and *Thomas N. Lavelock*, and sufficient others to preserve and protect the rights of plaintiff, and also enjoining said defendants, and each of them, from taking any illegal action as threatened by them, or discontinuing the collections of fines, penalties, dues and interest, until the funds be sufficient to pay plaintiff's shares according to the face value, as expressed in the certificates issued and given to plaintiff, and as required by the by-laws of said association aforesaid; and that said defendants,

directors and association be required to accept all dues, fines and penalties to accrue on said shares, until the assets of the association, exclusive of unmatured monthly dues, shall be sufficient to make each and every share of stock worth in cash the sum of *two hundred* dollars, as by the laws governing said association, and as by the contract of plaintiff as shareholder with said association, the plaintiff is legally entitled to receive; and for such other and further orders, judgments and decrees, and for such other and further relief, as the court shall deem meet and just in the premises.

W. D. Fisher.

STRAYS.

See the title ESTRAYS AND IMPOUNDING, vol. 7, p. 834.

STREET RAILWAYS.

BY HAROLD N. ELDRIDGE.

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STREET RAILWAYS.

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CROSS-REFERENCES.

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For other Forms relating to Personal Injuries Caused by the Servants of a Street Railroad Company, see the titles CARRIERS, vol. 4, p. 192; DEATH BY WRONGFUL ACT, vol. 6, p. 1; NEGLIGENCE, vol. 13, p. 1.

For Forms relating to Elevated Railroads, see the title ELEVATED RAILROADS, vol. 7, p. 443.

For Forms relating to the Taking of Property by Eminent Domain, see the title EMINENT DOMAIN, vol. 7, p. 561.

For a Form of Petition to Restrain a Steam Railroad Company from Interfering with the Construction of a Crossing of an Electric Railroad, see the title IN JUNCTIONS, vol. 9, Form No. 10945.

For a Form of Petition to Restrain the Laying of Tracks in Streets, see the title IN JUNCTIONS, vol. 9, Form No. 1046.

I. LOCATION OF ROUTE AND CONSTRUCTION OF ROAD.

1. Petition for Appointment of Commissioners to Determine Whether a Street Railroad should be Constructed Along Certain Street or Streets.¹

Form No. 18996.²

N. Y. Supreme Court. General Term — Second Judicial Department.

In the Matter of
the application of the *Nassau Electric
Railroad Company* for the appointment
of Commissioners as to *Union Street*.

To the Supreme Court of State of *New York*, at the *General Term* thereof, held in and for the *Second Judicial Department*:

1. Requisites of Petition, Generally. — For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

Consent of Common Council. — In Matter of People's R. Co., 112 N. Y. 578, a petition which alleged that the consent of the common council was given on a certain day was held sufficient without an averment that such consent had been filed in the clerk's office.

Consent of Owners. — In Matter of People's R. Co., 112 N. Y. 578, it was held that an objection that the petition was defective and conferred no jurisdiction, because it did not allege facts showing that the petitioner failed to obtain the consent of the owners of more than one-half in value of the property on the streets named in the petition, could not be sustained where the affidavits filed with the petition

showed a list of the property owners who had been applied to and had refused to consent to the construction of the road in front of and along their respective premises, and also gave a list of the streets in which the persons so applied to lived, and the valuation in each street of the property owned by the person so refusing, and the petition showed the total valuation of the property on the portion of each of the streets mentioned along which the company proposed to construct its road, and it appeared therefrom that the refusal to consent represented more than one-half of the total valuation.

2. New York. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94.

This is the petition in Matter of Nassau Electric R. Co., 167 N. Y. 37, and is copied from the records. The prayer of the petition was granted.

The petition of the *Nassau Electric Railroad Company* respectfully shows to the Court —

First. — Your petitioner is a corporation duly incorporated, organized and existing under the provisions of chapter 565 of the Laws of 1890 of the state of *New York*, entitled "An Act in relation to railroads, constituting chapter thirty-nine of the General Laws," and the several acts amending the same and supplementary thereto, for the purpose of building, maintaining and operating a street surface railway for the conveyance of persons and property in cars through, over and along certain streets, avenues and places in the city of *Brooklyn*, and in the county of *Kings*, in said state. The certificate of incorporation of your petitioner was made and executed in due form, and on the 13th of *May*, 1893, was, pursuant to law, duly filed in the office of the Secretary of State of said state, and a duplicate thereof was on the said day filed in the office of the clerk of the said county of *Kings*, and your petitioner thereupon became a body corporate, duly incorporated under said laws, and thereafter possessed the powers and privileges conferred by said laws upon street surface railroad corporations.

Second. — Certain portions of the route of your petitioner's said railroad in said city, set forth in said certificate of incorporation, upon, through, and along which it is proposed to construct and operate the said railroad under the provisions of law aforesaid, are respectively in and upon and extend through and along the following streets, avenues or parts thereof in said city of *Brooklyn*, as laid down upon the map of said city, to-wit: commencing at *Ferry Place*, at *Hamilton Ferry*, in said city, thence through and along *Hamilton* avenue to *Union* street, thence through and along *Union* street to *Ninth* avenue, and thence through and along *Ninth* avenue to *Twentieth* street; and also from *Ninth* avenue to *Twentieth* street; and also from the intersection on *Union* street and *Ninth* avenue, through, over and along the public street and place known as *Prospect Park Plaza* to *Douglass* street, and thence through and along *Douglass* street and other streets and avenues described in said certificate of incorporation to different parts of said city and county.

Third. — On the 19th day of *June*, 1893, the Common Council of said city, being the local authorities of said city having control of the streets, avenues and places aforesaid in said city, upon which it is proposed to build and operate said railroad, by a resolution duly adopted, granted its consent to the construction, maintenance and operation by your petitioner of a double-track street surface railroad, to be operated by horses or by electric power, through, over and along the streets, avenues and places in said city named in said certificate of incorporation, and said resolution and consent was duly approved by the mayor of the said city of *Brooklyn* on the 23rd day of *June*, 1895, and is in full force, and your petitioner has duly executed and delivered to the said city a bond in the penalty of \$150,000, approved by the mayor and corporation council of said city, as required by the provisions of said resolution.

Fourth. — On the 2nd day of *January*, 1894, the Board of Railroad Commissioners of the state of *New York*, by its order duly made,

approved the operation by your petitioner of its said railroad by the overhead electric trolley system, upon, through and over the streets, avenues and places aforesaid, and the said order of approval is in full force.

Fifth. — Your petitioner made application to this court, at the *General Term* thereof, held in this department in *September, 1894*, for the appointment of *three* commissioners, as prescribed in section 94 of the aforesaid chapter thirty-nine of General Laws, to determine whether said railroad ought to be constructed through and upon certain of the streets and avenues in said city, named in said certificate of incorporation, and described in said application, and said commissioners having been duly appointed by this court at said *General Term*, pursuant to the provisions of law aforesaid, and having determined that said railroad ought to be constructed and operated through and upon the streets and avenues described in your petitioner's application aforesaid, such determination of said commissioners was confirmed by this court, at the *General Term* thereof, held in this department by its order made *March 5, 1895*. The owners of more than *one-half* in value of the property bounded by the remaining streets and avenues through which the route of said railroad extends, excepting only a small portion of said route, have duly consented to the construction and operation of said railroad upon said streets and avenues.

Sixth. — Your petitioner has already constructed, and is operating a considerable portion of said railroad, and intends in good faith to complete the construction of, and to maintain and operate the said railroad upon, through and along the streets, avenues and places aforesaid in said city, named in its certificate of incorporation, according to the conditions and provisions of said certificate and of the consent of the local authorities aforesaid.

Seventh. — An important portion of the route of said railroad, as described aforesaid, is the portion of said route in and upon and extending through and along *Union street* aforesaid, between the intersection of said *Union street* and *Hamilton avenue* aforesaid and the intersection of said *Union street* and *Ninth avenue* aforesaid, together with the respective intersecting portions of said *Union street* and said avenues and also the public street and place known as *Prospect Park Plaza* aforesaid.

Eighth. — The construction and operation of said railroad upon and along the portion of the route thereof described in Article *Seventh* of this petition is necessary for the completion of the continuous and connected line and route of said railroad as described in said certificate, and also for the connection of portions of said route respecting which your petitioner's right to construct and operate its railroad thereon is perfected.

Ninth. — Your petitioner has proceeded with due diligence, by the employment of canvassers, and by the exertions of its officers and agents, to obtain the consents of the owners of the property bounded on the portion of the route of said railroad described in Article *Seventh* of this petition, to the construction and operation of said railroad upon said portion of said route, and has continued to the

present time its exertions to obtain such consents, and has obtained such consents from a large number of said owners, but the consents of the owners of one-half in value of such property upon the portion aforesaid of said route have not been obtained, and cannot be obtained, as you petitioner is informed and believes.

Tenth.—Your petitioner heretofore made application to this court, at a *General Term* thereof, held *September 9th, 1895*, for the appointment of *three* commissioners, as prescribed in section 94 of the aforesaid Chapter Thirty-nine of the General Laws, to determine whether said railroad ought to be constructed and operated through and upon the portion of said route described in Article *Seventh* of this petition, and thereupon, on the *12th* day of *September, 1895*, this court, at said *General Term*, granted such application and made an order appointing such *three* commissioners, but said commissioners did not within *ten* days after their said appointment, being the period allowed by law therefor, meet and cause public notice to be given of their first meeting in the manner directed by the court in said order, and such notice was not given nor has any action been taken in the premises by said commissioners. Your petitioner therefore presents this its application and petition in the premises, and prays for the appointment of *three* commissioners, as prescribed in Section 94 of the aforesaid Chapter Thirty-nine of the General Laws, as amended, aforesaid, to determine whether said railroad ought to be constructed and operated through and upon the said portion of the route of said railroad described in Article *Seventh* of this petition, to the end that if said commissioners shall determine that said railroad ought to be constructed and operated upon the portion aforesaid of said route, such determination of said commissioners, if confirmed by this court, shall be taken in lieu of the consent of the owners of the property bounded on said portion of said route, and that your petitioner may have such other and further order and relief in the premises as to the court may seem just.

And your petitioner will ever pray, etc.

Dated *Brooklyn, New York, November 12th, 1895.*

The Nassau Electric Railroad Company,
by *P. H. Flynn, President.*

John J. Allen, Attorney for Petitioner,
No. 203 Montague St., Brooklyn, N. Y.

State of *New York*, }
City of *Brooklyn*, }
County of *Kings*. }

Patrick H. Flynn, being duly sworn, says that he is president of the *Nassau Electric Railroad Company*, the petitioner in this proceeding, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to these matters he believes them to be true.

That the reason why this verification is made by deponent, and not by petitioner, is because the petitioner is a corporation; that the

ground of deponent's belief, as to all matters in said petition not stated upon his knowledge is information received by deponent in the course of his duties as such officer of the petitioner.

P. H. Flynn.

Sworn to before me this 12th day of November, 1895.

Fred C. Cochen, Commissioner of Deeds,
City of Brooklyn, N. Y.

2. Notice of Motion to Apply on Petition for Appointment of Commissioners.¹

Form No. 18997.²

General Term — Fourth Department.

In the Matter of the Application of the
People's Railroad Company of Syracuse for
the Appointment of *Three Commissioners*
to Determine Whether it Ought to be
Constructed. } Notice of Motion.

To the Owners of Property Bounded on the Proposed Route of the
People's Railroad Company whom it may concern:

Notice is hereby given that the *People's Railroad Company of Syracuse*, a corporation duly organized and incorporated under and pursuant to an act of Legislature of the State of *New York*, entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof, in cities, towns and villages," passed May 6th, 1884, and the laws supplementary thereto and amendatory thereof, having failed to obtain the consent of the owners of one-half in value of the property bounded on each of the following named streets on the proposed route of said railroad company, viz.: *South avenue, Slocum avenue, Shonnard street, Seymour street and Lock street* will apply, pursuant to the provisions of said act, upon the petition, a copy of which is hereto annexed, and also upon the affidavits of *Francis Callanan, John C. Keefe, Ennums H. Sanford, Charles W. Andrews and Alfred Wilkinson*, copies of which are hereto annexed and due proof of service thereof, to the *General Term* of the *Supreme Court* of the *Fourth Department* of the state of *New York*, to be held at the court-house in the city of *Syracuse, N. Y.*, on *January 10th, 1888*, at the opening of the court, or as soon thereafter as counsel can be heard, for the appointment of *three commissioners* to determine after a hearing of all parties interested whether the *People's Railroad Company of Syracuse* ought to be constructed and operated upon and along the streets above mentioned, and for such other and further relief as may seem good to the court. The proposed route of said *The People's Railroad*

1. For the formal parts of a notice of motion in a particular jurisdiction see the title *MOTIONS*, vol. 12, p. 938.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94.

This is the notice of motion in Matter of *People's R. Co.*, 112 N. Y. 578, and is copied from the records. The motion was granted.

Company of Syracuse is set out at length in the petition hereto annexed.

Dated *Dec. 27th*, 1887.

The People's Railroad Company,
By *F. J. Callanan.*

Knapp, Nottingham & Andrews, Petitioners' Attorneys,
8 *Larned Building*, *Syracuse, N. Y.*

3. Order Appointing Commissioners.¹

Form No. 18998.²

At a *General Term* of the *Supreme Court* of the state of *New York*, held in and for the *Second Judicial Department*, at the court-house, in the city of *Brooklyn*, on the *second day of December*, 1895.

Present — *Hon. Charles F. Brown*, presiding justice.

Hon. Jackson O. Dykman, { JJ.
Hon. Calvin E. Pratt, }

In the Matter of
The Application of the *Nassau Electric Railroad Company* for the Appointment of Commissioners as to *Union Street*.

On reading and filing the petition of the *Nassau Electric Railroad Company*, dated *November 12*, 1895, and duly verified, and the affidavit of *Graham K. Anderson*, and after hearing *Jesse Johnson*, Esq., and on motion of *John J. Allen*, Esq., attorney for the petitioner, it is

Ordered, that *Joseph A. Burr*, *Joseph C. Hendrix*, and *George H. Southard* be, and they are hereby, appointed commissioners under and in pursuance of the provisions of chapter thirty-nine of the General Laws of the State of *New York*, and the acts amending the same, and supplementary thereto, to determine whether the railroad referred to in the petition and mentioned and described in the certificate of incorporation of said company ought to be constructed and operated in the city of *Brooklyn*, in said state, through and along *Union street*, between the intersection of said street and *Hamilton avenue*, and the intersection of said street and *Ninth avenue*, and the public street and place, known as *Prospect Park Plaza*, in said city, specified in article *seventh* of said petition.

And it is further ordered that said commissioners shall, within *ten* days from the date of the entry of this order, give notice in writing of a place within the city of *Brooklyn*, and a time not less than *five* nor more than *twenty* days from the date of said notice, when and where their *first meeting* hereunder will be held.

And it is further ordered, that said notice shall be published *twice* in "*The Brooklyn Daily Eagle*," and the *Brooklyn "Standard Union*," and shall be posted conspicuously in *two* places on said *Union street*, as above described.

1. For the formal parts of an order in L. & Rev. Stat. (1901), p. 3313, c. 39, a particular jurisdiction see the title § 94.
ORDERS, vol. 13, p. 356.

2. *New York*. — Heydecker's Gen. Electric R. Co., 167 N. Y. 37, and is

And it is further ordered, that said commissioners shall proceed to the determination of said matter, and report thereon to this court, or to the *Appellate* Division of the *Supreme* Court in this department, with all convenient speed, and that the petitioner, by its attorney and counsel, may present said report to a *General* Term of this court, or to the *Appellate* Division of the *Supreme* Court in this department, for confirmation upon any day when said court shall be in session, first giving notice of said intended presentment, by publishing said notice *twice* in the daily newspapers above mentioned, and by serving a copy of said notice at least *five* days previous to said intended presentment upon all attorneys who shall have served a written notice of appearance herein to *John J. Allen*, Esq., attorney for said petitioner, at his office, *203 Montague* street, in the city of *Brooklyn*.

And it is further ordered, that the expenses and disbursements of said commissioners, together with a suitable amount for their services, to be adjudged and allowed by the court, be paid by the petitioner.

Granted *December 2nd*, 1895.

Enter:

Henry C. Saffen, Clerk.

C. F. Brown, Presiding Justice.

4. Notice by Commissioners of First Meeting.¹

Form No. 18999.²

New York Supreme Court — Kings County.

In the matter of application of the *Nassau Electric Railroad Company* for the appointment of commissioners as to *Union* street.

The undersigned *Joseph A. Burr*, *Joseph C. Hendrix* and *George H. Southard*, who were by an order of the *General* Term of the *Supreme* Court, held in and for the *Second* Judicial District, at the city of *Brooklyn*, on the *2nd* day of *December*, 1895, made in the above entitled matter, appointed as commissioners, under and in pursuance of the railroad law, being Chapter Thirty-nine of the General Laws of the State of New York, and the acts amendatory thereof and supplemental thereto, to determine whether the railroad mentioned and described in the articles of association referred to in the petition of the *Nassau Electric Railroad Company*, in said matter ought to be constructed and operated by said company, over, through, and along *Union* street, in the city of *Brooklyn*, as specified in the *Seventh* Article of said petition, which said petition, duly verified, together with said order, was filed in the office of the clerk of the county of *Kings* on the *2nd* day of *December*, 1885, do hereby appoint *Tuesday*, the *17th* day of *December*, 1895, at 4 o'clock in the afternoon, at Room 24, No. 350 *Trenton* street, in the city of *Brooklyn*,

copied from the records. No objection was made to its sufficiency.

1. For the formal parts of a notice in a particular jurisdiction see the title NOTICES, vol. 13, p. 212.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94.

This is the notice in Matter of Nassau Electric R. Co., 167 N. Y. 37, and is copied from the records. No objection

the place where and the time when they will hold their *first* meeting, and will hear all persons interested in said matter.

Dated *Brooklyn, New York, December 10th, 1895.*

*Jos. A. Burr,
Jos. C. Hendrix,
Geo. H. Southard,
Commissioners.*

5. Report of Commissioners that Street Railroad should be Constructed.

Form No. 19000.¹

General Term — Fourth Department.

In the Matter of the Application of the *People's Railroad Company of Syracuse*

for

The Appointment of *Three* Commissioners to Determine Whether its Railroad Ought to be Constructed.

To the *General Term* of the *Supreme Court* of the *Fourth Department*:

The undersigned, appointed by an order of the *General Term* of the *Fourth Department*, duly made and entered in the *Onondaga County Clerk's office, January 16th, 1888*, pursuant to chapter 252 of the Laws of 1884, and of the acts supplementary thereto and amendatory thereof, commissioners to determine whether the proposed street surface railroad of the *People's Railroad Company of Syracuse* ought to be constructed and operated, having, pursuant to said order, caused a public notice to be given of our *first* sitting within *ten* days after the entry of said order by publishing the same in the "*Syracuse Evening Herald*," of *Syracuse, N. Y.*, for *ten* successive days, and by mailing a copy of such notice to each of the persons upon whom a notice of the application for the appointment of commissioners herein was served, which said notice was so mailed, and the *first* publication thereof made more than *ten* days before our said *first* sitting, we met pursuant to said notice at the court-house in the city of *Syracuse, N. Y.*, on the *28th* day of *February, 1888*, and each of us having first duly taken and subscribed the required oath of office, *Martin A. Knapp, Esq.*, and *Charles W. Andrews, Esq.*, appeared before us on behalf of the petitioner herein, *Harrison Hoyt, Esq.*, appeared for the following named property owners, to wit: (*naming them*), *N. W. White, Esq.*, appeared on behalf of *Trinity Church*, and *Mary M. White*, property owners, *J. C. Flower, Esq.*, and *Caius Weaver, Esq.*, appeared in person, property owners; no one appeared in behalf of the property owners on *Lock street*; and it having been stipulated and agreed by the respective attorneys and parties appear-

was made to the sufficiency of this notice.

1. *New York. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94.*

This is the report in Matter of *People's R. Co.*, 112 N. Y. 578, and is copied from the records. The sufficiency of the report was not objected to.

ing that the minutes and evidence should be taken by *Frederick J. Morgan*, Esq., stenographer, and when taken by him be adopted and regarded as the evidence and minutes of the proceedings herein; we personally examined the proposed route, and heard the evidence, proofs and allegations of all the parties appearing and heard *Harri-son Hoyt*, Esq., *J. C. Fowler*, Esq., and *Caius Weaver*, Esq., in opposition to and *Martin A. Knapp*, Esq., in favor of the petitioner herein. After such public hearing, having duly weighed and considered all the proofs and allegations of the several parties, we do determine and respectfully report to this court that such railroad ought to be constructed and operated along and upon its proposed route, which is through and upon the following streets in the city of *Syracuse*, viz.: (*setting out route*).

We do further report, that the minutes heretofore annexed and the exhibits therein referred to, and which accompany the same, are the evidence taken by us, and the proceedings on said hearing, and the whole thereof.

Dated *March 10*, 1888.

A. M. Mills,
W. B. Edwards,
Watson N. Rogers, } Commissioners.

6. Notice of Motion for Confirmation of Report of Commissioners.¹

Form No. 19001.²

Supreme Court — General Term — Fourth Department.

In the Matter of the Application of the *People's Railroad Company of Syracuse* for

The Appointment of *Three Commissioners* to Determine Whether its Railroad Ought to be Constructed.

Sirs: You will please take notice that the report of *Albert M. Mills*, Esq., *William B. Edwards*, Esq., and *Watson M. Rogers*, Esq., the committee duly appointed herein by an order of said *General Term* made and entered in *Onondaga County Clerk's office*, *January 16*, 1888, with the evidence taken by them, will be presented to the *General Term* of the *Fourth Department* appointed to be held at the court-house in the city of *Utica, N. Y.*, on *April 17*, 1888, at the opening of the court on that day or as soon thereafter as counsel can be heard, and that, upon such report duly made *March 10th*, 1888, and filed and entered in the *Onondaga County Clerk's office* on *March 15*, 1888, a copy of which is herewith served upon you, and upon the petition and notice of application herein, dated *December 24*, 1887, the affidavits thereto annexed and due proof of service thereof

1. For the formal parts of a notice of motion in a particular jurisdiction see the title *MOTIONS*, vol. 12, p. 938.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94.

This is the notice of motion in Matter of *People's R. Co.*, 112 N. Y. 578, and is copied from the records.

No objection was made to the sufficiency of this motion.

at least *ten* days prior to making said application; upon the order of the *General Term* appointing *Albert M. Mills, Esq., William B. Edwards, Esq., and Watson M. Rogers, Esq.*, commissioners herein to determine whether the railroad of the petitioner herein ought to be constructed and operated, and requiring public notice to be given by said commissioners of their first sitting, which order was made and entered in the *Onondaga County Clerk's office* on *January 16, 1888*; upon due proof of service of said order and of the notice of entry thereof on *Harrison Hoyt, N. M. White and J. C. Fowler, Esq.*, the attorneys appearing on such application; upon the appointment made by said commissioner of their first sitting and due proof of the publication, mailing and service of notice thereof within *ten* days after their appointment, upon all the proceedings taken by said commissioners and all the evidence taken and had by them on the hearing herein, and upon all the proceedings taken and had in the above entitled matter, the undersigned will then and there move the said *General Term* for an order confirming in all respects the said report of said commissioners, determining that the railroad of the *People's Railroad Company of Syracuse* ought to be constructed and operated upon and along its proposed route, and for such other and further order as may seem good to said court.

Dated *April 5, 1888*.

Knapp, Nottingham & Andrews,
Att'ys for *People's Railroad Company of Syracuse,*
the petitioner herein,

8 Larned Building, Syracuse, N. Y.

To *Hoyt, Beach & Hancock, Esqs., Harrison Hoyt, Esq., N. M. White, Esq., J. C. Fowler, Esq., Caius Weaver, Esq., and George F. Hine, Esq.,* attorneys respectively for certain of the property owners along the proposed route of the *People's Railroad Company of Syracuse*.

7. Order Confirming Report of Commissioners.¹

Form No. 19002.²

At a *General Term* of the *Supreme Court* held in and for the *Fourth Judicial Department* at the court-house in the city of *Utica* on the *7th day of April, 1888*.

Present — Hon. *George A. Hardin*, Presiding Justice.

Hon. *David L. Follett*,

Hon. *Celora E. Martin*,

} Assistant Justices.

In the Matter of the Application of the *People's Railroad Company of Syracuse*

for

The Appointment of *Three Commissioners* to Determine Whether its Railroad Ought to be Constructed.

The People's Railroad Company of Syracuse, having appeared at a *General Term* of this court, held in and for the *Fourth Judicial*

1. For the formal parts of an order in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94. This is the order in the Matter of

Department at the city of *Syracuse* on the *tenth* day of *January*, 1888, for the appointment of *three* commissioners pursuant to the provision of chapter 252 of the Laws of 1884, and the laws amendatory thereof and supplemental thereto, to determine whether its railroad ought to be constructed, and an order having been made appointing *Albert M. Mills*, Esq., *Watson M. Rogers*, Esq., and *William B. Edwards*, Esq., as such commissioners, said order providing, however, that all questions and objections should be reserved until an application should be made for the confirmation of the report of said commissioners, and the said commissioners having duly made their report and said petitioner having at this time moved for the confirmation thereof, and *Louis Marshall*, Esq., having appeared at this time in behalf of certain property owners, who had been served with notice of the application for the appointment of such commissioners, residing on *South* avenue, *Slocum* avenue, *Shonnard* and *Seymour* streets, in the city of *Syracuse*, and objected to the appointment of said commissioners, and moved that said order appointing commissioners be set aside and vacated upon the grounds (*setting out grounds*).

After reading and filing the notice of application to the *General Term* for the appointment of commissioners, with proof of due service thereof, on all the owners of property on the route in said *South* and *Slocum* avenues, *Shonnard*, *Seymour* and *Lock* streets, and on others, the petition for appointment, the affidavits of *Charles W. Andrews*, *Francis J. Callanan*, *John C. Keeffe*, *Alfred Wilkinson* and *Ennums H. Sanford* thereto annexed, the article of association of said petitioner and the affidavit of *Edmund Drake*, verified the *10th* day of *January*, 1888, the report of said commissioners, and notice of application to confirm the same, and after hearing *Martin A. Knapp*, Esq., in favor of the petitioner, and *Louis Marshall*, Esq., opposed, it is

Ordered, that said order appointing said commissioners be and the same is hereby confirmed; that the objection hereinbefore set forth made to said petition by the property owners be and each of them is hereby overruled, and that the notice to vacate and set aside the said order appointing said commissioners be and the same is hereby denied; and that the report and determination of the said commissioners be and the same is hereby confirmed.

J. E. Wells, Clerk.

(Endorsed.)

Entered *August 1*, 1888.

II. PROCEEDINGS FOR INJUNCTION.¹

1. By Abutting Property Owner or Owners Against Street Railroad Company.

a. To Restrain Construction of Railroad.

People's R. Co., 112 N. Y. 578, and is copied from the records. No objection was made to the sufficiency of this order.

1. For forms in proceedings for injunctions, generally, see the title INJUNCTIONS, vol. 9, p. 822.

- (1) WHERE THE CONSENT OF THE OWNERS OF ONE-HALF IN VALUE OF THE PROPERTY ON THE STREET OR STREETS HAS NOT BEEN OBTAINED.

(a) *In General.*

Form No. 19003.¹

Supreme Court, County of *Richmond*.

Frederick Tiedemann, plaintiff,

against

Staten Island Midland Railroad Company,
defendants. }

The plaintiff, by *John J. Kenney*, his attorney, alleges as follows:

1. That the defendant is a domestic corporation duly organized under the laws of the state of *New York*.

2. That the plaintiff is the owner in fee of premises situated in the northeasterly corner of *Hyatt* street and *Tompkins* avenue, in the village of *New Brighton*, and having a frontage of *two hundred and forty (240)* feet on said *Hyatt* street.

3. That the defendant has made application to the board of trustees of the village of *New Brighton* for the consent of such board of trustees to construct, operate and maintain a street surface railroad upon said *Hyatt* street (said *Hyatt* street being one of the public highways of said village of *New Brighton*), and that said board of trustees has given its consent to the construction of such street surface railroad.

4. That part of said *Hyatt* street upon which it is proposed to construct such street surface railroad has been duly adopted and improved as a county road under the provisions of chapter 555 of the Laws of 1890, and is now subject to the control of the board of supervisors of the county of *Richmond*, and that such board of supervisors has not consented to the construction of such railroad upon said *Hyatt* street in said village.

5. That this plaintiff has not given his consent to the construction of such railroad upon said *Hyatt* street, nor has the consent, in writing duly acknowledged or proved as are deeds entitled to be recorded, of the owners of one-half of the value of the property bounded on said *Hyatt* street, been obtained or procured in any other way provided by law.

6. That it is the intention and purpose of said *Staten Island Midland Railroad Company* to construct a street surface railroad upon said *Hyatt* street, and that plaintiff has been so informed by one *Rockwell*, the president of the defendant.

7. That this plaintiff will be seriously injured in his rights and property by the construction, operation and maintenance of a street surface railroad in *Hyatt* street in front of his property.

1. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313. c. 39. § 94.

This is the complaint in *Tiedemann v. Staten Island Midland R. Co.*, 18 N. Y. App. Div. 368, and is copied from the records. An order denying a mo-

tion for an injunction *pendente lite* restraining the defendant from constructing, operating and maintaining a street surface railway upon *Hyatt* street, in the village of *New Brighton*, *Richmond* county, was reversed, and the motion for the injunction granted.

8. That, upon information and belief, said defendants have caused to be laid and placed in *Hyatt* street rails for such surface railroad in said *Hyatt* street without authority required by law.

Wherefore this plaintiff prays that defendant may be restrained and enjoined from constructing and operating its street surface railroad upon said *Hyatt* street and from opening and excavating said street for that purpose, and from placing any material upon said street, and for such further and other relief as may be just and equitable, besides the costs of this action.

Jno. J. Kenney, Plaintiff's Attorney,
New Brighton, N. Y.

(*Verification.*)

(*b*) *And the Consent of the Common Council has Not been Obtained in a Legal Manner.*

Form No. 19004.¹

Supreme Court, City and County of New York.
Catharine L. Beekman, Adelaide A. Beekman and
Mary E. Beekman, plaintiffs,
against

The Third Avenue Railroad Company, defendant.

The plaintiffs above named, for their complaint in this action, allege as follows:

I. That the plaintiff *Catharine L. Beekman* is a widow, and the plaintiffs *Adelaide A. Beekman* and *Mary E. Beekman* are unmarried, and that all of your plaintiffs are above the age of *twenty-one* years, and reside in the city of *New York*, and are seised in fee simple, as tenants in common, of certain lands, with the buildings thereon and the easements and rights appurtenant thereto, situated in the city of *New York*, and bounded as follows, namely:

Beginning at a point on the *Kingsbridge* road or *Broadway*, where the same is intersected by a line drawn through the center of *182d* street, along the center of said *182d* street to the land formerly belonging to *Barney Bowers*, deceased; thence south *thirty-three* degrees *thirty* minutes west along said last mentioned land, *two hundred and fifty-three* feet *ten* inches to land now or formerly of *John A. Havens* and *Gorden Buck*; thence south *sixty-three* degrees *thirteen* minutes east along said last mentioned land *three hundred and ninety-one* feet *eight* inches to the westerly side of the *Kingsbridge* road or *Broadway*; thence southerly along said westerly side of the *Kingsbridge* road to the center of *182d* street, the place of beginning.

II. That the buildings upon said lands are and for many years have been used as a hotel and place of public entertainment. They are and long have been frequented by many equestrians, bicyclists

1. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3313, c. 39, § 94. This is the complaint in *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144, and

is copied from the records. An order was entered granting an injunction against the defendant *pendente lite*, which was modified and affirmed.

and occupants of carriages and other vehicles, who have resorted thither for purposes of rest, refreshment and recreation, and therein a valuable hotel business has long been done.

III. On information and belief, that the defendant, *The Third Avenue Railroad Company*, is a street surface railroad corporation organized and existing under the laws of the state of *New York*, and is and long has been engaged in operating a street surface railroad situated on *Third* avenue, on *125th* street and on *10th* and *Amsterdam* avenue, north of *125th* street, in the city of *New York*.

IV. On information and belief, said *Third Avenue Railroad Company* threatens and intends, and is about to construct, maintain and operate, by the overhead trolley system of traction, certain new street surface railroads as extensions or branches of its existing railroad aforesaid, one of which (herein styled the *Kingsbridge* extension), it intends, threatens and is about to construct, maintain and operate on the *Kingsbridge* road or *Broadway*, commencing and connecting with its said existing railroad in *10th* and *Amsterdam* avenue, near the intersection thereof with *162d* street, and running thence northerly along said *Kingsbridge* road or *Broadway* in front of plaintiffs' premises aforesaid and across the bridge at the *Ship Canal* and at *Spuytten Duyvil Creek* to the northerly line of *New York* city, and for the purpose of constructing such extension, defendant has already commenced to tear up and disturb the roadway of said *Kingsbridge* road or *Broadway* at or near *162d* street.

V. On information and belief, that during the process of constructing the said *Kingsbridge* extension plaintiffs' premises aforesaid will for a long period of time be rendered difficult and partially impossible to access to the plaintiffs and their licensees, and to the usual patrons of the hotel aforesaid, and to other persons desiring to enter the same and less valuable, agreeable and convenient for occupation and use by reason of the holes, excavations, piles of stone, earth and materials, and of the generally disturbed condition of the surface of the *Kingsbridge* road or *Broadway* necessarily and inevitably incident to such construction process, and by the maintenance and operation of the said extension railroad when constructed and by the rails, poles and wires and trolley structure appertaining thereto, the *Kingsbridge* road or *Broadway*, especially in front and in the neighborhood of plaintiffs' premises aforesaid, will be permanently obstructed and thereby access to said premises made permanently dangerous and the occupation and use of said premises permanently made disagreeable and less valuable.

VI. On information and belief, that the construction, maintenance and operation of *Kingsbridge* extension is wholly unauthorized by law and will constitute public and common nuisances which will greatly, continuously and irreparably damage the plaintiffs as the owners of the property abutting on the *Kingsbridge* road or *Broadway* aforesaid.

VII. On information and belief, that the *Third Avenue Railroad* has never obtained consent of the local authorities of *New York* city to the construction or operation of said *Kingsbridge* extension, unless it has done so in and by certain resolutions of the Common

Council adopted on the 27th day of *August*, 1895, and approved by the mayor on the 10th day of *September*, 1895, and in and by certain pretended sale of franchises made by the comptroller of the city of *New York* on the 14th day of *November*, 1895, pursuant to a notice of sale, a copy of which is hereto annexed, such notice containing a copy of said resolutions adopted by the Common Council, and of the application of the *Third Avenue Railroad Company* upon which the same were based; that said resolutions and said comptroller's sale are null and void for that said resolutions provided for the sale of several and distinct and independent extensions of the *Third Avenue Railroad Company* in gross and as an entirety and not separately as contemplated by law; and for that the said Common Council was illegally and wrongfully induced and influenced to adopt said resolutions by an offer contained in the said application of the said *Third Avenue Railroad Company* to pay into the said treasury the sum of \$250,000 in cash; that said comptroller's sale was also ineffectual to vest any right, privilege or franchise in said *Third Avenue Railroad Company* for that said sale was never authorized by any consent to the use and occupancy as proposed by said railroad company of the bridges at *Spuyten Duyvil Creek* and at the *Ship Canal*, therefor given or granted by the Department of Public Parks in whom by law the exclusive control of said bridges is vested.

VIII. Upon information and belief that the *Third Avenue Railroad Company* has never obtained the consent of the owners of one-half in value of the property bounded on that portion of the *Kingsbridge road* or *Broadway* upon which said *Third Avenue Railroad Company* proposed to construct and operate a railroad as aforesaid.

IX. Upon information and belief, that said *Third Avenue Railroad Company* has never obtained the consent of the owners of one-half in value of the property bounded on each street or highway, or portion of a street or highway, mentioned in said Common Council resolutions as streets or avenues upon and over which the construction, use and operation of a street surface railroad as branches or extensions of the *Third Avenue Railroad Company* is consented to, and especially that said *Third Avenue Railroad Company* has never obtained the consent of the owners of one-half in value of the property bounded on that portion of *Riverdale avenue* which is mentioned in said resolutions, or on that portion of *Manhattan avenue* which is mentioned in said resolutions.

X. Upon information and belief, that the Appellate Division of the *Supreme Court* in the first department has never, upon application of the *Third Avenue Railroad Company* or otherwise, determined whether the railroad mentioned in said resolutions ought to be constructed or operated.

XI. Upon information and belief, that to the construction, maintenance and operation of the railroad purporting to be authorized by said resolutions, the use and occupation of the bridges over the *Ship Canal* and over *Spuyten Duyvil Creek* is essential; that the exclusive control of said bridges is vested in some other authority than the Common Council of *New York city* (to wit, the Department of Public Parks), and that the consent of such other authority to the use

and occupation of said bridges by defendant's proposed railroad has never been obtained.

Wherefore plaintiff demands judgment that the defendant, *The Third Avenue Railroad Company*, its officers, agents, contractors and servants, may *pendente lite* and perpetually be enjoined and restrained from constructing, maintaining or operating its said proposed extension or branch on *Kingsbridge* road or *Broadway*, and especially on that portion of said *Kingsbridge* road or highway which is in front or in the neighborhood of plaintiffs' premises aforesaid, and for such other or different relief as to the court may seem proper, together with the costs of this action.

Root & Clarke, Attorneys for Plaintiffs,
32 Liberty Street, N. Y.

(Verification.)

- (2) WHERE THE NECESSARY CONSENT HAS BEEN OBTAINED TO AUTHORIZE THE GRANT OF A FRANCHISE, BUT PLAINTIFFS SEEK TO RESTRAIN THE CONSTRUCTION OF THE ROAD UNTIL THEY SHALL HAVE RECEIVED COMPENSATION IN A PROPER APPROPRIATION PROCEEDING FOR DAMAGES CAUSED TO PREMISES.

Form No. 19005.

(Precedent in *Schaaf v. Cleveland*, etc., R. Co., 66 Ohio St. 216.)¹

[(Title of court and cause as in Form No. 5929.)

The plaintiffs say:

That the defendant, *The Cleveland, Medina & Southern Electric Railway Company*, is a corporation duly incorporated under the laws of the state of *Ohio*.

The plaintiffs further say that]² they are the owners of and are seised as of estates in fee simple of certain tracts of land located in *Middleburg* township, *Cuyahoga* county, state of *Ohio*, and which tracts of land abut on the western side of what is known as the *Wooster* pike, which is a road or highway dedicated to public use for the purpose of a road or highway; that these plaintiffs are the owners of the fee to the center of said road on the portion of said road upon which the lands of these plaintiffs abut subject only to the right of the public use as such road or highway; that the board of commissioners of *Cuyahoga* county have heretofore granted to another corporation, to wit: *The Wooster, Medina & Cleveland Street Railway Company*, the right of way in said *Wooster* pike so far as the said board of commissioners have power to grant the same to construct and build a railway over and along said *Wooster* pike, and especially on the portion of said *Wooster* pike upon which the lands of the plaintiffs above described directly abut and the title to which is in these plaintiffs subject only to said public uses as above set forth; that the defendant, *The Cleveland, Medina & Southern Electric*

1. A judgment dismissing this petition was reversed and judgment entered for the plaintiffs granting them an injunction.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

Railway Company, claims to be entitled to all the rights of the said *The Wooster, Medina & Cleveland Street Railway Company*, so acquired from said board of commissioners; that the said defendant railway company, without having acquired the right from these plaintiffs or under the statute in such cases made and provided, is about, and unless prevented by order of this Honorable Court will, through its agents, contractors and servants, wrongfully and unlawfully erect large wooden poles on the land of these plaintiffs along said highway for the purpose of supporting electric trolley wires to be used in connection with the proposed electric railway, and the said defendant railway company also threatens, through its agents, contractors and servants, to proceed to lay and construct a railroad suitable for the use of operating electric cars on the side of said highway, the title to which is vested in these plaintiffs as above set forth; and when the said railroad is completed the defendant railway company through its agents and servants will operate and run over said railroad electric cars at a very high rate of speed, said cars it is proposed to have carry passengers and freight from various points through the counties south of *Cuyahoga* county.

Plaintiffs further say that the defendant railway company has entered into a contract with the defendant, *Joseph Davis*, for the furnishing and erecting of said wooden poles, and the said defendant, *Joseph Davis*, has already distributed the poles along the lands of these plaintiffs, and is about to erect and set them along the lands of these plaintiffs in the manner above set forth.

Plaintiffs further say that the erecting of said poles and the construction of said railroad and the laying of the tracks along said highway, as contemplated in the manner above set forth, and as provided for in the grant of the right of way by the said county commissioners, and the running of the electric cars thereon, will have the effect of seriously interfering with plaintiff's enjoyment of their property above described and will result in great diminution of the value thereof and of the value of the private rights and easements which they now respectively have in said highway, and especially will seriously interfere with their means of access to and from their respective tracts of land and will render it absolutely impossible to hitch their teams along that side of the highway or to allow them to stand in said highway.

Plaintiffs further say that such contemplated use of the said highway by the said defendants in the manner hereinbefore set forth is an essential and great diversion of the said property to uses and purposes other than those for which it was acquired by the public use as to accumulate materially additional burdens upon the lands and as to destroy and impair the incidental rights of the plaintiffs appurtenant to their lands on said highway, and that the damages resulting therefrom will be irreparable, and that said defendant railway company is insolvent and unable to pay its obligations or any judgment for damages which these plaintiffs might recover against them by virtue of the premises.

Plaintiffs further say that these defendants have been notified by all the plaintiffs herein or by their agents that these plaintiffs

objected to the proposed acts of the defendant, *Joseph Davis*, that he has only accelerated the work, and has been laying telegraph poles by day and night, and without any right whatsoever to do it, is unlawfully distributing them along the front of the land of these plaintiffs, and if the court should require any notice to be given of an application for a restraining order in this case, such notice will only give the said defendant, *Joseph Davis*, and the said defendant railway company, opportunity to erect all of said poles before the said restraining order can be granted on notice to these defendants.

Wherefore, plaintiff prays that an order may issue from this Honorable Court forthwith restraining these defendants, their officers, agents, contractors and servants, from further carrying on any portion of their work in the manner above set forth, and that such order be issued without notice to these defendants for the reason that the object for which this injunction is prayed may in great measure be defeated by giving any notice to said defendants, and that on the final hearing of this case a perpetual injunction may be granted forever restraining these defendants or either of them, or their officers, agents, contractors or servants, from carrying on any portion of said proposed work, and plaintiffs ask for such other and further relief as in good conscience they may be entitled to.

[(Signature and verification as in Form No. 5929.)]¹

b. To Restrain Maintenance of Switch or Siding.

Form No. 19006.²

Supreme Court, Kings County.

William Irvine

against

The Atlantic Avenue Railroad Company. }

The complaint of the plaintiff respectfully shows to this court:

I. — That the defendant is a corporation organized under the laws of the state of *New York*, engaged in business of carrying passengers for hire, and for that purpose owns, controls and operates street railroads in the city of *Brooklyn*, among others a street railroad running through *Ninth* avenue in the city of *Brooklyn* in front of the premises hereinafter described.

II. — That at all the times hereinafter mentioned the plaintiff was and still is the owner of the following described premises: All that certain plot, piece or parcel of land, situate, lying and being in the *twenty-second* ward of the city of *Brooklyn* aforesaid bounded and described as follows, to wit: beginning at a point on the northerly side of *Carroll* street distant *five hundred and ninety-four* feet and *eight* inches easterly from the northeasterly corner of *Carroll* street and *Eighth* avenue, running thence northerly parallel with *Eighth* avenue *one hundred* feet to the center line of the block between *Carroll* and *President* streets; thence easterly along said center line of the block

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the complaint in *Irvine v.*

Atlantic Ave. R. Co., 10 N.Y. App. Div. 560, and is copied from the records. A judgment in favor of the plaintiff was affirmed.

and parallel with *Carroll* street eleven feet; thence again northerly parallel with *Eighth* avenue one hundred feet to the southerly side of *President* street, at a point thereon distant six hundred and five feet and eight inches easterly from the southeasterly corner of *President* street and *Eighth* avenue; running thence easterly along the southerly side of *President* street one hundred feet to the westerly side of *Ninth* avenue as widened; thence southerly along said westerly side of *Ninth* avenue two hundred feet and three inches to the northerly side of *Carroll* street, and thence westerly along the northerly side of *Carroll* street one hundred feet to the point or place of beginning. And also all land lying in said streets and avenue adjoining the premises aforesaid.

That the said premises are located in one of the finest residential neighborhoods in said city.

III. — That on or about the *first* day of *August*, 1894, this defendant, part of whose road is in front of the above described premises, constructed a switch or siding in front of said premises, on which it is its intention, as declared by its superintendent to the plaintiff, of standing and storing its cars there waiting for crowds to come from the park and elsewhere, thereby cutting off access to the property of plaintiff and causing irreparable injury thereto.

IV. — That the construction of said siding or switch was unlawful and done without the requisite and necessary authority or permission of the city of *Brooklyn*, and without obtaining the consent of the adjoining property owners or of this plaintiff and without any compensation whatever to this plaintiff, and that the construction and maintenance of said siding or switch and the storage and standing of cars thereon will greatly deteriorate the value of plaintiff's said property and prevent proper and convenient access thereto and prevent the sale of said land, and if said switch or siding is permitted to remain and said cars permitted to be stored and stand thereon, said land of plaintiff will be ruined for the purpose of erecting the first-class dwellings and residences for which the same was intended.

V. — That a money judgment alone would not be adequate relief to plaintiff for said unlawful acts of the defendant, as the premises are irreparably injured and the amount of injury cannot be exactly ascertained.

VI. — That plaintiff has demanded from the defendant that the said switch or siding be removed and that it cease from stopping its cars in front of said premises, but said demand has not been complied with.

Wherefore plaintiff demands judgment —

1. That the defendant be enjoined and restrained from maintaining said switch or siding or any switch or siding on *Ninth* avenue, between *Union* and *Carroll* streets, in the city of *Brooklyn*, in front of plaintiff's said premises.

2. That the defendant be enjoined and restrained from using said switch or siding for the storage or continuous standing of cars thereon.

3. That the defendant be enjoined and restrained from refusing to remove said switch or siding.

4. That during the pendency of this action the plaintiff may have an order enjoining and restraining the defendant from the commission of all the acts aforesaid.

5. That the plaintiff may have such other and further judgment, order or relief in the premises as to the court may seem just, besides the costs of this action.

Hirsh and Rosquin, Plaintiff's Attorneys.

Office and post-office address, 4 and 5 Court Square,
Brooklyn, N. Y.

c. To Restrain Operation of Railroad and to Recover Damages.

Form No. 19007.¹

Supreme Court, County of Orange.

Harriet W. Clark, plaintiff,

against

Middletown-Goshen Traction Company, defendant. }

Complaint.

Plaintiff, for cause of action herein against the above named defendant, declares:

1. That she is now and has been for *twelve* years last past seised in fee simple of and in possession of certain premises situate in the city of *Middletown, Orange county, New York*, and more particularly described as follows:

All that tract or parcel of land situate in the village of *Middletown*, county of *Orange* and state of *New York*, bounded as follows, to wit: Beginning at a stake in the northeasterly line or side of *Division* street, *twenty-seven* feet and *three* inches north, *twenty-eight* and *three-fourth* degrees east from the northerly corner of the row of brick houses on a lot hereby described, and running from thence south *thirty-six* and *one-half* degrees east *one hundred and fifty-four* feet to an iron bolt on the northerly line or side of *Wickham* avenue; thence along a northerly line or side of said avenue south *eighty* degrees and *twenty-three* minutes west *seventy* feet to an iron bolt, thence north *forty-five* degrees west *one hundred and thirteen* feet, passing through and along the middle line of the partition wall between the *fourth* and *fifth* houses in the row of brick houses aforesaid, parallel with and *fifty-four* feet from the northeasterly end of said row to an iron bolt in the southeasterly line of *Division* street, thence along the said line or side of *Division* street north *forty-five* and *three-fourths* degrees east *eighty* feet and *four* inches to the place of beginning as surveyed by *C. J. Everson*, surveyor, *June 8th, 1883*.

Also all the land adjoining and in front of said premises to middle line of *Division* street, and to the middle line of *Wickham* avenue, subject, however, to use as public highways, being a portion of the same property conveyed to *Henry R. Low* by *J. Milton Fuller* and *Mary H. Fuller*, his wife, by deed dated *May 14th, 1881*, and

1. This is the complaint in *Clark v. Middletown-Goshen Traction Co.*, 10 N. Y. App. Div. 354, and is copied

recorded in the *Orange* county record for deeds on the 17th day of *April*, 1882, in book 313, at page 7.

II. That the said premises abut and are upon certain streets and highways in the said city of *Middletown, New York*, known as *Wickham* avenue and *North* street.

III. That prior to the acts of the defendant hereinafter complained of, there were buildings upon the said premises owned by plaintiff, consisting of stores which are now on said premises fronting on said *Wickham* avenue, and which have been leased by her for business purposes, and the rents and profits of which she has received and enjoyed, and the same were, before the acts of defendant hereinafter complained of, desirable and sought after for such business purposes.

IV. Upon information and belief, that said street known as *Wickham* avenue has for more than *twenty-five* years last past been a public street or highway and forms the only convenient access to the said premises and to the said stores of plaintiff and is of great value to plaintiff, together with other property owners fronting thereon. That plaintiff, while owner of said premises, is and has been the owner in fee of such portions of said *Wickham* avenue as are in front of her said premises and is seised in fee to the center of said *Wickham* avenue, and of such portions thereof as are in front of her said premises, said seisin being subject, however, to the right of the public to use the said *Wickham* avenue; that during said times plaintiff has been and is the owner of valuable easements of light and air and accession to the whole of said *Wickham* avenue adjoining her said premises to, over and from the same, and especially to the portions of said *Wickham* avenue from the center thereof to the premises of plaintiff fronting thereon and adjoining thereto.

V. Upon information and belief, that during the year 1893 the said defendant was incorporated under the laws of the state of *New York*, and as such at the times hereinafter mentioned said defendant owned and operated and now owns and operates a street railroad in the city of *Middletown, N. Y.*, commonly called a trolley road, the motive power of which is electricity.

VI. Upon information and belief, that on or about the month of *August*, 1894, the said defendant unlawfully, wrongfully, and without the consent or knowledge of plaintiff, and without any right or authority whatsoever from her, and without due authority of any kind and without acquiring any title to any portion of the premises owned by plaintiff as aforesaid, and without paying or offering to pay her any compensation for any damage and injury to the said premises or to any easements in and to said streets owned and possessed by her and to the property owned and held by her fronting and abutting thereon, and without the taking or institution of any proceedings to condemn and appropriate under the State's right of eminent domain the property rights and interests of this plaintiff in and to said streets and said portions thereof and in and to said premises described as aforesaid and the buildings thereon, unlawfully and in violation of the constitution of the state of *New York* and of the United States, entered upon said portion of said *Wickham* avenue

owned by plaintiff and wrongfully and unlawfully laid and placed wooden or iron ties and iron rails and tracks on said premises and in said avenue or street or over the same and permanently affixed the same thereto; that said defendant so laid and placed a continuous line of said tracks and rails along said *Wickham* avenue on plaintiff's said premises within or about *four* feet from the curb line of said avenue nearest to the buildings of plaintiff, and another continuous line of said ties, tracks and rails within or about *eight and three-fourths* feet of said curb line and parallel to the other continuous line, and has likewise laid and placed curves of said tracks and rails in and on the said *Wickham* avenue and on and adjoining the said premises of plaintiff; that said rails are what is commonly known as the "T" rail, and being so placed by defendant as aforesaid on said premises and streets, project above the surface thereof, forming an obstruction thereon.

VII. That said defendant now operates and runs, and ever since in or about the month of *August*, 1894, has run and operated over said tracks, rails and curves in said street called *Wickham* avenue, together with the other streets in said city, its cars for the carrying of passengers, which are moved by electricity applied thereto by a system known as the trolley system, requiring and having wires for the transmission of said electricity, one or more of said wires being strung over and above and along said premises of plaintiff and said avenue and street, sustained on poles placed thereon and in and on said premises and streets, which wires were so placed wrongfully and unlawfully by defendant without any permission or consent of plaintiff, and obstructs said avenue and street and access to plaintiff's premises therefrom, and by reason of its obstruction of said premises, avenue and street, and by reason of its dangerous character when transmitting said electricity, has done great injury and damage to plaintiff; that said defendant has wrongfully and without the consent of plaintiff, or any due authority, erected and placed said poles for sustaining said wire or wires on plaintiff's said premises and said avenue and street, and now keeps and maintains the same thereon, and has so maintained them ever since in or about the month of *August*, 1894, and to the great damage and injury of plaintiff.

VIII. Upon information and belief, that said defendant in the operation of its said street railway as aforesaid wrongfully and unlawfully has for *six* months last past run and continues to run its said cars at short intervals of time, to wit:—at intervals of about *ten* minutes—back and forth over plaintiff's said premises and said avenue and street on said tracks and rails, and wrongfully and unlawfully has stopped and left and continues to stop and leave its cars standing on said tracks and rails upon plaintiff's said premises and said avenue and street, and in front of and near to the buildings erected by plaintiff thereon as aforesaid, obstructing and rendering the accession to and use of said enjoyment of said buildings, premises and street by plaintiff difficult and dangerous.

IX. That, as plaintiff is informed and believes, said defendant intends to continue to operate its said rails, tracks, switches, curves, wires, polls and cars on said plaintiff's premises and said avenue and

street, and to maintain the same, and intends to continue to do all the acts hereinafter complained of, and in the manner aforesaid.

That by reason of the facts heretofore set forth herein access to the said premises of plaintiff, and to said avenue and street and to said buildings of plaintiff, has been, and continues to be, greatly interrupted and injured, and thereby the value and usefulness of plaintiff's said premises and the said buildings thereon are, and have been, greatly diminished; that the actual value and the rental value of said premises and said buildings is, and has been, greatly diminished; that by reason of the wrongful and unlawful placing and maintaining said poles, wires and tracks, and by reason of the wrongful and unlawful running and standing of said defendant's cars on and in front of the premises and buildings of plaintiff as aforesaid, great damage and loss has been occasioned to plaintiff; that said damage and injury amounts in value to the sum of *six thousand* dollars.

X. Plaintiff further says that the damage and injury to her said premises as aforesaid is occurring daily, and is increasing from day to day, but owing to the peculiar injuries inflicted upon them, and the daily continuance and repetition by defendant of the wrongful acts aforesaid, and the intent of the defendant to continue them in the future, she has no adequate remedy at law. That should the acts of the defendant continue permanently, the value of plaintiff's property would be depreciated at least by the amount of *six thousand* dollars.

That defendant never made any compensation to the plaintiff for the wrongs complained of, and has continued the perpetrations of the injurious acts above alleged, in spite of plaintiff's demand that it cease the same.

XI. Wherefore plaintiff demands judgment:

First. That said defendant, and each and every of its servants, agents and attorneys, be restrained and enjoined from operating any railway in and upon plaintiff's premises, or to, in and upon plaintiff's premises, or to, in and upon said *Wickham* avenue or said other street adjoining the premises owned by plaintiff, and that it remove its ties, polls and wires and tracks therefrom until adequate compensation shall be made to the plaintiff, or until her rights, property and easements in said premises and said *Wickham* avenue and said other street be condemned as required by law.

Second. That plaintiff have a temporary injunction to that effect.

Third. That the plaintiff may have judgment against the defendant for the amount of damages suffered by her on account of the past wrongful and injurious acts of the defendant hereinbefore set forth, to wit, in the sum of *six thousand* dollars.

Fourth. That plaintiff may have such other and further relief as to the court may seem just, besides the costs of this action.

George T. Clark, Plaintiff's Attorney.

State of *New York*, }
County of *Orange*. } ss.

Harriet W. Clark, being duly sworn, says that she is the plaintiff above named; that she has read the foregoing complaint and knows

the contents thereof; that the same is true of her own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters she believes it to be true.

Harriet W. Clark.

Sworn to before me this 4th day of June, 1895.

B. F. Low, Notary Public.

2. By Individual Against a Municipality, to Restrain It from Awarding Contract for the Paving of Streets Because It Failed to Direct a Street Railroad Company to Pave Its Share.

Form No. 19008.¹

Supreme Court — Monroe County.

John Conway
against

*The City of Rochester and Thomas McMillan,
Frederick C. Seitz and Oscar Knebel,*
composing the executive board of said
City.

The plaintiff in this action complains of the defendants and alleges:

That he is a resident and tax-payer of the city of *Rochester*; that he is the owner in fee of a parcel of real property 40 feet in width and fronting and abutting on *Lyell* avenue between *Lake* avenue and *Saratoga* avenue, in the ninth ward in the city of *Rochester*, *Monroe* county, *N. Y.*, and has been such owner for more than 10 years last past; that he is assessed and liable to pay taxes in said city, and also has paid taxes thereon within one year previous to the commencement of this action; that there are more than 50 persons who own property in fee abutting on said *Lyell* avenue, who are assessed for and liable to pay taxes in said city; that the defendant the city of *Rochester* is a domestic municipal corporation, incorporated under and by virtue of the laws of the state of New York, to wit, chapter 14, Laws of 1880, and acts amendatory thereof and supplemental thereto, and plaintiff begs leave to refer to any part of said charter as a part of this complaint; that the defendants *Thomas McMillan*, *Frederick C. Seitz* and *Oscar Knebel* are members of and compose the executive board of said city, duly elected and qualified, and are now acting as members of said board; that said *Lyell* avenue is one of the public streets of said city of *Rochester*, and that the *Rochester Railway Company* is a domestic street surface railroad corporation, located and having its main or home office in the said city of *Rochester*, and own and operate the street surface railway therein,

1. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3316, c. 39, § 98.

This is the complaint in *Conway v. Rochester*, 157 N. Y. 33, and is copied

from the records. A temporary injunction was granted, which was subsequently vacated, but on appeal to the court of appeals the order vacating the injunction was reversed.

and as part thereof it has *two* railway tracks laid in the center of the roadbed of said *Lyell* avenue in front of plaintiff's said premises; that the said company runs and operates its cars through said street daily, and has done so for a number of years. That on or about the *fifth* day of *May*, the Common Council of the city of *Rochester* adopted as and for its first ordinance for the improvement of said *Lyell* avenue in front of plaintiff's premises the following:

First Ordinance.

Lyell avenue improvement. By Ald. *Edelman* — Resolved, that the city engineer ascertain and report to this council the expense of improving *Lyell* avenue.

Adopted.

The city engineer submitted as such estimate, \$117,000.

By Ald. *Edelman* — Resolved, that the following improvement is necessary and should be made, viz:

The improvement of *Lyell* avenue from *Lake* avenue to the western city line by the construction of the following described pavement and sewers. The width between curbs shall be generally *thirty-eight* feet. A pitch, *Lake* *Trinidad* or *Sicilian* and *German* rock asphalt pavement shall be laid on each side of the roadway from the curbs to lines not more than *two* feet outside the outside rails of the said railway tracks and the balance of the space paved with *Medina* block stone, all on a *six*-inch concrete foundation. The connection between the asphalt and the stone shall be made at such a distance, not exceeding *two* feet, and in such a manner as the executive board and the said engineer may deem necessary; the asphalt shall also be extended to the street line at all intersecting streets, alleys and driveways where in the opinion of the executive board and said engineer it is advisable in order to make a complete improvement.

That portion of the street crossing the *N. Y. C. & H. R. R. R.* shall be paved with *Medina* block stone on a concrete foundation for the full width of the street.

A line of *six*-inch *Medina* stone curb, properly connected with all lateral streets, alleys and driveways, shall be set on each side of the roadway for the entire length of the improvement; also the construction of the necessary manholes, surface sewers, lot laterals, water services and cross-walks, and the cleaning of the main sewer, if found necessary. The pavements and curbs on intersecting streets or alleys shall be relaid for such a distance as is necessary to properly connect with the new pavement. The side-walks shall also be adjusted to grade and line where necessary to complete the improvement. Also the construction of the necessary main sewers of suitable form and dimensions between *Frank* street and *Jones* street; and also between *Moore* street and the *Erie* canal and between *Austin* and *Warner* street. Also a removal of all obstructions necessary to permit the widening of the roadway to *thirty-eight* feet.

On that portion of the street west of the *N. Y. C. & H. R. R. R.* crossing the pavement shall be carried out in the same manner as where the street railway tracks exist, the same width in the center of the street being paved with *Medina* block stone.

And the said engineer, under the directions of this council, having made an estimate of the whole expense thereof, and reported the same at \$117,000, which being deemed reasonable is hereby approved.

Resolved, further, that the whole expense of such improvement is hereby directed to be assessed upon all the following portion and part of the city which this council deems proper to be so assessed for and will be benefited by such improvement, to wit: *one* tier of lots and parcels of land on each side of *Lyell* avenue from *Lake* avenue to the city line.

That on or about *May 11*, 1897, at a regular meeting, the Common Council of the city of *Rochester* adopted as and for the final ordinance for the improvement of said avenue the above mentioned first ordinance by the following vote: Ayes—Alds. *Tracy, Callihan, Ford, Green, Rauber, Adams, Beard, Seyle, Dewey, Cook, Kelly, Crane, Simmelink, Englehardt, Wilson, Reichenberger*—16. Nays—Alds. *Edelman, Johnston, Ward, Paucker*—4. That thereafter the mayor of said city duly approved said ordinances.

That a majority of the property owners on said *Lyell* avenue did not petition for said improvement.

That thereafter the defendants, the executive board of the city, pursuant to said charter, advertised for bids for making said improvement, which time will expire on *Monday, May 24*, 1897, at *ten o'clock A. M.* That no contract has been made or entered into for making said improvement by defendants.

Plaintiff further alleges, upon information and belief, that no request was made by the said Common Council of the city of *Rochester* to the said *Rochester Railway Company* to improve any portion of said street, or to bear any portion of the expense of said improvement, prior to the adoption of either of said ordinances, although said company's property is benefited thereby, nor did any other officer of said city request said railway company to make any portion of the proposed improvement of said *Lyell* avenue, and that said defendants intend that the abutting property owners, of which this plaintiff is one, shall bear the whole expense of the making of said improvement, and that if said improvement shall be made under said ordinance, the said *Rochester Railway Company* cannot be compelled to contribute to any portion of the expense thereof, owing to the fact that no request of said company was made to make said improvement between said tracks and the rails of its tracks and *two* feet outside thereof prior to the adoption of said ordinances or at any other time, although it is and was the duty of said railway company to make improvements and repairs between its tracks and the rails thereof and for *two* feet outside of the same of all streets on which it runs and operates its cars, and in case of its refusal to do so it is the duty of the defendant, the city of *Rochester*, to make them and collect the expenses thereof from said corporation; that if said defendants shall be permitted to make said improvements without requesting the said *Rochester Railway Company* to make and construct that portion between its tracks and the rails thereof and *two* feet outside of its tracks, this plaintiff will suffer great irreparable damages, and will give rise to a multiplicity of actions by the abutting owners on said

street to restrain the said defendants from making said improvement. That said ordinances are in violation of the statute and are void and illegal.

Plaintiff further alleges that said ordinances are illegal and void, owing to the fact that all the parties benefited, and especially the *Rochester Railway Company*, are not compelled to contribute to the expense of said improvement, and are not to be assessed therefor, and that if said improvement shall be made the defendants will be wasting the funds and property of the taxpayers of said city; the said members of the executive board will award and enter into contracts for improving said avenue on *Monday, May 24th, 1897*.

Wherefore plaintiff demands judgment adjudging said ordinances illegal and void, and enjoining and restraining temporarily and permanently the defendants from awarding any contract for making said improvement, and from doing any other act or acts in pursuance of said ordinances, and for such other and further relief as may seem proper, besides the costs of this action.

John Desmond, Attorney for Plaintiff,
813 Powers Building, Rochester, N. Y.

(Verification.)

III. CONNECTIONS WITH STEAM RAILROADS.

1. Proceeding by Steam Railroad Company to Obtain Permission to Unite and Connect Its Tracks with Those of a Street Railroad.

Form No. 19009.¹

Rutland Railroad Company
vs.
Bellows Falls & Saxton's River
Street Railway Company.

To the *Supreme Court of the State of Vermont*:

Your petitioner, the *Rutland Railroad Company*, a railroad corporation created by and existing under the laws of the State of *Vermont*, and having its principal office at the city of *Rutland*, in the county of *Rutland*, in the said state, brings this its petition against the *Bellows Falls and Saxton's River Street Railway Company*, a railroad corporation created by and existing under the laws of the State of *Vermont*, and having its principal office in the town of *Rockingham*, and county of *Windham*, in said state, and respectfully represents:

First. — That your petitioner owns and operates a railroad in said state extending from the city of *Burlington*, in the county of *Chittenden*, to the village of *Bellows Falls*, in said town of *Rockingham*; that at each of its said termini it has connections with other railroads; that in said village of *Bellows Falls* it owns terminal property.

1. *Vermont*. — Stat. (1894), § 3864.

This is the petition in *Rutland R. Co. v. Bellows Falls, etc., St. R. Co.*, records. The prayer of the petition was granted and commissioners were appointed.
73 Vt. 20, and is copied from the

Second. — That said *Bellows Falls and Saxton's River Street Railway Company* is now constructing its railroad between the town of *Westminster*, in said county of *Windham*, and said village of *Bellows Falls*; and that said company when said railroad is completed will operate the same for the transportation of persons and property; that it will receive freight at various points on its said road for delivery to points on or beyond the railroad of your petitioner in car-load lots and otherwise; and that your petitioner will haul over its road freight in car-load lots and otherwise to be delivered to points on the road of said petitionee.

Third. — That the railroad of said petitionee will terminate at or near the terminal property of your petitioner in said village of *Bellows Falls*; and that for the convenience of the public and to facilitate the exchange of said freight in car-load lots or otherwise, said petitionee should unite or connect its said railroad on said terminal property with that of your petitioner, and such freight should thereby exchange between said respective railroads.

Fourth. — That your petitioner has tried to agree with the said petitionee as to the point and manner of the union or connection of their respective railroads, and for the interchange of freight there; and that your petitioner has been unable to agree with said petitionee in regard thereto.

Now, therefore, your petitioner prays: —

1st — That three disinterested commissioners be appointed who shall upon due notice to said parties hear said parties with their allegations and proofs, and with the least possible delay fix upon the point and manner of such union and connection, and arrange the manner of the exchange of such traffic and report the same to this Court.

2nd — That an order may issue commanding the said *Bellows Falls and Saxton's River Street Railway Company* to appear before this Court and to stand to and abide by such order, direction and decree therein as to this Court shall seem meet.

Dated at said *Rutland*, this 29th day of *January*, 1900.

Rutland Railroad Company,

By *Frederick H. Britton*, Attorney.

2. Proceeding by Street Railroad Company to Obtain Permission to Unite and Connect Its Tracks with Those of a Steam Railroad.

a. Petition.¹

Form No. 19010.²

Supreme Court, Saratoga County.

1. For the formal parts of a petition in a particular jurisdiction see the title PETITIONS, vol. 13, p. 887.

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3259, c. 39, § 12.

This is the petition in *Stillwater, etc., R. Co. v. Boston, etc., St. R. Co.*, 171 N. Y. 589, and is copied from the records. Commissioners were appointed in accordance with the prayer of the petition.

In the matter of the Application of the
Stillwater and Mechanicville Street
Railway Company for Appointment
 of Commissioners under Section 12
 of the Railroad Law
 against

} Petition.

The Boston and Maine Railroad.

To the *Supreme Court* of the State of *New York*:

The petition of the *Stillwater and Mechanicville Street Railway Company* respectfully shows to this court:

1. That your petitioner is a railroad corporation duly organized under an act entitled "An Act to authorize the formation of railroad corporations, and to regulate the same, passed April 2, 1850, and the several acts amending and extending the said act."

2. That defendant is a railroad corporation organized under the laws of the state of *Massachusetts*.

3. That your petitioner is the owner of and operates a railroad in the village of *Mechanicville* and in the town of *Stillwater*, adjacent thereto, which intersects the tracks owned and operated by said *Boston and Maine Railroad*.

4. That your petitioner desires and intends to intersect, join and unite its railroad with the railroad of the *Boston and Maine Railroad* at some point in the town of *Stillwater* where the railroads of your petitioner and said *Boston and Maine Railroad* parallel and cross each other, and to construct and intersect them with the necessary turnouts, sidings and other conveniences for the furtherance of its connections.

5. That your petitioner has in good faith attempted to agree upon the amount of compensation to be made and upon the line or lines, grade or grades, points and manner of such intersection or connection with the said *Boston and Maine Railroad*, and they have absolutely refused to entertain any proposition whatever, and have refused to enter into any negotiations therefor, and have absolutely refused to entertain any proposition or offer made by your petitioner to make such connections.

Wherefore your petitioner asks that commissioners be appointed, as is provided in the condemnation law, by the court, one of whom shall be a practical civil engineer and surveyor, to determine the amount of compensation to be made for the connections and intersections of your petitioners' tracks with the tracks of the *Boston and Maine Railroad*, and to determine upon the line or lines, grade or grades, points and manner of such intersection and connections, and for such other and further order and relief in the premises as may be just and proper.

Dated *May 31, 1901*.

Stillwater and Mechanicville Street Rwy Co.,

By *J. A. Powers*, President.

Thomas O'Connor, Attorney for Petitioner.

Office and post-office address, *Waterford, Saratoga County, N. Y. Saratoga County, ss:*

Joseph A. Powers, being duly sworn, says that he is the president

of the *Stillwater and Mechanicville Street Railway Company*; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except such matters as are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. A. Powers.

Sworn to before me this 30th day of May, 1901.

L. M. Haskins, Notary Public.

b. Judgment.¹

Form No. 19011.¹

At a *Special Term* of the *Supreme Court* of the State of *New York*, held at the chambers of Hon. *J. W. Houghton*, in the village of *Saratoga Springs, N. Y.*, on the 13th day of *July, 1901*.

Present — Hon. *J. W. Houghton*, Justice.

Supreme Court, Saratoga County.

In the matter of the Application of the *Stillwater and Mechanicville Street Railway Company* for the Appointment of Commissioners under section 12 of the Railroad Law
against

The Boston and Maine Railroad.

} Judgment.

On reading and filing the petition of the *Stillwater and Mechanicville Street Railway Company*, on the above entitled matter, verified *May 30, 1901*, the answer of the *Boston and Maine Railroad*, verified *June 8th, 1901*, the testimony taken before Hon. *H. V. Borst*, of *Amsterdam, N. Y.*, referee, and the exceptions filed to said referee's report by the *Boston and Maine Railroad*, and after hearing *Thos. O'Connor*, attorney for the *Stillwater and Mechanicville Street Railway Company* and Hon. *Theo. F. Hamilton*, attorney for *Boston and Maine Railroad*, opposed, it is hereby

Ordered that *Nash Rockwood*, of *Saratoga Springs, N. Y.*, *William J. Roche*, of *Troy, N. Y.*, and *Palmer C. Ricketts*, of *Troy, N. Y.*, the last named being a practical civil engineer and surveyor, be and they are hereby appointed commissioners to determine the amount of compensation to be made by the *Stillwater and Mechanicville Street Railway Company* to the *Boston and Maine Railroad* for the connection and intersection of their respective lines in the town of *Stillwater* as prayed for in said petition, and to determine upon the line or lines, grade or grades, points and manner in which the intersections and connections shall be made by said two railroad companies. It is further

Ordered that the first meeting of said commissioners shall be held at the law office of *Thos. O'Connor*, in the village of *Waterford, N. Y.*, on the 29th day of *July, 1901*, at ten o'clock A. M., and it is further

1. For the formal parts of a judgment in a particular jurisdiction see the title JUDGMENTS AND DECREES, vol. 10, p. 645

2. *New York*. — Heydecker's Gen. L. & Rev. Stat. (1901), p. 3259, c. 39, § 12. This is the judgment in *Stillwater*, etc., *St. R. Co. v. Boston*, etc., *R. Co.*,

Ordered that said referee's report be confirmed and that judgment be entered in the clerk's office of *Saratoga* county in conformity with the directions of said referee's report and of this order. The question of costs to either party is reserved until the final order herein.

Enter in *Saratoga* county.

J. W. Houghton, Justice *Supreme* Court.

IV. ACTION BY MUNICIPALITY OR STATE AGAINST STREET RAILROAD.

1. For Forfeiture of Franchise for Nonuser.

Form No. 19012.¹

Supreme Court.

The People of the State of New York, Plaintiff, } *Albany* County Place
against } of Trial.

The Broadway Railroad Company, Defendant. } Complaint.

The plaintiffs, by *Charles F. Tabor*, their attorney-general, complaining of the defendant, allege and state as follows:

I. That the Legislature of the state of *New York* heretofore, and on or about the 17th day of *April*, in the year 1858, passed an act entitled "An Act to authorize the laying of a railroad track in Broadway and through certain other streets in the city of Brooklyn, and New Lots, in the county of Kings;" and thereafter and on or about the ——— day of ———, in the year 1858, as more fully and at large appears by articles of association filed in the office of the secretary of state of the state of *New York* on the day last aforesaid, and under and pursuant to the provisions of the act of the Legislature aforesaid, and of the "Act to authorize the formation of railroad corporations and to regulate the same," passed April 2d, 1850, the *Broadway Railroad Company of Brooklyn* was created and became and now is a corporation created by and under the laws of the state of *New York*.

II. A paper hereto annexed and marked "Exhibit A," is a copy of the articles of association of said company, filed in the office of the secretary of state aforesaid.

III. And thereafter and on or about the 16th day of *April*, 1860, the Legislature of the state of *New York* duly passed another act entitled "An Act to amend the act to authorize the laying of a railroad track in Broadway and New Lots in the county of Kings, passed April 17, 1858," reference to which is hereby made and which is hereby expressly pleaded as part of this complaint.

IV. The defendant, *The Broadway Railroad Company of Brooklyn*,

171 N. Y. 589, and is copied from the records.

1. *New York*.—Code Civ. Proc., § 1798.

This is the complaint in *People v. Broadway R. Co.*, 126 N. Y. 29, and is

copied from the records. Judgment was rendered by a special term of the supreme court directing forfeiture of the franchises as prayed in the complaint. This judgment was affirmed in the court of appeals.

accepted said last mentioned act and the franchises and rights thereby given, and said company also accepted and assumed the obligations imposed and implied by said act, and imposed and implied by the acceptance of the franchise and right therein and thereby given. The said company, at a period of time not precisely known to this plaintiff, but at or about the time of the passage of the aforesaid act, and at some time within a period of *ten* years thereafter, under and pursuant to the act aforesaid, and in the exercise given by said act passed in the year 1860, entered into and upon certain of the streets mentioned in said act, and constructed, built and operated a railroad thereon, to wit, upon and along the following streets, or portions of the same, to wit: on *South Sixth* street, *Eleventh* street, *South Fifth* street, *Montrose* avenue, *Morrell* street and *Johnson* street, and on and upon portions of said streets and avenues.

V. Thereafter and prior to the year 1870, the defendant removed said tracks from said streets, and each of them, and discontinued and ceased the operation of a railroad on said streets so far as it had entered on them under the provisions of the said act passed in the year 1860, and, except as aforesaid, thereafter and at all the times until about the 28th day of *January* in the year 1887, the defendant has refrained from and failed to build or operate any railroad upon the routes indicated therefor in and by the act aforesaid, passed in the year 1860, and on or about the month of *January* last the said defendant entered into and upon a portion of *Central* avenue, and laid a small portion of railroad track thereon, but has refrained from operating the same as a railroad.

VI. And the defendant has never built a railroad commencing at what is designated in and by the said act passed in the year 1860 as "their present track at *South Sixth* street;" thence through *Eighth* street to and across *Broadway* to *Ross* street, and through the said *Ross* street and *Bedford* avenue to *Fulton* avenue; and thence through *Fulton* and either *Nostrand* or *Rogers* avenue to the village of *Flatbush*.

VII. And except that the said company, the defendant, laid and operated and afterwards, at about the time hereinbefore stated, removed the railroad track from the streets and avenues next herein-after mentioned, the said company has not built or operated any railroad commencing at what is designated in and by the said act passed in the year 1860 as "their present track on *South Sixth* street;" thence through *11th* street to *South Fifth* street, to *Montrose* avenue, through said avenue to *Morrell* street, through *Morrell* street, through *Johnson* street to intersect the track of said company on *Broadway*, and from *Morrell* street through *Johnson* street to its intersection with the *Cypress Hills* Plank Road, and through and over the said Plank Road to *Cypress* avenue. And the consent of the *Plank Road Company* controlling said *Cypress Hill* Plank Road has been for a long time and heretofore obtained by the defendant to the construction and operation of the railroad, and the said company has failed to construct or operate a railroad on *Cypress* avenue. Except as hereinbefore stated, as to *Central* avenue, and said company has failed to construct and has failed to operate any railroad on *White*,

Bogert or *Thames* streets and on *Central* and on *Knickerbocker* avenues. *Central* avenue was opened from, at or near *Flushing* avenue and the terminus of *White* street to *Jay* street, a distance of over a mile, in and about the year 1871; and about the year 1875 it was graded and paved from its junction with *Flushing* avenue to, at or near *Ivy* street, and has remained ever since about the year 1875, as to being opened, graded and paved, as it was at the time of the construction of the railroad thereon, as aforesaid.

VIII. Except as hereinafter stated as to the railroad on *Central* avenue, and as to the railroad tracks laid and removed, the defendant has failed and omitted, and is still failing and omitting, to operate any railroad on any of the routes or on any portions of the routes, as to which a franchise was granted to it, in and by the act passed in the year 1860, as aforesaid, and said streets and avenues, except as aforesaid, were opened and graded about the year 1860 and ever since have been, and many of the streets and avenues mentioned in said act about or prior to the year 1860 were, and ever since have been, streets of said city, opened, graded and paved.

IX. The defendant, though refraining and failing as aforesaid, nevertheless insists upon and asserts its rights to build and operate a railroad upon and through the various routes named therefor in and by the said act passed in the year 1860, and although failing, as aforesaid, when another railroad company, duly authorized by proceedings of chapter 252 of the Laws of 1884 and the acts amendatory thereof, and under and by consent of the owners of a majority of the property bounded on *Central* avenue, entered into and upon said *Central* avenue about the month of *January* last, the defendant entered upon said *Central* avenue and commenced to construct a railroad thereon, as aforesaid, preventing said other company, authorized as aforesaid, from constructing and operating the railroad thereon.

X. By reason of its acts and omissions, as aforesaid, defendant has so done and has failed to do that it has forfeited its corporate privileges and franchises, and forfeited its privileges and franchises given by the act passed in the year 1860, and particularly those privileges and franchises given by the said last named act as to the said *Central* avenue, by a failure to exercise its powers given in and by said act passed in the year 1860 — that is to say, by failing to lay down, construct, operate or maintain a railroad upon the several streets and avenues and portions thereof designated therefor in and by said act passed in the year 1860, and upon and including *Central* avenue and the streets and avenues connected therewith, by said act for railroad purposes, and omitting as aforesaid, has so done and omitted as to surrender its corporate privileges and franchises, and its corporate privileges and franchises given it by said act passed in the year 1860, and its corporate privileges and franchises given by said act as to said *Central* avenue and the streets and avenues connected therewith, as aforesaid.

XI. Consent has been given to this plaintiff to bring this action in and by the order of the *Supreme* Court duly made.

The allegations hereinabove made, other than the allegations as to

the statute of the state of *New York*, and as to the order of the court aforesaid, are made on information and belief, and on information and belief derived from public documents and records, and from statements of persons interested in, and having a knowledge of, the matters therein referred to.

Wherefore plaintiff demands judgment that the charter of defendant be, and be deemed to be, vacated, and its existence annulled, or that, in the alternative, the charter or privileges given and granted in and by the said act passed in the year 1860 be vacated and annulled, or that, in the further alternative, so much of the franchises given by the said act passed in the year 1860, relating to said *Central* avenue and the streets and avenues therewith, for railroad purposes, connected by the said act, be vacated and annulled, and that such further and other relief in the premises may be granted as shall be meet and agreeable to the rules of practice of this court, besides the costs of this action.

Charles F. Tabor, Attorney-General,
Plaintiff's Attorney.

Office and P. O. address for purposes of this action at the office of

Jesse Johnson,
26 Court Street, Brooklyn, N. Y.

State of *New York*, }
County of *Kings*. } ss.

Jesse Johnson, being duly sworn, deposes and says that he is an attorney and counsellor at law, residing in the city of *Brooklyn*, N. Y. That he is personally acquainted with all of the facts set forth in the foregoing complaint. That he has read the said complaint, and that the same is true of his own knowledge, except as to the matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Jesse Johnson.

Sworn to before me this 11th day of May, 1888.

Isaac Lubin, Notary Public, *Kings* County.

2. To Recover License Fees on Cars.

Form No. 19013.¹

Supreme Court, City and County of New York.
The Mayor, Aldermen and Commonalty of the
City of New York
against
The Eighth Avenue Railroad Company. } Complaint.

The Complaint of the plaintiff respectfully shows:

First. That during the times hereinafter mentioned, it was, and is, a municipal corporation duly existing under and by virtue of its

1. This is the complaint in *New York* judgment in favor of the plaintiff was entered upon a verdict directed by the court, which judgment was affirmed.

ancient charters and of the laws of the state of *New York*. That the common council of the city of *New York* is a duly authorized body enacting all ordinances governing the said city. That by an ordinance of the said common council, duly enacted and passed on the 31st day of *December*, 1858, it is required that each and every passenger railroad car running in the city of *New York*, below *One Hundred and Twenty-fifth* street, shall pay into the said treasury a license fee of *fifty* dollars annually, except the small one-horse cars, which shall pay *twenty-five* dollars annually as such license. That said Ordinance continued in force until the 18th day of *March*, 1875, on which day by an ordinance of the said common council duly enacted and passed, it was provided as follows: "Sec. 1. Each and every passenger railroad car running in the city of *New York* shall pay into the said treasury the sum of *fifty* dollars, annually, for a license; a certificate of such payment to be procured from the mayor, except the one-horse passenger cars of the *Ninth Avenue Railroad Company*, which shall pay the sum of *twenty-five* dollars annually, for said license as aforesaid, and except such as pay the sum of *three* per cent. or over on the gross receipts, or where the franchise has been sold at public sale to the highest bidder."

Second. That, during the times hereinafter mentioned, the above mentioned defendant was and is also a corporation duly existing under and by virtue of the laws of the state of *New York*. That during such times, by virtue of the provisions of an agreement dated the 6th day of *September*, 1851, between the Mayor, Aldermen and Commonalty of the city of *New York*—the plaintiff herein—of the first part, and *John Pettigrew* and others therein mentioned, their successors, associates and assigns, of the second part, and of the provisions of certain resolutions of the common council of the city of *New York*, amending the resolution contained in said agreement, granting the right to construct a railroad—which said resolutions were duly enacted and passed as follows: The first on the 23d day of *June*, 1852; the second on the 13th day of *December*, 1852; the defendant herein, as successor to said *John Pettigrew* and others above referred to, has operated and controlled a certain line of railroad known as the *Eighth Avenue Railroad*, occupying certain streets and avenues of the city of *New York* below *One Hundred and Twenty-fifth* street, and is the proprietor of a large number of passenger cars running daily thereon.

Third. That the said defendant, upon occupying the said streets and avenues and running cars thereon, as permitted by and in accordance with the terms of the agreement above referred to, became liable for the payment to the plaintiff herein of a license fee for each car used on said road, as determined by the ordinance of *December 31st*, 1857, and *March 18*, 1875, above referred to.

That, as plaintiff is informed and believes, the defendant has run passenger cars upon and along streets and avenues of the city as follows: In the year 1875, 112 cars; in the year 1876, 112 cars; in the year 1877, 112 cars; in the year 1878, 112 cars; in the year 1879, 112 cars; in the year 1880, 112 cars; in the year 1881, 112 cars.

That, as plaintiff is informed and believes, the defendant is the proprietor of the said cars, and thereby has become indebted to the plaintiff in the sum of *fifty* dollars annually for each car run, as above set forth, amounting in the aggregate to the sum of *thirty-nine thousand two hundred* dollars.

Fourth. That, although often and duly demanded, defendant has paid no part of said indebtedness, and wholly neglects and refuses so to do. That, as plaintiff is informed and believes, said defendant is now justly indebted to the plaintiff as follows: In the sum of \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1875; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1876; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1877; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1878; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1879; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1880; \$5,600 for unpaid license fees on 112 cars, at \$50 each, in the year 1881, amounting in the aggregate to the sum of *thirty-nine thousand two hundred* dollars, with interest on the said amounts respectively.

Wherefore plaintiff demands judgment against said defendant for the sum of \$39,200, with interest on \$5,600, part thereof, from the 1st day of *January*, 1875; on \$5,600, part thereof, from the 1st day of *January*, 1876; on \$5,600, part thereof, from the 1st day of *January*, 1877; on \$5,600, part thereof, from the 1st day of *January*, 1878; on \$5,600, part thereof, from the 1st day of *January*, 1879; on \$5,600, part thereof, from the 1st day of *January*, 1880; on \$5,600, residue thereof, from the 1st day of *January*, 1881, besides the costs of this action.

Wm. C. Whitney, Counsel for the Corporation.
Supreme Court.

*The Mayor, Aldermen and Commonalty of the City
of New York*, plaintiffs,

against

The Eighth Avenue Railroad Company, defendants. }

City and County of New York, ss.:

Richard A. Storrs, the Deputy Comptroller of the city of *New York*, and an officer of the plaintiffs in the above entitled action, being duly sworn, says: That the foregoing complaint is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why this verification is not made by the plaintiffs is that they are a corporation; that this deponent is an officer of the same, to wit, Deputy Comptroller; and that the grounds of his belief as to the matters not therein stated upon his knowledge are as follows, to wit, information obtained from the books and records of the Department of Finance or of other departments of the said government, or from statements made to him by certain officers or agents of the plaintiffs.

Richard A. Storrs, Deputy Comptroller.

Sworn to before me this 25th day of *June*, 1881.

Chas. A. Clark, Com. of Deeds.

3. To Recover Penalty for Violation of Ordinance Limiting Speed of Cars.

Form No. 19014.¹

Justice's Court, City of *Brooklyn*, Second Judicial District.

The City of Brooklyn, plaintiff,
against

The Nassau Electric Railroad Company,
defendant.

The complaint of the plaintiff herein shows to the court as follows:

I. — That the plaintiff is a municipal corporation, duly created, organized and existing under the laws of the state of *New York*.

II. — That the common council of the city of *Brooklyn* is a duly authorized body having power to make, establish, publish, modify, amend or repeal ordinances, rules, regulations and by-laws for the government of the city of *Brooklyn* under the powers conferred upon it by law.

III. — That on or about the 25th day of *March*, 1895, the common council of the city of *Brooklyn* duly enacted and passed and did make and establish the following ordinance:

“An ordinance relative to the Trolley Railroads operated in the streets, avenues or public places of the city of *Brooklyn* for regulating the rate of speed, the mode of use of the tracks and for the protection of persons.

The Common Council of the city of *Brooklyn* do ordain as follows:

1. Rate of speed. No street surface railroad car operated by electricity in any of the streets, avenues or public places of the city of *Brooklyn* shall be run at a rate of speed to exceed *six* miles an hour in *Fulton* street, between the ferry and *Flatbush* avenue; in *Myrtle* avenue, between *Fulton* street and *Hudson* avenue; in *Broadway*, between the ferry and *Driggs* avenue; in *Grand* street, between the ferry and *Driggs* avenue; nor in any other part of the first *twenty-eight* wards of said city, at a rate of speed to exceed *eight* miles an hour.

2. Stoppage of cars. Outside of the limits in *Fulton* street, *Myrtle* avenue, *Broadway* and *Grand* street, defined in the first section of this ordinance, no such street surface railroad car shall stop inside of any block which does not exceed *three hundred* feet in length. In the case of blocks exceeding in length *three hundred* feet, there shall be a stopping place located in the middle thereof, and indicated by a sign bearing the words, ‘Trolley Station.’ All such cars stopping at a street corner must stop with the front platform at the near crossing, and all such cars must come to a full stop before crossing any intersecting railroad.

3. Occupation of platform. No persons except motormen, conductors or police officers in uniform shall be allowed on the front platforms when in operation, except that such platform may be used for the exit of passengers at the corner stoppages.

1. This is the complaint in *Brooklyn* records. A judgment in favor of the *v. Nassau Electric R. Co.*, 20 N. Y. plaintiff was affirmed. App. Div. 31, and is copied from the

4. Platform gates. The rear platform gate on the track side of every such car shall be always kept closed.

5. License. That any individual company or corporation using the streets of *Brooklyn*, and running thereupon cars propelled by steam, electricity or horse power for passenger traffic, shall obtain a license, which license, with the number thereof, shall be displayed conspicuously in each car, and said license shall not be transferred from one car to another.

6. Accidents. That any individual company or corporation running cars upon the streets of *Brooklyn* shall, on or before *twelve* o'clock *noon* of each day, report to the commissioner of police, in writing, all casualties or accidents, and the nature thereof, occurring upon the road under its management, whereby any person has suffered or sustained injury during the space of *twenty-four* hours preceding the day of report.

7. Penalty. Any corporation whose officers, agents or servants shall wilfully or negligently violate any of the provisions of this ordinance shall be liable for a penalty in the sum of *twenty-five* dollars for each and every offense.

8. All ordinances and parts of ordinances inconsistent with the provisions of this ordinance are hereby repealed."

IV. That thereafter, and on or about the *28th* day of *March*, 1895, said ordinance was duly approved by the mayor of said city, and was duly published for *ten* days successively in a corporate newspaper.

V. That on or about the *first* day of *April*, 1895, the common council of the city of *Brooklyn* duly enacted and passed an amendment to sections one and two of the ordinance aforesaid and did make and establish the following ordinance:

"Resolved, That sections one and two of Resolution No. 103 of minutes of *March 25*, 1895, be amended to read as follows:

Section 1. Rate of speed. No street surface railroad car operated by electricity in any of the streets, avenues or public places of the city of *Brooklyn* shall be run at a rate of speed to exceed *six* miles an hour within a radius of *one and one-half* miles from the *city hall*, or within a radius of *two* miles from the *Broadway* ferries, nor in any other part of the first *twenty-eight* wards of said city, at a rate of speed to exceed *eight* miles an hour.

Sec. 2. Stoppage of cars. Outside of the limits defined in the first section of this ordinance, no such street surface railroad car shall stop inside of any block which does not exceed *three hundred* feet in length. In the case of blocks exceeding in length *three hundred* feet, there shall be a stopping place located in the middle thereof, and indicated by a sign bearing the words 'Trolley Station;' but all such cars stopping at a street corner must stop with the front platform at the near crossing, and all such cars must come to a full stop before crossing any intersecting railroad."

VI. That thereafter, and on or about the *12th* day of *April*, 1895, said ordinance was approved by the mayor of said city, and was duly published *ten* days successively in the corporation newspapers.

VII. That the defendant, *The Nassau Electric Railroad Company*, is a domestic corporation created and existing under the laws of the

state of *New York*, and operates by means of electricity a system of street surface railroads along *Fulton* street and other public streets and highways in the city of *Brooklyn*.

VIII. Upon information and belief, the plaintiff alleges that on the 13th day of *May*, 1896, the defendant, its officers, agents or servants, did wilfully and negligently, and in violation of section 1 of the aforesaid ordinance, operate, by means of electricity, one of its cars, No. 145, on the line known as the *Marcy* avenue, between *New York* and *Nostrand* avenues, on *Fulton* street, a public highway in said city, at a rate of speed exceeding eight miles an hour.

IX. That the public highway at the point aforesaid is within the first twenty-eight wards of the city of *Brooklyn*.

Wherefore, plaintiff demands judgment for the sum of \$25.00, together with the costs of this action.

Joseph A. Burr, Corporation Counsel,
Brooklyn, N. Y.

City of *Brooklyn*, }
County of *Kings*. } ss.:

Frederick W. Wurster, being duly sworn, says that he is the mayor of the city of *Brooklyn*. That the foregoing complaint is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

F. W. Wurster.

Sworn to before me this 14th day of *May*, 1896.

Frank G. Gardner, Commissioner of Deeds,
City of *Brooklyn*.

V SPECIFIC PERFORMANCE OF CONTRACT RELATING TO USE OF STREET RAILROAD TRACKS.

Form No. 19015.¹

Supreme Court, Kings County.

The Prospect Park and Coney Island Railroad
Company
against

The Coney Island and Brooklyn Railroad
Company.

The complaint of the plaintiff, by *Wingate and Cullen*, its attorneys, alleges as follows, on information and belief:

First. That at the several times hereinafter mentioned the plaintiff and defendant were both railroad corporations duly organized under the laws of the state of *New York*.

Second. At the time of the execution of the contract, dated *June 1*, 1882, and hereinafter mentioned, this plaintiff was operating a railroad which consisted of two sections.

1. This is the complaint in *Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co.*, 144 N. Y. 152, and is copied from the records. A judgment in favor of the plaintiff was entered

upon a decision of the court on trial at a special term of the supreme court, which judgment was affirmed in the court of appeals.

1st. Of a steam surface railroad usually known as "*Culver's Coney Island Railroad*," which extended from *Coney Island* to the depot situated at the corner of *Ninth* avenue and *Twentieth* street, in the city of *Brooklyn* and adjoining *Greenwood Cemetery* and usually known as "*Culver's Coney Island Depot*."

2d. Of certain horse-car railroads, which were entirely distinct from said steam railroad, and the tracks of which began in the street outside of the said depot and extended through *Ninth* avenue to various points in the city of *Brooklyn*.

Third. That passengers desiring to reach *Coney Island* took the horse-cars passing over said horse-car lines until they arrived at the said depot, and there changed to the surface railroad of the plaintiff and continued to *Coney Island*, and those returning therefrom took said horse-cars from said depot. That plaintiff also had an arrangement with the corporation known as the *Iron Steamboat Company*, which carried passengers to and from the city of *New York* and *Coney Island* by which the return tickets issued by that company for passage over its lines were received by the plaintiff in payment of passage over its said steam surface railroad to *Brooklyn*, and which tickets had coupons attached, which were received by the plaintiff as vouchers for the passengers over its said horse-car lines and were redeemed by said steamboat company, by which arrangements many passengers were induced to travel over plaintiff's said steam surface railroad.

Fourth. That at such times the defendant was operating certain horse-car lines which ran from *Hamilton Avenue Ferry*, *Fulton Ferry* and other ferries in the city of *Brooklyn* and from the *East River bridge* through various streets and avenues to *Ninth* and *Tenth* avenues to *Fifteenth* street, and thence through to *Coney Island Plank Road* to the southern entrance of *Prospect Park*, and thence continued over said plank road to *Coney Island*.

Fifth. That on or about the *eighth* day of *June*, 1882, a contract was duly executed between the plaintiff and the defendant, bearing date *June 1st*, 1882, a copy of which is hereto annexed, marked "*A*."¹

Sixth. That in pursuance of this contract, and directly after the execution thereof, this plaintiff constructed the switches and terminal facilities near its depot required for the use of the defendant under said contract to the satisfaction of the latter, and thereof reserved the same for the exclusive use of the defendant, and has in all respects fully performed the obligations on its part contained in said contract. That directly after the execution of the said contract, the defendant connected its tracks in *Fifteenth* street with the

1. **Terms of Contract.** — By the contract that was entered into between the plaintiff and the defendant, the plaintiff granted the defendant the right to use its tracks on *Ninth* avenue from *Fifteenth* street to the depot at *Ninth* avenue and *Twentieth* street, free of charge for twenty-one years from *June*

1, 1882, and the defendant covenanted to run to the plaintiff's depot, during the spring, summer and fall months, cars to connect with the ferries and all of the plaintiff's trains to and from *Coney Island*. The plaintiff agreed to furnish the defendant necessary terminal facilities at the depot.

tracks of the horse-car lines of this plaintiff in *Ninth* avenue and entered upon the use of said switches and terminal facilities.

Seventh. That the defendant, as soon as said switches and terminal facilities were constructed, and it had taken possession thereof, began to draw its cars into *Ninth* avenue and to run the same to the said *Greenwood* depot, and during the spring, summer and fall months, and upon pleasant Sundays during certain other portions of the year, ran to the said depot of the plaintiff cars connecting with all ferry boats at *Hamilton* Ferry via *East River* bridge and *Catharine* Ferry, on the same time-table as that of the plaintiff, so that said cars connected with all trains of the plaintiff to and from *Coney Island*, and that it continued so to do until and including the fall of 1889, a period of *eight* years. That during the said period the defendant received the coupon tickets issued by the *Iron Steamboat Company* (which tickets were, under the agreement aforesaid between the *Iron Steamboat Company* and the plaintiff, available over the road of the latter), as being good for passage on its cars from said depot to *Hamilton* and *Fulton* Ferries; that said coupons were collected by it and turned in to the plaintiff; and for all such tickets so collected on its cars plaintiff paid to the defendant the sum of *five* cents each.

Eighth. That these arrangements were extensively advertised by both parties to said contract, and by the said *Iron Steamboat Company*, and the plaintiff furnished to the defendant signboards which were placed on its said horse-cars, stating "This car for *Culver's Depot*," meaning the depot aforesaid at *Ninth* avenue and *Twentieth* street, for the purpose of giving public notice that such cars were the proper means of transit to plaintiff's said steam surface railroad.

That by the carrying out of the contract as aforesaid, and the running of said lines, as hereinbefore mentioned, the said horse-cars of the defendant became extensively used and known to the people of *New York* and *Brooklyn* as being a means of conveyance to the plaintiff's said depot, and as a proper and sure way of reaching said steam surface railroad of the plaintiff as aforesaid, and that a large number of passengers were taken to and from said depot over the lines of the defendant to and from *Hamilton* Ferry, and also through *Jay* and *Smith* streets, and other streets to and from *Fulton* and *Catharine* Ferries and the *East River* bridge, and that said lines and ferries became an habitual mode of travel to *Coney Island* from *Brooklyn* and *New York*.

Ninth. That during the spring of 1890, the defendant changed its motive power to electricity by the overhead system over that portion of its railroad only, however, which runs from the *Plaza* at the southerly point of *Prospect Park* over the *Coney Island Plank Road* to *Coney Island Beach*, the remainder of its railroad being operated as previously by cars drawn by horses, and that its said railroad is thus operated at the present time.

Tenth. That for the purpose of securing as passengers over its new electric line those persons who have been formerly in the habit of riding to and from plaintiff's said depot in defendant's horse-cars, and thence over plaintiff's said steam surface railroad and in violation of the covenants and conditions contained in the aforesaid con-

tract, the defendant, on or about the middle of *October, 1889*, stopped running its said cars through *Ninth* avenue south of *Fifteenth* street, and in place thereof have since run all such cars through *Fifteenth* street to the *Plaza* at the south end of *Prospect Park* where they connect with its said electric road, and which point is a long distance from plaintiff's said depot. That the boards on the outside of the open excursion cars of the defendant (which boards were furnished and paid for by the plaintiff with the understanding that they should be used only for the purpose of advertising the plaintiff's steam railroad from *Ninth* avenue and *Twentieth* street) were used by said defendant for the purpose of advertising its electric road to *Coney Island*, and that said defendant failed and refused to further perform any of the covenants on its part contained in said contract. That while the fare charged by this plaintiff for transportation over its said steam surface railroad from said depot to *Coney Island* was and is *twenty* cents for a single and *thirty* cents for excursion tickets, the defendants have carried and are now carrying passengers over its said electric road, from the terminus of its horse-car line at the *Prospect Park Plaza*, for *ten* cents each way.

Eleventh. That by reason of its action on the part of the said defendant, a large number of passengers, who otherwise would have traveled over the plaintiff's steam surface railroad, to and from its said depot at *Ninth* avenue and *Twentieth* street, were diverted therefrom and prevented from riding over the same, and the value of the plaintiff's business was greatly impaired.

That by reason thereof, the plaintiff sustained damages during the spring, summer and fall months of *1890*, in the sum of *twenty-five thousand* dollars (\$25,000), and will sustain a like amount of damages in each successive year, during which defendant continues to violate its said contract.

Twelfth. That upon ascertaining defendant's intention to violate the agreement upon its part contained in said contract, this plaintiff, on or about *May ninth, 1890*, demanded from it, in writing, that it should immediately commence running and operating its lines of cars to the aforesaid depot of the plaintiff at *Ninth* avenue and *Twentieth* street, and should furnish the facilities and accommodations in accordance with the provisions of said contract. That said defendant refused to do so, and on *June 5th, 1890*, notified this plaintiff, in writing, that it had been advised by counsel that it was not under any obligation to run its cars to said *Ninth* avenue and *Twentieth* street, and as it was against its interests to do so, under the changed condition of affairs, it did not intend to do so.

Thirteenth. Plaintiff further shows that in addition to the damages, which it had already sustained, as hereinabove mentioned, by reason of the defendant's refusal to comply with the terms and conditions of the aforesaid contract, it will, in addition thereto, sustain very heavy damages in case such refusal is continued during the period which said contract has still to run. That said damages are uncertain in their amount, and difficult of computation, so that an action to recover the same would not afford the plaintiff adequate relief, and that the plaintiff will, in consequence, sustain irreparable injury

unless the said defendant is required to specifically perform the said contract.

Wherefore this plaintiff demands judgment against the defendant:

1st. That the said defendant may be required in all respects to specifically perform the said contract and to run its cars to the plaintiff's said depot, as therein provided, and to perform specifically according to the terms thereof all other covenants and conditions on its part in said contract contained.

2d. That it may recover from the defendant the sum of *twenty-five thousand dollars* (\$25,000) as the damages which it has sustained up to the time of the commencement of this action from the defendant's breach of said contract, and also all other damages which it may sustain up to the time of the trial thereof.

3d. That it may have such other and further relief as to the court may seem proper, together with the costs and disbursements of this action.

Wingate & Cullen, Attorneys for Plaintiff.

Office and post-office address, *20 Nassau Street, New York City.*
City of *Brooklyn*, }
County of *Kings*. } ss:

Andrew R. Culver, being duly sworn, says, that he is the president and an officer of the *Prospect Park Railroad Company*, the plaintiff herein; that the foregoing complaint is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. The reason this verification is not made by plaintiff is because it is a corporation.

The grounds for deponent's belief as to all matters in said complaint not stated on his knowledge are information coming to him and inquiries and investigations made by him in course of his business and duties as such president.

Andrew R. Culver.

Sworn to before me this *twenty-first* day of *October*, 1890.

Lysander Stacy, Notary Public, *Kings County*.

VI. INJURIES TO PERSONS AND PROPERTY.

1. Assault on Passenger by Employee.

a. For Failing to Pay Fare.

Form No. 19016.

(Precedent in *Birmingham R., etc., Co. v. Ward*, (Ala. 1900) 27 So. Rep. 471.)¹

[(*Venue and title of court and cause as in Form No. 5907.*)]²

The plaintiff claims of the defendant *ten thousand dollars* as dam-

1. This is the first count of the complaint, which contained four counts. The second count alleged assault and battery and the use of insulting and abusive language by the motorman to the plaintiff; the third count alleged the arrest and imprisonment of the plaintiff by the motorman and the use of insulting and abusive language by the motorman to the plaintiff; the fourth count alleged an assault and

battery and that the motorman called the plaintiff a liar and used other insulting language to him. The cause was tried upon the plea of the general issue and there was a judgment in favor of the plaintiff, which was reversed and a new trial granted on the ground that the amount rendered was excessive.

2. The matter to be supplied within [] will not be found in the reported case.

ages for that heretofore, to wit, on the 10th day of January, 1899, defendant, as a common carrier of passengers, was operating, among others, a certain electric car running over and along a railway running in or near *Birmingham* and *Jonesville*, *Jefferson county, Alabama*, for the carriage of passengers, as such common carrier of passengers: that plaintiff boarded said car with the bona fide intent and purpose of paying the regular fare charged by defendant for being carried as a passenger on said car, and of being carried as such passenger to his destination, to wit, at or near the *Henly School Building* in the said *Birmingham*, but, after plaintiff had ridden a short distance on said car as aforesaid, he became aware that he did not have the money with him necessary to pay said fare, and thereupon he left said car, or was engaged in or about leaving said car, when defendant, through its servant or agent in charge or control of said car, wrongfully assaulted and committed a trespass upon the person of plaintiff, and used insulting and abusive language towards plaintiff, and cursed and abused plaintiff, and as a proximate consequence of all which plaintiff was injured in his back or spine, and received other severe personal injuries, and was rendered sore and sick, and suffered great mental and physical pain, and his health and physical stamina were greatly impaired, and plaintiff was prevented for a long time from going to school.

[(Signature as in Form No. 5907.)]¹

b. For Pulling Bell Cord to Stop Car.

Form No. 19017.

(Precedent in *Birmingham R., etc., Co. v. Baird*, 130 Ala. 335.)²

[(Venue and title of court as in Form No. 5907.)]

John Doe, an infant under the age of twenty-one years, who sues by *Samuel Short*, as his next friend, plaintiff,

against

Richard Roe, defendant.]³

The plaintiff, *J. L. Baird*, who is a minor under twenty-one years of age, and who sues by his next friend, *A. C. Baird*, claims of the defendant, the *Birmingham Railway and Electric Company*, a private corporation under the laws of *Alabama*, five thousand dollars damages in this, that on and prior to the 29th day of January, 1898, the defendant was engaged in operating and running cars or trains between *Birmingham, Alabama*, and *East Lake, Alabama*, as a com-

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the first count of the complaint, which contained three counts. The second count charged that the conductor, Sorsby, "while in the discharge of his duties and in the light of his employment as such conductor, wilfully, wantonly and violently assaulted the said *J. L. Baird*," etc., and the third count charged that the said Sorsby, "while acting within the scope of his employ-

ment, followed and pursued the said *J. L. Baird* out of the car and onto the platform thereof, and while the car was moving at a rapid rate of speed, wilfully and violently assaulted the said *J. L. Baird*," etc. The cause was tried upon the plea of not guilty and a judgment was rendered for the plaintiff, which was affirmed.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

mon carrier of passengers for hire or reward; that the said *J. L. Baird* embarked on one of defendant's cars or trains at *College Station*, and paid his way to his destination, which was *Thirty-ninth* street station, on defendant's line, near the *Avondale* cotton factory, and the said *J. L. Baird* notified the conductor in charge of the car upon which plaintiff was riding, one *W. E. Sorsby*, that his destination was *Thirty-ninth* street station, and informed said *Sorsby* that he wished to stop at said station; that when the car upon which the said *J. L. Baird* was riding reached *Thirty-ninth* street station it did not stop at said station, and thereupon the said *J. L. Baird*, in order to stop said car, pulled the bell cord on said car to signal the motorman thereon to stop the same, and immediately thereafter the said *W. E. Sorsby*, conductor as aforesaid, also pulled the bell cord, whereupon the said *Baird*, finding that the said car had not stopped and was not slowing up, pulled the bell cord again; the said car not stopping, but continuing to pass beyond said station, and having then reached some distance beyond said station, the said *J. L. Baird* stepped inside of the car, having before that time been on the back platform of said car, and pulled the bell cord again, whereupon the said *Sorsby* immediately took hold of the bell cord in front of said *J. L. Baird* and prevented his ringing the bell; thereupon the said *J. L. Baird* returned to the rear platform of the car, and the said *W. E. Sorsby*, conductor as aforesaid, pursued him to the rear platform of the car and with great violence assaulted and beat the said *J. L. Baird* in the face and on the body and head and neck with his fist, and greatly bruised and ill treated the said *J. L. Baird*, and put him in great peril of knocking him off the platform of said car, and the plaintiff avers that the said *Sorsby* committed the acts above mentioned upon the said *J. L. Baird* while in the performance of his duties as conductor of defendant's said car, and that by reason thereof the said *J. L. Baird* was greatly humiliated and chagrined, and was brought into the contempt of those present on said car, and that his feelings were greatly outraged and wounded, and he was made sick, sore and lame by the assault and beating aforesaid, wherefore he sues.

[(*Signature as in Form No. 5907.*)]¹

2. Through Negligence.

a. Collision.

(1) OF CARS.

Form No. 19018.²

Supreme Court, Kings County.

Annie E. Anderson, plaintiff,
against

The Brooklyn Heights Railroad Company. }

The plaintiff, for complaint and cause of action, alleges:

First. Upon information and belief, that the defendant is and was,

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the complaint in *Anderson v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 266, and is copied from the

at all times hereinafter mentioned, a domestic corporation, and as such corporation leased, operated, maintained and controlled certain street surface electric railroads for carrying passengers over, along and upon certain streets and highways in the city of *Brooklyn*, among others being *Third* avenue, a public street in said city.

Second. That on or about the *5th* day of *August*, 1896, plaintiff was a passenger for hire on one of the cars operated by the defendant, its agents and servants, on said *Third* avenue; that while the car in which plaintiff was riding was stopped in said avenue, another car operated by the defendant's agents and servants was passing along said avenue in the same direction and on the same track, in the rear thereof, that the said servants and agents of the defendant were negligent and careless in the management and operation of said car and caused the same to run into and collide with the car of the defendant standing on said avenue, in which plaintiff was riding as aforesaid, with great force and violence, in consequence of which plaintiff was thrown from her seat and forcibly against another seat of the said car, whereby she sustained severe, painful and permanent injuries, she was greatly bruised and injured about her body, and more particularly upon the lower part of her abdomen, which caused internal injury of a permanent character, and at the same time she received a severe shock to her nervous system.

Third. That by reason of the aforesaid negligence and carelessness of the defendant, its agents and servants, plaintiff was confined to her house for a long period of time and has ever since been unable to attend to her business and household duties; she has suffered and will in the future suffer great pain; her nervous system is greatly injured and she has been permanently injured and will continue to suffer in consequence of said injuries to her damage in the sum of *twenty thousand* dollars.

Fourth. That the aforesaid injuries were caused solely through the negligence and carelessness of the defendant, its agents and servants, and without any fault or want of care on the part of the plaintiff herein contributing thereto.

Wherefore, plaintiff demands judgment against the defendant for the sum of *twenty thousand* dollars, besides the costs and disbursements of this action.

Nervis & Whitehouse, Attorneys for Plaintiff.

Office and P. O. address, *164 Montague Street, Brooklyn, N. Y.*
(*Verification.*)¹

(2) OF CAR AND VEHICLE.

(a) *Injuring Passenger in Car.*

Form No. 19019.²

Court of Common Pleas for the City and County of New York.

records. There was a verdict for the plaintiff, but a motion by the defendant for a new trial was allowed, not, however, on the ground of any deficiency in the complaint.

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the form of complaint in *Hill v. Ninth Ave. R. Co.*, 109 N. Y.

Adella L. Hill, plaintiff,
 against
The Ninth Avenue Railroad Company and
Patrick Heniff, defendants.

The complaint of the plaintiff respectfully shows to this court:

I. That the *Ninth Avenue Railroad Company*, one of the defendants above named, is a corporation created by and under the laws of the state of *New York*, organized pursuant to an act of the legislature of this state, entitled "An Act to authorize the formation of Railroad Corporations and to regulate the same," passed April 2d, —, and the acts amending the same, and the defendant *Patrick Heniff* is a public cartman or truckman in the city of *New York*.

II. That on the *23d of November, 1882*, plaintiff, while being lawfully conveyed in a horse-car drawn by one horse, the property of the defendant the *Ninth Avenue Railroad Company*, became and was dangerously and severely injured and bruised in and about the body, and on the left side of her said body, and otherwise injured in her person and body, all through the carelessness and negligence of the servant and driver of the said defendant the *Ninth Avenue Railroad Company*, and the said *Patrick Heniff*, the other defendant herein, the owner and driver of a horse and truck.

That the said injuries so received by said plaintiff were caused by a collision between said car and the said defendant *Heniff's* truck at *13th street and Ninth avenue* in the city of *New York*, without notice or warning to the said plaintiff, and solely through the carelessness and negligence of the said defendants and their servants and drivers.

That plaintiff was guilty of no negligence in the said premises.

That by reason thereof said plaintiff became ill and unable to leave her bed and house, and suffered great bodily pain, and is still compelled to remain in, and is still under medical treatment, and is still suffering great bodily pain from the effects of such injuries, and is unable to walk without assistance, and verily believes that her injuries are permanent.

That by reason of the negligence and carelessness of the defendants, plaintiff has been damaged *twenty thousand* dollars.

Wherefore the plaintiff demands judgment against the defendants for damages in the sum of *twenty thousand* dollars, besides the costs of this action.

Jeroloman and Arrowsmith, Attorneys for Plaintiff.
 (Verification.)¹

(b) *Injuring Person in Vehicle.*

Form No. 19020.

(Precedent in *Birmingham R., etc., Co. v. Baker*, 132 Ala. 509.)²

239, and is copied from the records. The plaintiff was nonsuited, but this was held error and a new trial was granted.

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. To the first count the defendant

[(*Venue and title of court and cause as in Form No. 5907.*)]¹

Plaintiff claims of defendant *ten thousand* dollars as damages for that heretofore, to-wit, on *January 10th*, 1898, plaintiff was upon one of the public streets of the city of *Birmingham*, within the corporate limits of said city, to-wit, upon *First* avenue, and at its intersection with *Twentieth* street, and was upon a vehicle being used by the fire department of said city, to-wit, a hose wagon, plaintiff being at said time engaged in or about the business of said fire department, to-wit, attending an alarm of fire; that at said time and place a car being operated by defendant over and along said *Twentieth* street, and across said *First* avenue, by means of electricity, collided with said vehicle and as a proximate consequence thereof, plaintiff's shoulder blade was broken, his shoulder dislocated, his knee injured and various parts of his body were cut, bruised and otherwise injured, and plaintiff suffered great mental and physical pain, and was crippled and disfigured, and was rendered unable for a long time to work and earn money, and was rendered permanently less able to work and earn money, and plaintiff was rendered unfit to pursue his accustomed avocation, and was put to great inconvenience and trouble and expense for medicine, medical attention, care and nursing in his efforts to heal and cure his said wounds and injuries. Plaintiff alleges that said car collided with said vehicle, and plaintiff suffered said wounds and injuries as a proximate consequence of the negligence of defendant, through its employee or employees in the management or control of said car.

2d count. Plaintiff refers to, and adopts as a part of this count, all the words and figures of the first count from the beginning thereof to and including the words "heal and cure his said wounds and injuries," where they first occur together in said count, and plaintiff further avers that defendant recklessly and wantonly or intentionally caused said injuries and damage to plaintiff, in that defendant, through its servants or agents, recklessly and wantonly or intentionally caused said collision. All to plaintiff's damage *ten thousand* dollars, wherefore he sues.

[(*Signature as in Form No. 5907.*)]¹

b. Fire in Electric Car.

Form No. 19021.²

(*Title of court and cause as in Form No. 5926.*)

demurred upon the following grounds:

"1. For that the allegations of negligence are vague, indefinite and uncertain. 2. For that it is not alleged in what manner the defendant was negligent. 3. For that it is not alleged that the injuries were inflicted by the negligence of the defendant."

To the second count the defendant demurred upon the following grounds:

"1. For that the same fails to show any facts constituting recklessness, wantonness or intentional misconduct.

2. For that the same fails to allege that the injuries were recklessly, wantonly or intentionally inflicted."

These demurrers were overruled. The court said, "counts one and two of the complaint, the one in its averment of simple negligence and the other of wanton, wilful and intentional injury, have too often been held sufficient to admit of further consideration."

1. The matter to be supplied within [] will not be found in the reported case.

2. This is the complaint in Leonard

The plaintiff complains of the defendant and alleges:

First. That the defendant now is, and at the time hereinafter mentioned was, a domestic street surface railroad corporation, owning, possessing and operating by electric power, lines of street cars over and upon various public highways in the borough of *Brooklyn*, city of *New York*, including *Rogers* avenue, in the vicinity of *Erasmus* street.

Second. That on or about the *19th* day of *June*, 1899, the plaintiff was riding as a passenger for hire on one of defendant's cars, then and there being operated in the aforesaid *Rogers* avenue, and which car was then and there in charge and control of the servants and agents of the defendant.

Third. That while plaintiff was riding as such passenger as aforesaid, and while said car was on the tracks of the defendant in said *Rogers* avenue near said *Erasmus* street, the defendant and the said servants were negligent and careless, in that they operated said car while the same was defective and imperfect in the electrical contrivance connecting therewith and applying the power thereto, and said defendant's servants in charge thereof carelessly managed the said car, and because thereof a great blaze and smoke entered and enveloped said car at and about where plaintiff was seated, and caused plaintiff to believe that she was in imminent danger of bodily injury, and fearing that if she remained upon said car she would inevitably be burned, and there endanger her life, plaintiff leaped from said car to the ground.

Fourth. That by the aforesaid carelessness and negligence of the defendant and the agents and servants, when plaintiff was a passenger on the said car, the plaintiff became injured and bruised in and about the body, her left leg fractured in two places, and she has been, and will be for a long time to come, confined to her bed, and she has been, and will be for a long time to come, unable to do her household duties, and her nervous system was severely shocked and injured, her right ankle was sprained, and she has been and will be put to expense in curing and attempting to cure herself, and plaintiff was permanently disabled, and has been damaged altogether in the sum of *fifteen thousand* dollars.

Fifth. That the aforesaid injuries were inflicted without any negligence on the part of the plaintiff herein, but solely through the negligence of the defendant, its servants and agents as aforesaid.

Wherefore plaintiff demands judgment against the defendant for the said sum of *fifteen thousand* dollars, together with the costs of this action.

Pearsall, Kaffer & Pearsall, Attorneys for Plaintiff,
183 *Montague* Street, *Brooklyn*, *N. Y.*

(*Verification.*)¹

c. Electric Shock.

(1) FROM RAIL.

v. Brooklyn Heights R. Co., 57 *N. Y. App. Div.* 125, and is copied from the records. A judgment was entered in favor of the plaintiff and a motion by the

defendant for a new trial was denied.

1. **Verification.** — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

(a) *Injuring Plaintiff.*Form No. 19022.¹

(Title of court and cause as in Form No. 5926.)

The complaint of the plaintiff respectfully shows to this court:

I. That, upon information and belief, the defendant was a domestic corporation at all times hereinafter stated, and operated a railroad propelled by electric power upon and along *Bergen* street, a public highway in the Borough of *Brooklyn*.

II. That on the *28th* day of *December*, 1898, plaintiff was lawfully crossing *Bergen* street at the corner of *Bond* street, and while he was in the act of crossing said *Bergen* street he had occasion to step upon the rails which compose the tracks of the defendant and which were laid upon said *Bergen* street, and that while plaintiff stepped upon said rails he sustained a severe electric shock to his system, and in consequence thereof his leg became badly burned, bruised and injured, and his general system has been greatly shattered thereby, and he has been informed and believes he has been permanently injured.

III. The said injuries were occasioned on account of the negligence and carelessness of the defendant in allowing their said rails to be overcharged with electricity and in not keeping them in a proper and reasonable state of repair, and said injuries happened without any fault or negligence on the part of the plaintiff.

IV. That in consequence of said injuries the plaintiff was made ill and suffered pain, and will be caused to suffer pain in the future, and was and will be put to expense for medicines and medical attendance in endeavoring to effect his cure, and was and will be prevented from attending to his business, and has and will lose his earnings thereby in the future, all to his damage in the sum of *fifteen thousand* (\$15,000) dollars.

Wherefore plaintiff demands judgment against the defendant for said sum of *fifteen thousand* dollars, besides the costs and disbursements of this action.

Charles J. Patterson, Attorney for Plaintiff,
No. 26 Court Street, Brooklyn Borough, N. Y.

(Verification.)²(b) *Injuring Plaintiff and Killing Horse.*Form No. 19023.³County Court, *Kings* County.

William Clarke, plaintiff,
against

The Nassau Electric Railroad Company, defendant. }

1. This is the complaint in *Braham v. Nassau Electric R. Co.*, 72 N. Y. App. Div. 456, and is copied from the records. A judgment was entered in favor of the plaintiff and a motion by the defendant for a new trial was denied.

2. Verification. — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

3. This is the complaint in *Clarke v. Nassau Electric R. Co.*, 9 N. Y. App. Div. 51, and is copied from the records. A trial was had, followed by a dismissal

The plaintiff, by *Dailey, Bell & Crane*, for complaint against the defendant, alleges and shows as follows: *

First. Upon information and belief, that the above named defendant now is, and was at the times hereinafter mentioned, a corporation created by and existing under the laws of the state of *New York*, and as such corporation maintained a trolley railroad operating cars by means of electricity through *Thirty-ninth* street in the city of *Brooklyn*.

Second. That for a motive power electricity was used, and in the construction and operation of its road by this means it had, and has, wires beneath the surface of the ground which are heavily charged with currents of electricity, and that unless said wires are safely and properly constructed and placed the surrounding ground and the surface of the earth becomes dangerously charged with the electricity.

Third. That by reason of the negligent, careless and defective construction and placing of the ground wire or wires in *Thirty-ninth* street, between *Sixth* and *Seventh* avenues, the electricity passed under the earth and material surrounding it, so that as this plaintiff was, on or about the *21st* day of *August*, 1895, driving through said *Thirty-ninth* street, his horse received a severe shock and was killed by said electricity, and the plaintiff also received a very severe shock, which has seriously affected him, causing him much pain and nervousness, and incapacitating him from attending to his business, thereby losing his earnings, and that the wagon and harness were also damaged.

Fourth. That said horse was of the reasonable value of *two hundred and fifty* dollars, and that the wagon and harness were damaged to the extent of about *five* dollars, and that this plaintiff by reason thereof and by reason of the injuries to himself and the loss sustained in his business by reason of being unable to attend thereto, and to use his horse, amounts or will amount, as he verily believes, to the sum of *five hundred* dollars.

Fifth. That said loss was caused solely by reason of the defendant laying and maintaining its rails and the wires conveying the electricity in connection therewith in a careless and negligent manner.

Wherefore, plaintiff demands judgment in his favor and against the defendant in the sum of *five hundred* dollars, besides the costs of this action.

Dailey, Bell & Crane, Attorneys for Plaintiff,
16 Court Street, *Brooklyn, N. Y.*

(*Verification.*)¹

(2) FROM TROLLEY WIRE.

(a) *In General.*

Form No. 19024.²

(*Commencing as in Form No. 19023, and continuing down to *.*)

First. That the defendant now is, and at the times hereinafter of the complaint, but on exceptions taken to such dismissal a new trial was granted.

parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the complaint in *Wagner v. Brooklyn Heights R. Co.*, 69 N. Y.

1. **Verification.** — For the formal

mentioned was, a domestic street surface railroad corporation, owning, possessing and engaged in operating elevated and street surface railroads over and upon various public highways in the borough of *Brooklyn*, city of *New York*.

Second. That in the conduct and operation of the said railroads, the defendant during all the hereinafter mentioned times had and used certain overhead wires which were fastened or strung to the elevated railroad structure of the defendant's pillars, laid in, over and upon *Adams* street in the vicinity of *Myrtle* avenue, public highways in said borough of *Brooklyn*.

Third. That on or about the 27th day of *October*, 1899, the plaintiff was in the employ of the police department of the city of *New York* as a lineman, and on the aforesaid day, in the course of his said employment and in the performance of his duties, he went to and upon a portion of the defendant's said elevated structure to repair a wire of the said city of *New York*, at and in the vicinity aforesaid, and while upon said structure the plaintiff received a severe, sudden and violent electric shock, which passed through his body, throwing him violently to the ground, greatly and severely injuring plaintiff, fracturing the bones of his arms, permanently injuring same, severely injuring both of his hips, and he suffered great shock and pain, was rendered sick and lame, and disabled from attending to his business, and he sustained special damages in loss of his earnings and earning capacity, and will hereafter suffer loss of earnings, and was put to expense for medicines and medical attendance, and was otherwise injured.

Fourth. The plaintiff's aforesaid injuries were occasioned solely by the negligence and carelessness of the defendant, in that the defendant negligently and carelessly suffered and permitted one of the aforesaid overhead wires to be and become uninsulated, defective and dangerous, from which there escaped, by reason of said condition, the electricity which occasioned the plaintiff's aforesaid shock and injuries, and that no negligence on plaintiff's part contributed thereto.

Fifth. That by reason of the matter aforesaid plaintiff has sustained damages in the sum of *fifteen thousand* dollars, for which sum he demands judgment against the defendant, together with the costs of this action.

Pearsall, Kaffer & Pearsall, Attorneys for Plaintiff,
183 *Montague* Street, *Brooklyn*, *N. Y.*

(*Verification*).¹

(*b*) *Falling Trolley Wire*.

Form No. 19025.²

Supreme Court, *Kings County*.

Rose T. O'Flaherty, Plaintiff,
against

Nassau Electric Railroad Company, Defendant. }

App. Div. 349, and is copied from the records. A judgment was entered in favor of the plaintiff and a motion by the defendant for a new trial was denied.

1. **Verification.**—For the formal parts of a verification in a particular jurisdiction see the title **VERIFICATIONS**.

2. This is the complaint in *O'Flaherty*

The plaintiff complains of the defendant and alleges:

First. That the defendant now is and at the time hereinafter mentioned was a domestic railroad corporation, having, possessing and engaged in operating street surface railroads over and upon public highways in the city of *Brooklyn*, including *Rockaway* avenue, at or about the place where the same intersects *East New York* avenue and *Prospect* place.

Second. That for the operation and conduct of the said railroad the defendant now has and, at the time hereinafter mentioned, had and used certain overhead trolley wires which were fastened or strung to posts in and upon the said highways.

Third. That on or about the *10th* day of *October*, 1896, one of the aforesaid wires broke and loosened from its fastenings and came down while plaintiff was lawfully upon the aforesaid *Rockaway* avenue, at or near the aforesaid intersecting streets.

Fourth. That the loosening, breaking and coming down of the wire caused the plaintiff to be violently thrown or to fall to and upon the tracks of the defendant in said *Rockaway* avenue, and thereby caused the plaintiff severe shock and bodily injury, disabling the plaintiff and causing her great pain and suffering, and impairing the plaintiff's nervous system, and plaintiff was thereby rendered sick, sore, lame and disabled, and was put to expense in endeavoring to effect her cure, was prevented from attending to her business, and was otherwise and permanently injured.

Fifth. That the breaking, loosening and falling of the aforesaid wire and plaintiff's aforesaid injuries were occasioned solely by the negligence and carelessness of the defendant in causing, suffering or permitting the aforesaid wire to be and become in such a dangerous, improper, defective and insecure condition as to occasion injuries to a pedestrian upon the public highway, as aforesaid, and that no negligence of the plaintiff contributed thereto.

Sixth. That by reason of the premises plaintiff has sustained damages in the sum of *twenty-five thousand* dollars.

Wherefore plaintiff demands judgment against the defendant for the said sum of *twenty-five thousand* dollars, besides the costs of this action.

Thomas E. Pearsall, Attorney for Plaintiff,
183 *Montague* Street, *Brooklyn*, *N. Y.*

(*Verification.*)¹

d. Running Car Off Track.

Form No. 19026.²

(*Title of court and cause as in Form No. 19025.*)

The plaintiff, by *L. L. Fawcett*, her attorney, complains of the defendant and alleges:

First. That the defendant now is and at all the times hereinafter

v. Nassau Electric R. Co., 34 *N. Y. App. Div.* 74, and is copied from the records. There was a judgment in favor of the plaintiff and a motion by the defendant for a new trial was denied.

1. *Verification.* — For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the complaint in *Pronk v. Brooklyn Heights R. Co.*, 68 *N. Y. App. Div.* 390, and is copied from the

mentioned was a domestic corporation and the lessee of the *Nassau Electric Railroad Company* system, and engaged in conducting and carrying on the business of common carrier of passengers by means of an electric surface railway or trolley system along *Rogers* avenue, a public highway, and other public highways in the borough of *Brooklyn*, county of *Kings*, city and state of *New York*.

Second. That on the 28th day of *July*, 1899, the plaintiff was a passenger upon one of this defendant's cars, having paid her fare and fulfilled all the requirements of becoming such, which said car was running along *Rogers* avenue in a southerly direction and was under the control of the defendant by its servants and employees.

Third. That when said car had reached a place off *Rogers* avenue aforesaid, almost two feet south of *Eastern Parkway*, another public highway in said borough of *Brooklyn*, and was being run at a high and dangerous rate of speed, and through the negligence, carelessness and unskilfulness of the defendant by its servants and employees, said car was caused to run off the rails or tracks and into a blind switch alongside of said track, thereby causing this plaintiff to be violently thrown from her seat in said car and precipitated with great force into the roadway or street alongside of said car.

Fourth. That solely by reason of the carelessness, negligence and unskilfulness of the defendant by its servants and employees, the plaintiff was severely bruised about the body and sustained serious internal injuries, resulting in the permanent impairment of her nervous system, and to suffer from convulsions, and she is rendered debilitated and delicate and is still suffering from profound shock and severe nervous prostration resulting in the depletion of her general system, all to her damage in the sum of five thousand dollars.

Fifth. That the said injuries were caused solely by the carelessness, negligence and unskilfulness of the defendant and without any negligence on the part of this plaintiff.

Wherefore the plaintiff demands judgment against the defendant in the sum of five thousand dollars, besides the costs of this action.

(Signature and verification as in Form No. 19025.)

e. Speeding Car Around Curve, Causing Plaintiff to be Thrown from Car.

Form No. 19027.

(Precedent in *Muth v. St. Louis, etc., R. Co.*, 87 Mo. App. 423.)¹

[(Title of court as in Form No. 5921.)]²

records. There was a verdict for the defendant because it was shown in evidence that the plaintiff suffered no injury from the accident.

1. In this case the plaintiff recovered judgment for one thousand dollars. It was shown that he had incurred liabilities to the amount of sixty-seven dollars for care in the hospital and for services rendered by the physician, but that these liabilities had not been paid.

It was held that under the allegations of the petition evidence of the liability incurred, but not paid, should not have been admitted. The judgment was affirmed on condition that the said sum of sixty-seven dollars be remitted. The form set out in the text has been amended so as to avoid this objection.

2. The matter to be supplied within [] will not be found in the reported case.

Sylvester Reuter, plaintiff,
v.
St. Louis & Meramec River Railroad Company,
defendant. }

Comes now the plaintiff in the above entitled cause and for cause of action says:

Defendant is a corporation duly existing under the laws of the state of *Missouri*, owning and operating a street railroad, and owning, as incident to said business, street railway tracks and a number of cars which operate upon said tracks by electric force, over, upon and along divers streets in the city of *St. Louis, Missouri*; that a part of said defendant's tracks run along *Manchester* avenue and *Sarah* street, said tracks being continued from the one to the other of said streets by what is known as a curve at the intersection of *Manchester* road and *Sarah* street.

And plaintiff says that on the *seventeenth* day of *September*, 1899, between the hours of *eight* and *nine* o'clock P. M., he was a passenger upon a certain car of defendant, owned and operated by defendant over said tracks, being car number ———, in charge of a motorman and conductor, servants of defendant, charged with the duty of operating said car; that while so riding upon said car, and while said car was going east along *Manchester* avenue, the motorneer and conductor in charge of the same drove and propelled the said car at an excessively high and dangerous rate of speed, and while going at such high and dangerous rate of speed, said servants did drive and propel the said car into and upon the said curve, part of defendant's said track, where the same turns from *Manchester* avenue into and upon *Sarah* street. That by reason of the force and speed with which said car was propelled and driven into and upon said curve, the said car on entering the said curve was caused to bound and jerk and turn with so sudden, violent and rapid a motion as that by reason of said motion the plaintiff was thrown from the said car with great force and violence; that being so as aforesaid thrown from said car the plaintiff fell upon the street, striking with his head and face, causing upon his body divers wounds, bruises, lacerations and contusions as follows, to wit:

Causing upon plaintiff's left brow at the upper portion of the same an irregular scalp wound extending to and laying bare plaintiff's skull; causing upon plaintiff contusions over his left shoulder and arm, laceration at left elbow, with contusions and extravasation of blood; causing plaintiff's left hand to be very severely contused and lacerated; causing upon plaintiff's body, near his left chest, large and painful bruises; causing plaintiff at the time spitting of blood from internal hemorrhage, and causing to plaintiff other internal injuries, the result of such shock and fall, which plaintiff is unable more particularly to describe from lack of acquaintance with and knowledge of anatomy, but of a very painful and serious nature.

Plaintiff further says that by reason of said fall his clothing was torn from his body, soiled and dirtied and destroyed. That he was compelled to lie in bed for a long time, to wit, *two* months, suffering great pain of body and mind, during which time he was unable to

labor or perform any service; that he [has incurred large liabilities to and]¹ was compelled to expend large sums to hospital for care and nursing at a hospital, and [incurred large liabilities and]¹ was compelled to expend and lay out large sums for medical attention and medicine, and is not yet restored to his health, but suffers great pain. All to plaintiff's damage in the sum of *two thousand five hundred* dollars, for which he prays judgment, together with his costs in this behalf incurred.

[(Signature of attorney as in Form No. 5921.)]²

f. Starting Car.

(1) WHILE PLAINTIFF WAS ALIGHTING.³

Form No. 19028.⁴

Supreme Court, Kings County.

Matilda P. Hamel,

against

The Brooklyn Heights Railroad Company. }

The plaintiff complains of the defendant and alleges:

First. That the defendant now is and at the times hereinafter mentioned was a domestic railroad corporation, having, possessing,

1. See *supra*, note 1, p. 654.

2. The matter to be supplied within [] will not be found in the reported case.

3. **Precedent.**—In *Armstrong v. Montgomery St. R. Co.*, 123 Ala. 233, the first and sixth paragraphs of the complaint, which were held sufficient, were as follows: "The plaintiff, *L. J. Armstrong*, suing as administratrix of the estate of *Charles Armstrong*, deceased, claims of the defendant, *Montgomery Street Railway*, a corporation organized under the laws of the state of *Alabama*, the sum of *thirty thousand* dollars as damages for this: That on, to-wit, the *25th* day of *May*, 1898, the defendant engaged in operating by electric force a street railway as a common carrier of passengers in and upon the streets of the city of *Montgomery*, in the state of *Alabama*, and said defendant then and there so negligently conducted said business that by reason of such negligence plaintiff's intestate, who was a passenger on one of defendant's street cars, received personal injuries which caused his death."

"6. The said plaintiff claims of the said defendant the sum of *thirty thousand* dollars as damages for this: That on, to-wit, the *25th* day of *May*, 1898, plaintiff's intestate was a passenger on an electric street car which was being operated by the defendant in the

city of *Montgomery*, in the state of *Alabama*; that at the proper distance from the point of his destination deceased gave the usual signal to stop the car, whereupon the motorman operating the car as the servant of the defendant slowed up the car and stopped, or so nearly so as to render it reasonably safe for deceased to proceed to alight, whereupon deceased proceeded to alight, placing himself in a standing position on the platform or running board alongside the car for that purpose; at that moment a passenger on the car told the motorman that he, the said passenger, did not want to get off at that point, whereupon the said motorman, negligently failing to look and see whether deceased was in a place of danger, negligently applied the force and started the car with a sudden motion; deceased then called out and warned said motorman that he was not off yet; but knowing or having good reason to know of deceased's danger, said motorman negligently caused said car to take a second and violent motion forward on a down grade, thereby throwing deceased violently from said car and inflicting personal injuries which caused his death."

4. This is the complaint in *Hamel v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 135, and is copied from the

and engaged in operating by electric power, street surface railroads over and upon various public highways in the borough of *Brooklyn*, including *Gates* avenue in the vicinity of *Bedford* avenue.

Second. That on or about the *fifth* day of *July*, 1898, the plaintiff was riding as a passenger for hire in one of the defendant's cars in said *Gates* avenue in said borough of *Brooklyn*, and which car was then and there being run, managed and operated by the servants and agents of the defendant.

Third. That while the plaintiff was riding as a passenger of the defendant as aforesaid, she endeavored to alight from the said car and while alighting therefrom the said servants and agents in charge and control of said car so negligently and carelessly ran, managed and operated said car, that solely in consequence thereof, and without any fault or negligence on the part of the plaintiff, she was thrown violently from the said car to and upon the ground, and thereby sustained severe and painful injuries upon her body, cutting her head, injuring her left arm and injuring her hearing, obstructing and deforming her nose, and plaintiff thereby sustained great nervous shock, and plaintiff, as she is advised and believes, is seriously and permanently injured, and was made sick, sore, lame, and disabled, was prevented from attending to her business or vocation, put to expense in endeavoring to effect her cure and she was otherwise injured, all to her damage in the sum of *five thousand* dollars, for which sum she demands judgment against the defendant, together with the costs of this action.

Thomas E. Pearsall, Attorney for Plaintiff,
No. 183 *Montague* street, *Brooklyn*, *N. Y.*

(*Verification.*)¹

(2) WHILE PLAINTIFF WAS BOARDING.

Form No. 19029.³

(*Title of court and cause as in Form No. 19028.*)

The plaintiff, by his attorney, *L. Lafayette Fawcett*, complains of the above named defendant and alleges:

First. That at all the times hereinafter mentioned the defendant was, and now is, a domestic corporation, organized and created under the laws of the state of *New York*, engaged in and carrying on the business of a common carrier of passengers by means of an electric surface railroad along the *Bowery*, a public highway in the borough of *Manhattan*, city, county and state of *New York*, and other public highways in the said borough of *Manhattan*.

Second. That on the *ninth* day of *April*, 1899, at the northeasterly corner of the *Bowery* and *East Houston* street, another public highway in said borough, plaintiff signaled to one of the defendant's employees in charge of one of said defendant's cars, which said car

records. There was a judgment in favor of the plaintiff and a motion by the defendant for a new trial was denied.

1. *Verification.*—For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. This is the complaint in *Kimber v. Metropolitan St. R. Co.*, 69 *N. Y. App. Div.* 353, and is copied from the records. A judgment was entered in favor of the plaintiff.

was bound northerly along said *Bowery*, his intention and desire to board said car and become a passenger thereon, and plaintiff thereupon proceeded to board said car, which was running at a very slow rate of speed, and was almost at a full stop, and while he had one foot on the run board or side rail of said car, and was about to step onto the platform thereof, the said car, through the negligence, carelessness and recklessness of the defendant, by its servants and employees, and without warning to this plaintiff, suddenly started forward at a high and dangerous rate of speed; that by reason of the defendant's said negligence, carelessness and recklessness, by its servants and employees, this plaintiff was caused to be violently thrown and precipitated with great force to the ground or highway.

Third. That solely by reason of the defendant's negligence, carelessness and recklessness, by its servants and employees, the plaintiff's right arm and shoulder were dislocated, and his back sprained and wrenched, and he otherwise suffered severe mental shock; that he is still sore and lame in said arm, and for some time was unable to follow his vocation, and was caused to become indebted in a considerable sum for surgical and medical attendance and treatment, all to his damage in the sum of *five thousand* (\$5,000) dollars.

Fourth. That said injuries were caused solely by reason of the defendant's negligence, carelessness and unskilfulness, and not by reason of any contributory negligence on the part of plaintiff.

Wherefore the plaintiff demands judgment against this defendant for the sum of *five thousand* (\$5,000) dollars, together with the costs of this action.

(Signature and verification as in Form No. 19028.)

g. Piling Rails Near Car Tracks, by Reason of Which Passenger was Injured.

Form No. 19030.¹

County Court, County of *Queens, New York.*

Adelaide L. Wells

against

Steinway Railway Company of Long Island. }

The plaintiff, by her amended complaint, respectfully shows to this court:

1. That plaintiff is a resident of the county of *Queens, New York.*
2. That during the various times hereinafter mentioned the defendant was and still is a corporation created by and existing under the laws of the state of *New York*, whose principal place of business is actually located in the county of *Queens, New York*, carrying on business in the county of *Queens* as a common carrier of passengers for hire, among other places, along certain streets and highways in *Long Island City, New York*, upon which its cars are and were operated by means of electricity upon tracks or rails of iron or steel laid along said streets.

1. This is the complaint in *Wells v. judgment was entered in favor of the Steinway R. Co., 18 N. Y. App. Div. plaintiff and a motion by the defend- 180, and is copied from the records. A ant for a new trial was denied.*

3. That among the streets upon which said cars were so run, was a street known as *Borden avenue*, in the city of *Long Island City, New York*.

4. That at times hereinafter mentioned said defendant was repairing its tracks and had same torn up from the usual terminal near *34th Street Ferry* to a point some distance east thereof, where the cars of said defendant, on same day, ended their trips and passengers were ordered by the defendant, its agents and servants to alight therefrom.

5. That on or about the *30th day of November, 1895*, a number of loose rails belonging to said defendant were placed or caused to be placed by said defendant, its agents or servants, along and on the southerly sidewalk of said street or avenue, known as *Borden avenue*, in such a manner that persons leaving cars of said defendant, at said place of debarkation, were obliged to and did pass near said rails in order to reach the southerly sidewalk of said street and avenue.

6. That the said rails were wrongfully and so negligently, carelessly and unskilfully placed by said defendant, its agents and servants, along and on said southerly sidewalk of said street or avenue, that on or about *November 30th, 1895*, while the plaintiff, who had been a passenger for hire on one of the said cars of defendant and had been directed by defendant, its agents or servants to alight therefrom, was lawfully on and crossing said sidewalk on said day aforesaid, at or near said place of debarkation en route to said ferry, wholly unaware of danger, she stepped on one of the said rails, which turned or slipped so that this plaintiff was thrown thereby, striking her face upon said rail, whereby she was made sick, sore and lame, her nose cut and broken, her right eyebrow and temple severely cut, the whole side of her face and upper lip cut and bruised, and also both knees severely bruised, and she suffered great nervous shock and was for some time prevented from attending to her occupation, and has and will be put to certain expense for medicine and medical treatment, and that by the breaking of her nose as aforesaid, her face has been permanently disfigured, all to her great damage.

Wherefore plaintiff demands judgment against the defendant for the sum of *two thousand dollars*, besides the costs of this action.

Samuel Campbell, Attorney for Plaintiff,
97 Cedar Street, N. Y.

(Verification.)¹

VII. CRIMINAL PROSECUTION.

1. Against Officer of Street Railroad, for Operating a Street Car Without Providing a Screen to Protect Motorman.

Form No. 19031.²

In the *St. Louis Court of Criminal Correction*.
St. Louis, January 19, 1900.

1. Verification.—For the formal parts of a verification in a particular jurisdiction see the title VERIFICATIONS.

2. Missouri.—Rev. Stat. (1899). § 2355.
This is substantially the information set out in *State v. Whitaker*, 160 Mo.

State of Missouri, plaintiff, } Charge for failure to provide screen over
 against } front end of electric street car.
John Doe, defendant. }

Andrew Jackson, prosecuting attorney of the *St. Louis Court of Criminal Correction*, now here in court on behalf of the state of *Missouri*, information makes as follows:

That *John Doe* is the president, agent and officer of the *St. Louis Transit Company*, which said company is a corporation duly organized under and by virtue of the laws of the state of *Missouri*, and as such, at the date hereinafter named, owned and operated a line of street railway in the said city of *St. Louis* and state of *Missouri*, operated by the motive power of electricity; that on the *first* day of *November*, and upon every day in the month of *November*, 1899, and upon the *first* day of *December*, 1899, and on the *first* day of *January*, 1900, and upon every day thence up to the filing of this information in said month of *January*, and on the *eighteenth* day of *January*, 1900, the said *John Doe*, as president, agent and officer of said transit company, did wilfully, knowingly and unlawfully operate an electric street car which was not a trail car attached to a motor car upon the line of said transit company, to wit, on the *Mound City Line*, electric car No. 259, which said electric car was not provided at the front end with a screen composed of glass or other material which fully and completely protected the motorman of said electric car or other person stationed on the front end of said car from wind and storm while said motorman or other person was guiding and directing said car, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Andrew Jackson, Prosecuting Attorney
 of the *St. Louis Court of Criminal Correction*.

State of Missouri, }
City of St. Louis. } ss.

Andrew Jackson, being duly sworn, upon his oath says, that the facts stated in the above information are true.

Andrew Jackson.

(*Jurat as in Form No. 6685.*)

2. Against Third Person, for Obstructing Railroad Track.

Form No. 19032.¹

(Precedent in *Com. v. Hicks*, 7 Allen (Mass.) 573.)²

[(*Commencement as in Form No. 10699*) that on the *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*, at *Boston* aforesaid, in the county of *Suffolk* aforesaid, there was, and still is, a certain railroad track then and there belonging to the *Middlesex Railroad Company*, a corporation organized and existing under the

59. That information was held insufficient because it charged the corporation with the crime when it should have charged the officer of the company.

1. *Massachusetts*. — Rev. Laws (1902). c. 112, § 48.

2. There was a conviction under this indictment.

laws of the commonwealth of *Massachusetts*],¹ and that said railroad track was then and there in the lawful possession of the said *Middlesex Railroad Company*, and lawfully used by said *Middlesex Railroad Company* for the passage and drawing the railroad cars and carriages of said company with passengers over and along said track, the said company then and there having lawful authority to pass and run their said railroad cars and carriages along, over and upon the said track without being unlawfully, wilfully and maliciously obstructed [that *John Doe*, late of *Boston* aforesaid, in the county of *Suffolk* aforesaid, on the *first* day of *May* aforesaid],² did wilfully, maliciously and unlawfully obstruct the passage of a certain car of the said *Middlesex Railroad Company* then and there lawfully being and passing upon and along said track, by then and there wilfully, maliciously and unlawfully driving and placing a certain wagon drawn by one or more horses driven by him, the said *Hicks*, upon said track, and by driving said wagon against said car, and by slowly driving in front of said car, and so did wilfully and maliciously obstruct, delay and hinder said car for a long time, to wit, *one-half* hour [against the peace (*concluding as in Form No. 10699*).]¹

1. The matter enclosed by and to be supplied within [] will not be found in the reported case. 2. The matter enclosed by [] will not be found in the reported case.

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For other Forms relating to Negligence, see the title NEGLIGENCE, vol. 13, p. 1.

For other Forms in Proceedings Against Municipal Corporations for Negligence, see the title MUNICIPAL CORPORATIONS, vol. 12, p. 952.

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I. ESTABLISHMENT, ALTERATION AND VACATION OF HIGHWAYS.**1. Establishment.****a. Petition.****(1) TO TOWN BOARD.****(a) Where Road Lies in One Town.**

Form No. 19033.¹

1. *Illinois.*—Starr & C. Anno. Stat. (1896), c. 121, par. 31 *et seq.*

State of *Illinois*, }
 County of *Greene*. }

To the Commissioner of Highways of the Town of *Carrollton*, in said County of *Greene*:

The undersigned, who are land-owners (or *two-thirds of the land-owners*), residing in said town of *Carrollton*, and within *two miles* of the route hereinafter mentioned and described for a road, do hereby petition you to cause to be laid out and opened a new road, of the width of *sixty feet*, as follows: (*stating point of commencement*), and running thence in a northerly direction on the most eligible route to (*stating point of termination*).

The names of the owners of the lands over which said proposed road is to pass are (*stating names of the land-owners, and if names of any of the owners are unknown, state that fact*).

And your petitioners pray that the said road may be laid out and opened according to law.

Dated at *Carrollton*, this *first day of May*, 1899.

(*Signatures of petitioners.*)

Form No. 19034.¹

To the Selectmen of the Town of *Walpole*:

The undersigned represent that there is occasion for a new highway in said town of *Walpole*, commencing at (*stating point of commencement*), and running thence in a northerly direction to (*stating point of termination*), in said town, and they therefore request that you lay out a highway of suitable width on the route above described.

Dated at *Walpole*, this *first day of May*, 1902.

(*Signatures of petitioners.*)

Form No. 19035.²

Road Petition.

To the Supervisors of the Town of *Canton*, in the County of *Lincoln* and State of *South Dakota*:

The undersigned, legal voters, who own real estate, or who occupy real estate under the homestead or pre-emption laws of the United States, or under contract from the state of *South Dakota*, within *one mile* of the road to be laid out (or *altered* or *discontinued*), hereby petition you to lay out (or *alter* or *discontinue*) said road as follows: beginning (*describing the road, stating the point at which it is to commence, its general course, and the point where it is to terminate*).

The description of the lands over which the said proposed road passes, and the names of the owners thereof which are known, as well as the lands the names of whose owners are unknown, are as follows:

1. *New Hampshire*. — Pub. Stat. & 2. *South Dakota*. — Stat. (1901), §
 Sess. L. (1901), c. 67, § 1. 1794.

Owners.	Description.	Sec.	Twn.	Rng.	

And your petitioners pray that you will proceed to lay out said road and cause the same to be opened according to law.

Dated at *Canton*, this *tenth* day of *May*, 1902.

(Signatures of petitioners.)

(b) *Where Road Lies in More than One Town.*

Form No. 19036.¹

To the Selectmen of the Towns of *Walpole* and *Alstead*:

Your petitioners respectfully represent that there is occasion for a new highway in said towns of *Walpole* and *Alstead*, commencing at (*stating point of commencement*) in said town of *Walpole*, and running thence in an easterly direction to (*stating point of termination*) in said town of *Alstead*, and your petitioners therefore request you to lay out a highway of suitable width on the route above described.

Dated (*concluding as in Form No. 19034.*)

(2) TO COUNTY BOARD OR COURT.

(a) *In General.*

Form No. 19037.²

State of *Illinois*, } ss.
Greene County. }

To the Board of County Commissioners of said County:

The undersigned, who are land-owners residing within *three* miles of the route hereinafter mentioned and described for a road, do hereby petition you to cause to be laid out and opened a new road, of the width of *sixty* feet, as follows: Commencing at the (*stating point of commencement*) in said road district, and running thence in a northerly direction on the most eligible route to (*stating point of termination*).

The names of the owners of lands over which the same is to pass are: (*stating names of the land-owners, and if names of any of the owners are unknown, state that fact*).

And your petitioners pray that the said road may be laid out and opened according to law.

Dated at *Kane*, this *first* day of *May*, 1899.

(Signatures of petitioners.)

1. *New Hampshire*. — Pub. Stat. & Sess. L. (1901), c. 67, § 20.

2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 121, par. 231.

Form No. 19038.¹

(Iowa Code (1897), § 1484.)

To the Board of Supervisors of *Harrison* County:

The undersigned ask that a road commencing at (*stating point of commencement*) and running thence (*Here state general line of direction*) and terminating at (*state point of termination*) be established.

Dated this *tenth* day of *May*, 1899.

(Signatures of petitioners.)

Form No. 19039.²To the Honorable the Board of County Commissioners of the County of *Linn*:

The undersigned respectfully petition your honorable body to lay out, establish and open to public travel in said county a public road as follows: (*describing the proposed road, specifying the place of beginning, the intermediate points, if any, and the place of termination*); and we respectfully represent that each of us is a householder of said county, residing in the vicinity where said road is proposed to be laid out, and that said road, if so laid out, will be of public utility.

- | | |
|-------------------------|---------------------------|
| 1. <i>John Doe.</i> | 7. <i>Andrew Jackson.</i> |
| 2. <i>Richard Roe.</i> | 8. <i>George Gray.</i> |
| 3. <i>Samuel Short.</i> | 9. <i>Henry Blake.</i> |
| 4. <i>William West.</i> | 10. <i>John Smith.</i> |
| 5. <i>Francis Fern.</i> | 11. <i>William Jones.</i> |
| 6. <i>Nathan Hale.</i> | 12. <i>John Adams.</i> |

State of *Kansas*, *Linn* County, ss:

John Doe, one of the within petitioners, being by me first duly sworn, deposes and says, that each of the persons whose names are signed to the foregoing petition, including affiant, resides in the vicinity where said road is proposed to be laid out, is of the full age of *twenty-one* years, and occupies a house in said vicinity, in said county, as a place of residence, and not as a boarder or lodger, and is a householder of said county, and that the signatures to the said petition are the genuine signatures of the said several petitioners, made personally by themselves, respectively.

*John Doe.*Subscribed and sworn to before me this *first* day of *May*, A. D. 1899.*Calvin Clark*, County Clerk.

Form No. 19040.

(Precedent in *Windham v. Cumberland County*, 26 Me. 407.)³To the Honorable Court of *County Commissioners* for the County of *Cumberland*:

The undersigned, inhabitants of said county, represent that the public highway, as now traveled from *Raymond*, *Otisfield*, *Harrison*, *Bridgeton*, and from *Oxford* county and the North-eastern part of

1. *Iowa*. — Code (1897), § 1483 *et seq.*2. *Kansas*. — Gen. Stat. (1897), c. 154, § 1483.§ 1 *et seq.*

3. This petition was held sufficient.

New Hampshire, through those towns towards *Portland*, is, and has long been a subject of complaint on account of the hills in *Windham*, especially *Windham* hill, so called, which presents a very serious obstacle to the public travel, especially to loaded teams. These objections and complaints would be obviated by the location of a piece of new road, commencing at some point on the present traveled road, near *Abram Anderson's* in *Windham*, and passing on the most convenient and practicable route easterly of *Windham* hill, and intersecting the present traveled road at some point in the vicinity of the lower corner in said *Windham*. We therefore pray that, after due proceedings had, a road may be located and opened on the route above mentioned.

[Dated (concluding as in Form No. 19033).]¹

Form No. 19041.

(Precedent in *Cole v. Cumberland County*, 78 Me. 533.)²

[(Address as in Form No. 19040).]³

The undersigned, being more than *one hundred* citizens of said county of *Cumberland*, hereby respectfully represent to your Honors that in their judgment, the public convenience and necessity require the location of a public highway in the city of *Portland*, commencing at a point in the center line of *Commercial* street, near where a line about *four* feet westerly from the easterly side of a private passage-way at the head of *Portland* pier crosses said line of *Commercial* street, thence south-easterly down said *Portland* pier to the end of said pier and into tide waters in said city, a sufficient distance to give a sufficient depth of water and to provide a good and substantial ferry-way and landing therein, suitable for the passage and accommodation of teams and passengers, as provided in chapter 375 of the special laws of the year 1873, and in chapter 495 of the special laws of the year 1885.

[We therefore pray that, after due proceedings had, a highway may be located and opened on the route above mentioned.

Dated (concluding as in Form No. 19033).]¹

Form No. 19042.⁴

Petition for County Road.

To the Board of County Commissioners of the County of *Martin*,
Minnesota:

The undersigned freeholders of the county of *Martin* hereby petition your honorable board for the establishment of a highway running into more than one town of said county and not within the limits of any incorporated city, and described as follows: (*describe the proposed road, setting forth the beginning, course and termination*).

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. This petition was held to be in all respects in compliance with the statute.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Minnesota*. — Laws (1897), c. 199, § 1.

The names of the owners of the lands, so far as known, through which the same may pass, are:

Owners of lands.	Description of lands.	Sec.	Town.	Range.

And your petitioners pray that you will proceed to examine said road and cause the same to be established according to law.

Dated at *Fairmont*, this *first* day of *May*, 1901.

(Signatures of petitioners.)

Form No. 19043.¹

(Mo. Rev. Stat. (1889), p. 2272, No. 198.)

To the honorable the *county* court of *Lincoln* county, *Missouri*:

The undersigned freeholders of *Bedford* township, in said county of *Lincoln*, would most respectfully petition your honorable body for the establishment of a new public road in said township (*Here give the proposed beginning, course and termination thereof, with not less than two points named on the direction of said road*). Your petitioners further state that three of their number are of the immediate neighborhood of said proposed road. Wherefore your petitioners ask that the necessary orders for the establishment of said road be made, and as in duty bound will ever pray.

Dated this *first* day of *June*, 1902.

(Signatures of petitioners.)

Form No. 19044.²

(Neb. Comp. Stat. (1899), § 4511.)

State of *Nebraska*, }
County of *Perkins*. } ss.

To the Board of *Perkins* County:

The undersigned ask that a public road commencing at (*stating point of commencement*), and running thence (*describe in general terms all the points*), and terminating at (*state point of termination*), be established (or *vacated* or *altered*, as the case may be).

Dated this *tenth* day of *June*, 1901.

(Signatures of petitioners.)

Form No. 19045.³

To the Honorable *County* Court of the State of *Oregon*, for the *County* of *Union*:

The undersigned, your petitioners, respectfully represent to the court and allege:

That they are each and all householders, residing in *Union* county,

1. *Missouri*.—Rev. Stat. (1899), § 9414.
2. *Nebraska*.—Comp. Stat. (1899), § 4511.
3. *Oregon*.—Bellinger & C. Anno. Codes & Stat. (1902), § 4782.

above named, in the state of *Oregon*, in the vicinity of the proposed road hereinafter described, to wit: within *three* miles thereof.

That said proposed road, if established in the manner provided by law, will be of great public utility.

Wherefore your petitioners, the undersigned, petition said *County* Court to lay out and cause to be laid out and established in said *Union* county, in the manner provided by law, a county road, *sixty* feet wide, described as follows, to wit:

Beginning at a point (*specify the place of beginning, the intermediate points, if any, and the place of termination*).

(*Signatures of petitioners.*)

State of *Oregon*, }
County of *Union*. } ss.

I, *John Doe*, being first duly sworn, say that I am one of the petitioners who signed the foregoing and annexed petition for the laying out and establishment of a county road in said *Union* county; that said petition is true as I verily believe; that the persons whose names are signed to said petition are each and all householders and reside in said *Union* county, in the vicinity of the proposed road described in said petition, to wit, within *three* miles thereof, and that each name signed to said petition as there appears is the true and genuine signature, respectively, of the person whose name appears thereunto subscribed, and are the signatures of the identical persons who signed the notice of the presentation of said petition to the *County* Court therein named, which notice is herewith filed.

John Doe.

Subscribed and sworn to before me the *tenth* day of *May*, 1902.

Calvin Clark, County Clerk.

Form No. 19046.¹

Petition for County Road.

To the Board of County Commissioners of *Lincoln* County, *South Dakota*:

The undersigned freeholders of the county of *Lincoln* hereby petition your honorable board for the location of a highway running into more than one town of said county and not within the limits of an incorporated city, and described as follows: (*describe the highway, setting forth the point of beginning, course and termination*).

The names of the owners of the lands through which the same may pass are: (*stating names of owners of the lands*).

And your petitioners pray that you will proceed to locate said road and cause the same to be opened according to law.

Dated at *Canton*, this *first* day of *May*, 1902.

(*Signatures of petitioners.*)

Form No. 19047.²

Petition for a Public Road.

To the Honorable *Commissioners'* Court of *Freestone* County, *Texas*:

We, the undersigned, freeholders residing in the precincts through

1. *South Dakota*. — Stat. (1901), § 1812. 2. *Texas*. — Rev. Stat. (1895), art. 4687.

which the following described proposed road will run, pray that a public road of the *first* class, *fifty* feet in width, be established in said county, having its points of beginning and termination, course and intermediate points as follows:

Commencing at (*describe the proposed road, specifying the beginning, course and intermediate points*) and ending at (*stating point of termination*), in Precinct No. *2*, the whole distance being (*stating distance*); and your petitioners pray that a jury be appointed to lay out and survey said road and to assess damages. And your petitioners will ever pray, etc.

Dated the *first* day of *May*, A. D. *1902*.

Petitioners.	Precinct where residing.	Petitioners.	Precinct where residing.

The State of *Texas*, }
County of *Freestone*. } ss.

John Doe, one of the petitioners herein, makes oath and says that notices of intended application for the within road were posted at the court-house door in *Fairfax*, in said county, and at (*stating place*) and (*stating place*), *two* other public places in the vicinity of the route of the proposed new road, at least *twenty* days before the first day of the term of the *Commissioners'* Court at which this petition is presented.

John Doe.

Sworn to and subscribed before me this *first* day of *May*, A. D. *1902*.

Norton Porter, Notary Public.

Form No. 19048.¹

(Precedent in Galveston, etc., R. Co. v. Baudat, 18 Tex. Civ. App. 596.)²

[[*Commencement and address as in Form No. 19047*].]³

The petition of the undersigned citizens and residents of *Fort Bend* county, *Texas*, respectfully represent unto your honorable court that they reside on, as their permanent home, a parcel of land situated on the north bank of the *Brazos* river, about *one* mile east of the town of *Richmond*, and on the south side of the line of railway of the *Galveston, Harrisburg & San Antonio Railway Company*. That the land upon which they reside is a portion of the *William Morton* league, and is so bounded by the river and lands of other people and said line of railway as to be completely surrounded and inclosed by

1. *Texas*.—Rev. Stat. (1895), art. 4687.

2. An order establishing the road was granted.

3. The matter to be supplied within [] will not be found in the reported case.

said lands and by the line of said railway. That there is a public road leading from *Richmond* to *Walker Station*, passing (parallel with said line of railway) within *one hundred* yards of petitioner's land, over which petitioners have heretofore been accustomed to travel in going to and returning from their nearest trading point, mills, gins, school-houses, church-houses and county seat, all situated in said town of *Richmond*. That about *six* months since the railroad company fenced up the outlet over their said line of railway, thus inclosing the lands of petitioners, and cutting them off from their said post-office, nearest trading point, mills, gins, school-houses, churches and county seat.

Wherefore petitioners pray that your honorable court will open a third-class road over said railway, and over the lands of *William Ryon* to said public road, a distance of about *100* yards. Said road to begin at a point on the northern line of petitioner's land in said *Morton* league, and thence north over the right of way of said *G. H. & S. A. Ry. Co.* and the lands of *William Ryon* to a point in the southern line of said public road leading from *Richmond* to *Walker Station*, at same point where the old road of petitioners formerly was.

J. Baudat.

Form No. 19049.¹

In the matter of the petition of *John Doe* }
et al. for laying out, viewing, survey- } No. 10.
 ing and establishing a county road }
 to be known as the (*stating name*) road. }

To the Honorable Board of County Commissioners of the County of *Spokane*, State of *Washington*:

We, the undersigned freeholders of the county of *Spokane*, respectfully petition this honorable board to have a county road examined, laid out, surveyed and established, of a width of *fifty* feet, along the route hereinafter more particularly described, and your petitioners respectfully show:

First. That said proposed road is a practicable one.

Second. That your petitioners are residents in the vicinity of said proposed road, and are interested in the opening thereof.

Third. That said road will be of general use and public benefit.

Fourth. That a particular description of the route of said proposed road is as follows:

Beginning at (*stating point of beginning, course and intermediate points*) and terminating at (*stating point of termination*), and that said proposed road be designated and known as the (*stating name*) road. A more particular description of the route of said proposed road is traced upon "*Exhibit A*" hereto attached and made a part hereof.

Wherefore the said undersigned freeholders pray the board to have said proposed road examined, laid out, surveyed and established and to cause the same to be opened according to law.

John Doe, Principal Petitioner.

Names of petitioners.	Residence.		
	Section.	Township.	Range.

(Attach plat.)

(b) *Where Land is Donated.*

Form No. 19050.¹

State of Colorado, } ss. June 10, 1899.
Pueblo County.

To the Honorable Board of County Commissioners of Pueblo County,
Colorado:

Gentlemen: We, the undersigned freeholders, citizens of your county residing within *two* miles of the route hereinafter mentioned, respectfully represent that the necessities of the public require a road, of the width of *sixty* feet, to be laid out as follows, to wit: Commencing at (*give a description of the desired road*).

We, your petitioners, pray your honorable body to cause to be laid out and opened a public road as above described, and we, the owners of the land through which said road is sought to be laid out, in consideration of the laying out and opening of said road, hereby agree to donate the right of way through our lands, as shown by the plat accompanying this petition, and relinquish all claims for damage by reason thereof.

(Signatures of petitioners.)

(Here set out plat of the land over which road will pass.)

The following is a list of names of owners of lands through which said road passes, and the number of feet in width along the line of said road donated by each owner thereof, to wit:

Owners' names.	Description.				No. feet donated.
	Part.	Sec.	Twn.	Range.	

(c) *Where Town Board has Refused to Establish Highway.*

aa. PROPOSED HIGHWAY ALL IN ONE TOWN.

Form No. 19051.²

(Conn. Prac. Act, p. 93, No. 141.)

(Commencement as in Form No. 19054.)

1. A highway from Woodbridge Center to the west line of Hamden,

1. Colorado. — Mills' Anno. Stat. 2. Connecticut. — Gen. Stat. (1888), §
(1891), § 3931. 2713 et seq.

leading over *West Rock*, near *Mill brook falls*, is and long has been demanded by common convenience and necessity.

2. On *September 1st*, 1879, the plaintiffs requested the selectmen of *Woodbridge* to lay out such a highway, and they refused so to do.

The plaintiffs claim judgment for the lay-out of such highway, and an assessment of the damages and benefits incident thereto.

Dated (*concluding as in Form No. 5912*).

Form No. 19052.¹

(Precedent in *Peckham v. Lebanon*, 39 Conn. 231.)²

[To the Honorable *Superior Court* of the County of *New London*:]³

The petition of the subscribers, inhabitants of the town of *Lebanon*, in the county of *New London*, and of the town of *Windham*, in the county of *Windham*, respectfully represents: that there are *two* public highways or roads, one called the *Babcock Hill* road and the other the *Kick Hill* road, in said town of *Lebanon*, leading from a point near the dwelling-house lately occupied by *Henry Williams*, deceased, in a northeasterly direction, to and into said town of *Windham*, which are the highways now traveled by persons having occasion to pass between said point and the village of *South Windham*, in said town of *Windham*; and both of said highways are hilly and circuitous, and do not accommodate in a reasonable manner the public travel; that a new road or highway may be laid out over a comparatively level route, and in a very direct line, from a point on said *Babcock Hill* road, about *five rods* east of said dwelling-house, to the boundary line between the said towns of *Lebanon* and *Windham*, in the direction of said village of *South Windham*, through lands of (*describing the lands through which the road would pass*), all within the limits of said town of *Lebanon*, and thereby save a considerable distance in the line of travel for all having occasion to pass between the said dwelling-house and the village of *South Windham*, and avoid the hills over which the public are now compelled to pass. And your petitioners aver that the said new highway over the route and lands named is necessary and will be of common convenience and necessity, and the whole of the same is within the town of *Lebanon*. And they also aver that the selectmen of the said town have been often requested, and on or about the *20th* day of *November*, 1869, were particularly requested, to lay out said new highway, but have at all times hereto neglected and refused, and still neglect and refuse, to lay out the same. Your petitioners therefore pray that the said new highway may be laid out, and that there be an assessment of the damages and benefits incident thereto.

Dated (*concluding as in Form No. 19053*).]⁴

Form No. 19053.⁵

To the Honorable *County Court* next to be holden at *Newfane*, within and for the county of *Windham*, on the *tenth* day of *March* next:

1. *Connecticut*. — Gen. Stat. (1888), § 2713 *et seq.*

2. This petition was held sufficient.

3. The matter enclosed by [] will not be found in the reported case.

4. The matter enclosed by and to be supplied within [] will not be found in the reported case.

5. *Vermont*. — Stat. (1894), § 3315.

The undersigned, freeholders of the town of *Rockingham*, in said county, and its vicinity, respectfully represent that heretofore, to wit, on the *first* day of *October*, A. D. 1902, *John Doe, William West and Samuel Short* and others, freeholders of the said town of *Rockingham*, made application to the selectmen of the said town of *Rockingham* to lay out and cause to be surveyed a public highway in said town of *Rockingham*, extending from (*describing the highway*), in said town, and the said selectmen have wholly refused and neglected so to do; and the undersigned therefore respectfully make application to the said court for that purpose, and pray that commissioners may be appointed, according to the statute in such case made and provided, to make examination and report in the premises.

Dated this *first* day of *February*, A. D. 1903.

(*Signatures of petitioners.*)

bb. PROPOSED HIGHWAY IN TWO TOWNS.

Form No. 19054.¹

(Conn. Prac. Act, p. 93, No. 140.)

(*Address as in Form No. 5912.*)

By authority of the State of *Connecticut*, you are hereby commanded to summon the town of *East Hartford* and the town of *Manchester*, to appear before the *Superior Court*, to be holden at *Hartford*, on the *second Tuesday* of *September*, 1879, then and there to answer unto *John Stiles*, of *East Hartford*, whereupon the plaintiff complains and says:

1. Public convenience and necessity require a new highway to be laid out, leading from a point in the highway in *East Hartford* which passes the dwelling-house of *John Doe*, directly in front of said house, to a point in the highway in *Manchester*, commonly called *Eastern Turnpike*, about 500 rods southerly from the intersection of said *Eastern Turnpike* with *Manchester* highway, so called.

2. The selectmen of *East Hartford*, on *March 10th*, 1879, refused to lay out said proposed highway so far as the same runs through *East Hartford*, and still refuse so to do.

3. The selectmen of *Manchester*, on *April 2d*, 1879, refused to lay out said proposed highway so far as the same runs through *Manchester*, and still refuse so to do.

The plaintiff claims judgment for the lay-out of such highway, and an assessment of the damages and benefits incident thereto.

Dated (*concluding as in Form No. 5912.*)

(d) For Road to Mining Claim.

Form No. 19055.²

(Precedent in *State v. District Ct.*, 14 Mont. 476.)³

In the *District Court* of the *Third Judicial District* of the State of *Montana*, in and for the County of *Deer Lodge*.

1. *Connecticut*. — Gen. Stat. (1888), § 2713 et seq. District Ct., 14 Mont. 476, which was an application for a writ of mandamus

2. *Montana*. — Pol. Code (1895), § 3631 et seq. to compel the district court to entertain the petition to open a private road across a mining claim. The writ was granted.

3. This petition is set out in *State v.*

William Coleman and Thomas McGuire, }
 Plaintiffs, }
 vs. } Petition.
William Lorenz, Defendant.

The plaintiffs complain of the defendant and allege:

1. That, at all the times hereinafter mentioned, the plaintiff, *William Coleman*, had declared his intention to become a citizen of the United States, and that the plaintiff *Thomas McGuire* was, at all the times hereinafter mentioned, a citizen of the United States, and that the plaintiffs were, at all the times hereinafter mentioned, and are now, citizens and residents of the county of *Deer Lodge*, in the state of *Montana*.

2. That the plaintiffs are, and have been since *April 4, 1894*, the owners of, and are in the peaceable and quiet possession of, the following described mining claim, situated and lying in the county of *Deer Lodge*, in the state of *Montana*, to wit, the *Alice* placer claim, which is located about *five* miles from the city of *Anaconda*, in said county of *Deer Lodge*, in a westerly direction, and on *Warm Springs* creek, and in section number *twenty-five*, in township number *five*, north of range *twelve* west.

3. That the defendant occupies a certain mining claim, located just east of the mining claim of the plaintiffs, above described, which is described as follows, to wit: Beginning at a point from which a certain notification stake set upon the premises bears south *62* degrees east, *400* feet distant (said notification stake is located north *30* degrees *55* minutes west from the quarter section corner, between sections *25* and *36*, in township *five*, north of range *twelve* west, and is *1,424* feet distant therefrom), thence north *28* degrees east *700* feet, thence south *62* degrees E. *800* feet, thence south *28* degrees W. *1,700* feet, thence N. *62* degrees W. *800* feet, thence N. *28* degrees E. *1,000* feet, to the place of beginning, the said claim being situated in the south-west quarter of section *25*, in township *five*, north of range *twelve* west, in the county of *Deer Lodge*, in the state of *Montana*.

4. That the location of the said claims with reference to each other is shown by and on the map hereto attached, marked "*Exhibit A*," and made part hereof, and is hereby referred to for a more particular description of the said claims.

5. That the said mining claim of the plaintiffs is so situated that it cannot be conveniently worked, and in fact cannot be worked at all, without a road thereto, which road must necessarily pass over and across the said mining claim occupied by the defendant, above described, which road must be at least *twelve* feet in width, and must pass over the said claim occupied by the said defendant, from east to west, the said road being particularly described and marked out on the map hereto attached, marked "*Exhibit A*," and made a part of this petition, the said proposed road being designated on the said map as "*Road No. 1*."

6. That the said plaintiffs heretofore, on the *ninth* day of *April, 1894*, at the city of *Anaconda*, in the county of *Deer Lodge*, in the state of *Montana*, requested of the said defendant that he give them, the said plaintiffs, a road and right of way over and across

the said mining claim occupied by him, for the purpose of working the claim of the plaintiffs, and on the said day tendered to the said defendant the sum of *one hundred and fifty* dollars to cover all damages which he, the said defendant, might suffer by reason of the said road passing over and across the said claim occupied by him, but the said defendant refused to accept the said sum, and refused, and still does refuse, to allow the plaintiffs to pass over the said claim occupied by him, and said right of way has not been and cannot be acquired by agreement between the plaintiffs and defendant herein.

7. That unless the plaintiffs are granted a right of way over and across the said claim occupied by the said defendant it will be impossible for them to work the said claim, for the reason that the only accessible route to their said claim is over and across the said claim occupied by the defendant.

8. That the plaintiffs are now working on their said claim, and intend in good faith to work the same.

Wherefore, the plaintiffs pray that the court award them a road and right of way over and across the said claim occupied by the defendant, for the purpose of enabling them, the plaintiffs, to work their said claim; that the court appoint *three* disinterested persons, residents of the said county of *Deer Lodge*, to assess the damages resulting to the defendant, and the said claim occupied by him, by reason of the said road passing over the said claim, and for such other and further relief as to the court may seem proper.

Geo. B. Winston, Attorney for Plaintiffs.

(*Verification.*)

(e) *By Municipality, for Condemnation of Land for Highway Purposes.*

Form No. 19056.

(Precedent in *Cape Girardeau v. Houck*, 129 Mo. 609.)

[In the *Circuit Court of Madison County, Missouri.*

City of Cape Girardeau, Plaintiff,

vs.

Louis Houck, Defendant.

} Petition.]¹

Plaintiff, for cause of action, says that it is a public municipal corporation established under and by virtue of acts of the general assembly of the state of *Missouri*, with power and authority to sue and be sued, to plead and be impleaded, to defend and be defended in all courts of law and equity and in all actions whatsoever, with full power and authority to establish, open, widen streets and alleys for public purposes within the jurisdictional limits of said city.

That for many years past there has been a public alley partially opened running south from *Themis* street, toward, but not reaching, *Independence* street, through the block bounded on the west by *Spanish*, on the south by *Independence* street, on the east by *Main* street and on the north by *Themis* street; that said alley was finished through said block, except through the land of Mrs. *Mary H. G. Houck* and *Louis Houck*, husband of said Mrs. *Mary H. G. Houck*, hereinafter

1. The matter enclosed by [] will not be found in the reported case.

fully described, leaving unfinished a part of said alley at the south end of the alley as far as finished, the following described grounds: From the northwest corner of *Main* and *Independence* streets run westwardly with the north line of *Independence* street one hundred and three (103) feet to the place of beginning, thence northwardly parallel with *Main* street one hundred (100) feet to the south end of an alley, thence westwardly parallel with *Independence* street nine (9) and thirty-three hundredths (33-100) feet, thence southwardly parallel with *Main* street one hundred (100) feet to the north line of *Independence* street, thence eastwardly with the north line of *Independence* street nine (9) and thirty-three hundredths (33-100) feet to the place of beginning, said strip being at and on the south end of said alley; that said strip of ground belongs to the defendants herein, and is in said block bounded as aforesaid in range *C* in the city of *Cape Girardeau*.

That heretofore, to-wit, on the ——— day of ———, 1890, a majority of the property holders affected by said alley petitioned the mayor and council to open said alley from *Themis* street on the north to *Independence* street on the south, and the mayor and council sought to obtain the consent of defendants to the opening of said alley through their property as aforesaid, but failed to do so by reason of the refusal of said owners to relinquish their title to said ground for said purpose of opening said alley as aforesaid. That the opening of said alley has been and is now a public necessity.

That on or about the ——— day of *March*, 1891, the mayor and council passed an ordinance for the purpose of authorizing condemnation proceedings of ground for said alley in words and figures as follows:

"An ordinance providing for the condemnation, opening and establishment of an alley in range *C* from *Independence* street to *Themis* street in the city of *Cape Girardeau, Missouri*.

Whereas, a majority of the property owners on the alley as designated on the city map in range *C* from *Independence* street to *Themis* street have petitioned the mayor and council that the said alley be established and opened as an alley for public uses and purposes, and

Whereas, the mayor and council have been unable to obtain from the owners, *Mrs. M. H. G. Houck* and *Louis Houck*, a relinquishment of sufficient ground in range *C* hereinafter described and as shown by the city map for the purpose of fully opening said alley for such purposes as aforesaid, and

Whereas, the mayor and council deem it necessary and expedient that said alley be opened and established for public uses; therefore,

Be it ordered by the mayor and council of the city of *Cape Girardeau* as follows:

Section 1. That the city attorney be and he is hereby authorized, empowered, and requested to institute condemnation proceedings in the recorder's court of the city of *Cape Girardeau, Missouri*, under the provisions of the charter of said city and section 50 of ordinance number 363, being an ordinance entitled an ordinance regulating the practice and pleadings in the recorder's court, approved April 29, 1882, for the purpose of condemning, opening and establishing to

provide use as an alley a certain piece of ground in range *C* as shown by the city map, running north and south and described as follows: From the northwest corner of *Main* and *Independence* streets run westwardly with the north line of *Independence* street *one hundred and three (103)* feet to the place of beginning, thence northwardly parallel with *Main* street *one hundred (100)* feet to the south end of an alley, thence westwardly parallel with *Independence* street *nine and thirty-three hundredths (9 33-100)* feet, thence southwardly parallel with *Main* street *one hundred (100)* feet to the north line of *Independence* street, thence eastwardly with the north line of *Independence* street *nine and thirty-three hundredths (9 33-100)* feet to the place of beginning, said strip of ground being of and on the southern part of said alley and belonging to Mrs. *M. H. G. Houck* and *Louis Houck*, and such condemnation proceedings shall, in all respects, conform to the requirements of the charter and ordinances relating to condemnation proceedings to the end that said alley, when so condemned, shall be established and open to public use.

Section 2. This ordinance shall be in force and take effect from and after its passage.

(Attest)

P. A. Hock, Register."

"The above and foregoing ordinance having been presented to the mayor for his approval and the same not being returned with his approval within three days, said ordinance became a law notwithstanding, under the charter of the city.

(Attest)

P. A. Hoch, Register.

March 11, 1891."

That said ground is necessary for the opening of said alley as aforesaid.

Wherefore, the premises considered, plaintiff prays that the ground hereinbefore set out and described be condemned to public uses and purposes as an alley as aforesaid in accordance with the charter and ordinances in that behalf, and that the same be opened for public uses and purposes as an alley as aforesaid.

[*W. J. Crawford*, Attorney for Petitioner.]"¹

b. Bond of Petitioners.

Form No. 19057.²

State of *Arkansas*, }
County of *Pulaski*. } ss.

Whereas, *John Doe* and (*naming the other petitioners*), freeholders of *Pulaski* county, have made application to the County Court of *Pulaski* county for laying out, viewing, reviewing, altering or vacating the following described road (*describing it*):

Now, therefore, we, *John Doe*, as principal, and *Samuel Short* and *William West*, as sureties, hereby acknowledge ourselves indebted to the state of *Arkansas* for the use of *Pulaski* county in the sum of *one thousand* dollars, conditioned, however, as follows: If the prayer of

1. The matter enclosed by [] will not be found in the reported case.

2. *Arkansas*. — Sand. & H. Dig. (1894), § 2817.

said petitioners shall not be granted, or if the proceedings had in pursuance thereof shall not be finally confirmed and established, then if the said person or persons making such application for a view, review, alteration or vacation of said road shall pay into the treasury of said *Pulaski* county the amount of all costs and expenses accruing on such view, review, alteration or vacation, then this obligation to be void and of no effect; otherwise to be and remain in full force and effect.

Witness (*concluding as in Form No. 4554*).

Form No. 19058.¹

Whereas *John Doe* and (*naming the remaining petitioners*) are about to present to the board of county commissioners of the county of *Linn*, in the state of *Kansas*, a petition signed by them and praying that said board of commissioners establish a certain road in said county of *Linn*, and in said petition described as follows: (*describing the road as in the petition*).

Now, therefore, we, the undersigned, *John Doe*, as principal, and *Henry Flemming* and *Thomas Young*, as sureties, all of the county of *Linn* aforesaid, do hereby bind ourselves firmly by these presents and do undertake, promise and agree to pay to the state of *Kansas*, for the use of the said county of *Linn*, the amount of all costs and expenses that may accrue in the proceedings had in pursuance of said petition in case the proceedings so had shall not be finally confirmed and established; but the condition of this obligation is such that if the petitioners above named shall, in case the proceedings had in pursuance of said petition shall not be finally confirmed and established, shall pay into the treasury in said county of *Linn* the amount of all said costs and expenses when and if the same shall become due and payable by them, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands this *tenth* day of *May*, 1899.

John Doe.
Henry Flemming.
Thomas Young.

c. Notice of Petition for Highway.

(1) THE NOTICE.²

1. *Kansas*. — Gen. Stat. (1897), c. 154, § 1.

2. *Precedent*. — In *Vedder v. Marion County*, 22 Oregon 264, the following road notice was held sufficient:

"To all persons concerned: Notice is hereby given that application will be made by the undersigned to the county court for *Marion* county, *Oregon*, at their next session, to be held on the *third* day of *June*, 1891, at the courthouse in said county, to lay out and establish a county road, commencing at the northwest corner of the donation

land claim of *W. Eastham*, in section 25, township 5 south, range 1 west, in said county of *Marion*; thence north about *one hundred and sixteen* rods to the center of the old road leading from *Shuck's* mill, in said *Marion* county, to the town of *Woodburn*, in said *Marion* county. Application will also be made at the same time to said court to vacate all that portion of the present county road leading from said *Shuck's* mill to said town of *Woodburn*, which is situated between the termini of said proposed road, and which runs diago-

Form No. 19059.¹(Precedent in *Stevens v. Cerro Gordo County*, 41 Iowa 342.)

Road Notice.

Notice is hereby given, that a petition will be presented to the Auditor of *Cerro Gordo* county, *Iowa*, on the *first Monday of March, 1873*, for a new road, beginning at or near (*then follows a description of the line*), of which all persons will take notice.

Geo. H. Harding.

Form No. 19060.²

State of *South Dakota*, } ss.
County of *Lincoln*.

Notice is hereby given, that a petition, of which the following is a true copy of the original on file in my office, will be presented to the Board of County Commissioners of *Lincoln* county, at their next session, which commences *June 10, 1902*.

Dated *May 1, 1902*.

Charles Adams, County Auditor.

Petition for County Road.

To the Board of County Commissioners of the County of *Lincoln*, *South Dakota*:

The undersigned freeholders of the county of *Lincoln* hereby petition your honorable board for the location of a highway running into more than one town of said county and not within the limits of any incorporated city, and described as follows: (*describe the highway, setting forth the point of beginning, course and termination*).

The names of the owners of the lands through which the same may pass are (*stating names of owners of the lands*).

And your petitioners pray that you will proceed to locate said road and cause same to be opened according to law.

Dated at *Canton*, this *first day of May, 1902*.

(*Signatures of petitioners*).

Form No. 19061.³

Public Road Notice.

We, the undersigned, *eight* freeholders, residing in the precincts through which the following described proposed road will run, hereby give notice, according to law, that on the *tenth day of May, A. D. 1899*, we will petition the honorable *Commissioners' Court of Freestone* county, *Texas*, for a public road of the *first class, fifty feet* in width, in said county, having its points of beginning and termination, course and intermediate points as follows:

Commencing at (*state point of beginning, course and intermediate points*) and ending at (*state point of ending*), in precinct No. 2.

Dated the *fifteenth day of April, A. D. 1899*.

(*Signatures of petitioners and precinct where residing.*)

nally across the land claims at present owned by *G. W. Vedder* and *Joseph Shafer*, respectively, in said county of *Marion*."

1. This notice was held sufficient.

2. *South Dakota*.—Stat. (1901), § 1812.

3. *Texas*. — Rev. Stat. (1895), art.

4686.

(2) PROOF OF SERVICE OF NOTICE.

Form No. 19062.¹

State of *Oregon*, }
County of *Union*. } ss.

I, *John Doe*, being first duly sworn, say, that the persons whose names are signed to the annexed notice of application to the *County* Court therein named, to lay out a county road therein described, are each and all householders and reside in said *Union* county, in the vicinity of said proposed road, to wit, within *three* miles thereof, and are the identical persons who signed the petition mentioned in said notice, and herewith presented to said *County* Court; that each name signed to said notice, as there appears, is the true and genuine signature, respectively, of the person whose name appears thereunto subscribed. I further say on oath, that on the *tenth* day of *June*, 1902, I posted one copy of said notice at the place of holding said *County* Court, viz: at the county court-house in *Union*, in said *Union* county, and likewise on said *tenth* day of *June*, 1902, I posted one copy of said notice in each of *three* public places in said *Union* county, in the vicinity of said proposed road, to wit: within *three* miles thereof, which *three* public places are here named, to wit: (*specifying places*); that all of said notices, *four* in number, posted as aforesaid, were signed by all the persons whose names are subscribed to the annexed notice, and to the petition therein mentioned, and were posted in plain view of the public.

John Doe.

Subscribed and sworn to before me this *eleventh* day of *June*, 1902.
Calvin Clark, County Clerk.

Form No. 19063.²

State of *South Dakota*, }
County of *Lincoln*, } ss.
Town of *Canton*.

John Doe, being duly sworn, says, that on the *tenth* day of *May*, 1902, he posted copies of the within petition in *three* of the most public places in said town of *Canton*, to wit: (*specifying the places*).

John Doe.

Subscribed and sworn to before me this *tenth* day of *May*, 1902.
Norton Porter, Notary Public.

d. Notice or Citation for Hearing on Petition.

(1) THE NOTICE OR CITATION.

(a) In General.

Form No. 19064.³

Notice is hereby given, that the supervisors of the town of *Canton*, in the county of *Lincoln* and state of *South Dakota*, will meet on the

1. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 4783.

2. *South Dakota*. — Stat. (1901), § 1795.
3. *South Dakota*. — Stat. (1901), § 1796.

tenth day of *June*, 1902, at ten o'clock A. M., at (*stating place*), in said town, for the purpose of personally examining the route named below proposed for a new road, and hearing all reasons for or against the said proposed road and deciding upon said application. Said proposed road as described in the petition is as follows: (*describing the road as in the petition*).

The several tracts of land through which said road will pass and the occupants thereof, as nearly as we can determine the same, are as follows:

Occupants.	Description.	Sec.	Town.	Range.

Given under our hands the *twentieth* day of *May*, A. D. 1902.

Richard Roe,
Samuel Short,
William West,
Supervisors.

Form No. 19065.¹

State of *Vermont*, }
Windham, ss. }

To any Sheriff or Constable in the State, Greeting:

By authority of the state of *Vermont*, you are hereby commanded to summon *Richard Roe*, *Samuel Short* and *William West*, selectmen of the town of *Rockingham*, in the county of *Windham* aforesaid, to appear before me at the town hall in *Westminster*, on the *fifteenth* day of *August*, A. D. 1903, at ten o'clock in the forenoon, to show cause, if any they have, why the prayer of the foregoing petition should not be granted.

Fail not but service and return make according to law.

Given under my hand at *Westminster*, this *twelfth* day of *June*, A. D. 1903.

Abraham Kent, Justice of the Peace.

(*Add a recognizance for costs in common form.*)

(*b*) *For Hearing Petition for Highway on Boundary Line.*

Form No. 19066.²

The State of *Texas*, to the Sheriff or any Constable of *Freestone* County, Greeting:

Whereas, on the *first* day of *May*, 1899, there was filed in the *Commissioners' Court* of *Freestone* county, *Texas*, a petition, signed by (*naming signers*), asking that the following named boundary lines be

1. *Vermont*. — Stat. (1894), § 3308.

2. *Texas*. — Rev. Stat. (1895), art. 4706.

declared a public highway, in order to give petitioners a better and more practicable route to their church (or *county seat* or *mill* or *timber* or *water*), to wit: Beginning at (*describing road as in the petition*).

And whereas, it is alleged in said petition that *Richard Ree* is the owner of *one hundred* acres of the above named ——— survey, which will be affected by said proposed public highway:

Therefore you are hereby commanded to summon the said *Richard Ree*, by delivering to him a true copy of this notice, to be and appear before the *Commissioners' Court* of said *Freestone* county, at the next regular term thereof, to be holden at the court-house of said county in *Fairfield* on the *second Monday* in *June*, 1899, then and there to show cause why said boundary lines should not be declared a public highway.

Herein fail not, but have you before said court, on the *first* day of the next term thereof, this writ, with your return thereon, showing how you have executed the same.

Witness my hand and seal of said court, at my office in *Fairfield*, this *tenth* day of *May*, 1899.

(SEAL)

Calvin Clark, Clerk,
County Court, *Freestone Co., Texas*.

(2) PROOF OF SERVICE OF NOTICE OR CITATION.

Form No. 19067.¹

State of *South Dakota*, }
County of *Lincoln*, } ss.
Town of *Canton*. }

John Doe, being duly sworn, says that on the *twentieth* day of *May*, A. D. 1902, he served the within notice upon each of the occupants of the land through which the within described highway may pass, by (*Here state manner of service, either by serving the parties personally or by leaving a copy of the notice at the abode of the occupant*); that also on the *twentieth* day of *May*, A. D. 1902, he posted copies of the within notice in *three* public places in said town of *Canton*, to wit, (*specifying the places in which copies were posted*).

John Doe.

Subscribed and sworn to before me this *twenty-first* day of *May*, A. D. 1902.

Norton Porter, Notary Public.

e. Order Appointing Commissioners or Viewers.

(1) IN GENERAL.

Form No. 19068.²

State of *Colorado*, } Board of County Commissioners.
Pueblo County. } ss. *March Meeting*, A. D. 1899.

We hereby appoint *John Doe*, *Samuel Short* and *William West*, qualified electors of said county, as road viewers, to view the new county

1. *South Dakota*. — Stat. (1901), § 1796. 2. *Colorado*. — Mills' Anno. Stat. (1891), § 3934.

road prayed for in the within petition, and also fix on the *tenth* day of *May*, A. D. 1899, at *ten o'clock A. M.*, as the day and hour on which the said road viewers will meet at (*stating place*), for the viewing of such road.

Calvin Clark, Chairman County Commissioners.

Form No. 19069.¹

State of *Minnesota*, }
County of *Martin*. } ss.

Whereas, on the *first* day of *May*, 1902, a petition, signed by *twenty-four* freeholders of said county, was presented to us, praying for the establishment of a highway running into more than one town of said county and not within the limits of any incorporated city, and described as follows:

Beginning at (*stating point of beginning*) and running thence (*stating general line of direction*) and terminating at (*stating point of termination*).

And whereas in the judgment of a majority of the members of this board said petition is reasonable on its face; it is ordered that a hearing thereon be had at (*stating place*) on (*stating time*); and we hereby appoint *Samuel Short*, *John Smith* and *William West*, members of this board, a committee to examine such proposed establishment, and hereby designate (*stating date*), at *ten o'clock A. M.*, at (*stating place*), in said county, as the time when and the place where such committee will meet for said purpose upon said route.

Given under our hand this *fourteenth* day of *July*, A. D. 1902.

(SEAL)

John Doe,

Chairman Board of County Commissioners.

Form No. 19070.²

Be it remembered, that at a term of the Honorable County Court of *Union* county, state of *Oregon*, begun and held at the court-house in *Union*, in said county, on the *tenth* day of *June*, A. D. 1902, and from day to day thereafter, during the continuance of said term — Present: Hon. *John Marshall*, County Judge; Hon. *Charles Adams*, Commissioner; Hon. *James Smith*, Commissioner; Hon. *Calvin Clark*, Clerk; Hon. *John Lynch*, Sheriff —

The following, among other proceedings, were had, to wit:

In the matter of the laying out and establishment of a county road in *Union* county.

On this day came *John Doe*, who presents to the court the petition of himself and *eleven* others, praying for the laying out and establishment of a county road in said county of *Union*, as follows, to wit: (*describing the proposed road as in the petition*). And it satisfactorily appearing to the court, from proof filed herein, that due notice of the pendency of this proceeding has been given as by law required; that more than *twelve* of said petitioners are legal householders

1. *Minnesota*. — Laws (1897), c. 199, § 2; Laws (1899), c. 202.

2. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 4784.

residing in the vicinity of said road, and that a good and sufficient bond has been filed;

It is therefore ordered by the court that *Samuel Short, William West* and *Richard Roe* be appointed viewers, and *Francis Fern*, surveyor, to view, survey and report upon said proposed road, and that they meet at (*stating place*), on the *twentieth* day of *June, 1902*, and duly qualify before entering upon the discharge of their duties in this behalf.

John Marshall, County Judge.

Form No. 19071.¹

State of *South Dakota*, }
County of *Lincoln*. } ss.

Whereas, on the *tenth* day of *May, 1902*, a petition signed by *twenty-four* freeholders of said county was presented to us, praying for the location of a highway running into more than one town of said county and not within the limits of any incorporated city, and described as follows: (*describing the road as in the petition*).

And being satisfied that at least *thirty* days' notice thereof has been given before this session of the board, by posting up notices in *three* of the most public places in each of the towns through which such highway is proposed to be located, we hereby appoint *John Doe, Richard Roe* and *Samuel Short*, members of this board, a committee to examine such proposed road, and hereby designate the *tenth* day of *July, 1902*, at *ten o'clock A. M.*, at (*stating place*), in said county, as the time when and the place where such committee will meet for said purpose upon said route.

Given under our hand this *tenth* day of *June, A. D. 1902*.

(SEAL)

John Smith,

Chairman Board County Commissioners.

Form No. 19072.²

The State of *Texas*, } In the *Commissioners' Court, Freestone County,*
County of *Freestone*. } *June Term, A. D. 1902.*

In the matter of the petition of } Petition for the location of a new
John Doe, Richard Roe, et al. } *first-class road.*

On this *tenth* day of *June, A. D. 1902*, came on to be heard the petition of *John Doe* and *seven* others, freeholders of precinct No. *2*, for a new road beginning at (*describe the road, stating the point of beginning, course and intermediate points*), and terminating at (*stating point of termination*), and it appearing to the court that notice of said petition has been given as required by law,

It is therefore ordered by the court, that *Samuel Short, William West, Francis Fern, John Smith* and *John Black*, *five* freeholders of said county, be and are hereby appointed a jury of view, a majority of whom may, after taking the prescribed oath before a properly authorized person, proceed to assess damages, if any are claimed, and, with the county surveyor, to lay out, survey and describe such

1. *South Dakota*. — Stat. (1901), § 1813. 2. *Texas*. — Rev. Stat. (1895), art. 4674 et seq.

road to the greatest advantage to the public, so that the same can be traced with certainty, and the field notes of such survey and description of the road, together with a statement of the damages assessed, if any, shall be included in the report of the jury, and, if adopted, shall be recorded in the minutes of the *Commissioners' Court*. And it is further ordered, that the said jury make a report in this cause at the next regular meeting of this court.

(2) TO VIEW PUBLIC ROAD BETWEEN COUNTY SEATS.

Form No. 19073.¹

Order for Jury to View Road Between County Seats.

The State of *Texas*, }
County of *Freestone*. }

In the matter of the establishment of a *first-class* public road from (*stating place*) to (*stating place*).

And now, on motion of the court in the said premises, it is hereby ordered that *John Doe, Richard Roe, Samuel Short, William West* and *Francis Fern*, five freeholders of the county of *Freestone*, be and are hereby appointed a jury of view to lay out, mark and define the above described road, and to report in writing such marks and any prominent natural objects that may aid in defining the route selected, in accordance with "An Act to require the Commissioners' Courts to lay out and open certain First-Class Roads," approved February 7, 1884. And it is further ordered that the said jury make a report in this cause at the next regular meeting of this court.

f. Commission or Warrant to Commissioners or Viewers.

Form No. 19074.¹

The State of *Alabama*, }
Jefferson County. } Court of *County Commissioners*.

To (*naming the seven disinterested householders appointea*):

The Court of *County Commissioners* of said county, at a term commencing on the *first* day of *December*, 1902, ordered that you view and mark out the following proposed road, to wit: (*describing the road*), and that you assess the value of the land of each land-owner that will be taken if the road is opened over the route marked out.

Before acting you must take an oath to view and mark out the foregoing described road to the greatest advantage to the public, and with as little prejudice to individuals as possible and without partiality or favor; and to justly assess the value of the land of each land-owner which will be taken for said road; and you must, after viewing and marking out the route and making the said assessment of compensation, return the same to said court.

John Marshall, Judge of Probate of *Jefferson Co*.

1. *Texas*. — Rev. Stat. (1895), art. 2447. 2. *Alabama*. — Civ. Code (1896), § 4674 et seq.

Form No. 19075.¹

Notice to Road Viewers.

In the *Pulaski County Court*.

To *John Doe, Samuel Short, William West* :

You are hereby notified that you have been appointed by the *County Court* as viewers, to view, survey and lay out a public road petitioned for by *Francis Fern* and others, as follows, to wit: (*describing the proposed road*), and you will meet for that purpose at (*stating place*), on the *tenth* day of *February*, 1899, or within *five* days thereafter, and, after taking oath hereto annexed, proceed to view and mark out said route and assess damages to any person or persons through whose lands said route passes, if in your opinion damages are sustained. You are authorized to call to your assistance, if you deem it necessary, a competent surveyor, chain carriers and markers to assist you in surveying out said route.

You will make full report of your proceedings to said court on or before the *second* day of the next *March* term thereof.

Witness my official signature and seal of office, this *first* day of *February*, 1899.

(SEAL)

Calvin Clark, Clerk.

By *David Corliss*, D. C.

Form No. 19076.²

State of *Colorado*, }
County of *Ouray*. } ss. In the matter of the petition of *John Doe*
and others, for county road.

The People of the State of *Colorado* to *Richard Roe, Samuel Short*
and *William West*, Greeting:

You are hereby notified that the county commissioners of *Ouray* county, at their *May* meeting, A. D. 1899, appointed you road viewers. We therefore command you to meet at (*stating place*), at *ten* o'clock A. M., on the *twentieth* day of *May*, A. D. 1899, to view and locate the county road prayed for in said petition (a copy of which is hereto attached), and further to survey or cause the same to be surveyed and platted; to assess the damages and benefits accruing to the owners of any lands over which the same may pass, by reason of the location, alteration, widening or changing thereof, and estimate the probable cost of opening such road to travel, and return to the office of the county clerk a full report of your viewing with a plat of said road, together with the assessment of damages and benefits accruing to the owner of any lands over which the same may pass, and an estimate of the probable cost of opening the same, at least *ten* (10) days before the next regular meeting of the board of county commissioners, after the same is completed. And herein fail not under penalty of the law.

Witness, *Calvin Clark*, County Clerk, and the seal thereof, at *Ouray*, (SEAL) in said county, this *tenth* day of *May*, A. D. 1899.

Calvin Clark, County Clerk.

By *Daniel Church*, Deputy.

(Attach copy of petition.)

1. *Arkansas*. — Sand. & H. Dig. (1894), §§ 2820, 2822.

2. *Colorado*. — Mills' Anno. Stat. (1891), § 3935.

Form No. 19077.¹

To *Richard Roe, Samuel Short and William West*:

You are hereby notified that, by an order of the board of county commissioners of the county of *Linn*, made on the *tenth* day of *May*, A. D. 1899, you were duly appointed viewers to view the following road, which has been petitioned for, to wit: (*describing the road*), and you were, by said board, ordered to meet at (*stating place*), on the *tenth* day of *June*, A. D. 1899, at which time and place the county surveyor will meet with you, and proceed to the discharge of your duties as such viewers.

By order of the board.

Witness my hand, and the seal of said county, this *tenth* day of *May*, A. D. 1899.

(SEAL)

Calvin Clark, County Clerk.

Form No. 19078.²

The State of *Nebraska*, }
County of *Perkins*. } ss. *June 10, 1901.*

Appointment of Commissioner.

To *John Doe*:

You are hereby notified that you have been this day, by me, county clerk of *Perkins* county, *Nebraska*, appointed a commissioner to view and examine into the expediency of establishing a road according to a petition filed in my office, a copy of which is hereto attached, and report accordingly.

Your attention is particularly called to the following sections of the Compiled Statutes of Nebraska for 1899, prescribing your duties:

Sec. 4514. The commissioner is not confined to the precise matter of the petition, but may inquire and determine whether that or any road in the vicinity answering the same purpose and in substance the same, be required; but such road must not be established through any burying ground which is exempt from execution; nor through any garden, orchard or ornamental ground contiguous to any dwelling house, so as to cause the removal of any building without the consent of the owner.

Sec. 4515. In forming his judgment, he must take into consideration both the public and private convenience, and also the expense of the proposed road.

Sec. 4516. After a general examination, if he shall not be in favor of establishing the proposed road, he will so report, and no further proceedings shall be had on that petition.

Sec. 4517. If he deems such establishment expedient, he may proceed at once to lay out the road as hereinafter directed, and may report accordingly, if the circumstances of the case are such as to enable him to do so, without pursuing the course pointed out in the next section.

Sec. 4518. If the precise location of the road cannot be otherwise

1. *Kansas*. — Gen. Stat. (1897), c. 154, § 3.
2. *Nebraska*. — Comp. Stat. (1899), § 4513 et seq.

given, he must cause the line of the road to be accurately surveyed and plainly marked out.

Sec. 4519. Any commissioner, other than the county surveyor, must be sworn to faithfully and impartially discharge his duty as such commissioner, and, after being thus qualified, he shall have power to swear the assistants employed to a faithful and impartial performance of their respective duties in laying out the road described in his commission.

Sec. 4520. Stakes must be set at each change of direction, on which shall be marked the bearing of the new course. Stakes must also be set at the crossing of fences and streams, and at intervals in the prairie, not exceeding a quarter of a mile each; in the timber the course must be indicated by trees suitably blazed.

Sec. 4521. Bearing trees must, when convenient, be established at each angle, and the position of the road relative to the corners of sections, and junctions of streams, or any other natural or artificial monument, or conspicuous object, must, as far as convenient, be stated in the field notes, and shown on the plat.

Sec. 4522. A correct plat of the road, together with a copy of the field notes of the surveyor, if one has been employed, must be filed as a part of the commissioner's report, and he shall also state the probable cost of the work in laying out or altering such road, including any necessary bridges, culverts and ditches. Such report shall be filed with county clerk.

You will commence the examination on the *twentieth day of June, 1901*, and file your report in this office on or before the *tenth day of July, 1901*.

(SEAL)

Calvin Clark, County Clerk.

Form No. 19079.¹

Order and Commission to Jury of View.

The State of *Texas*, } In the Commissioner's Court,
County of *Freestone*. } *June Term, 1899.*

Whereas, on the *tenth day of June, 1899*, at a regular term of said court held in and for said state and county, the court, upon the petition of *John Doe* and others for a public road, made the following order, to wit:

In the matter of the petition of } Petition for the location of a
John Doe et al. } *first-class road.*

On this *tenth day of June, A. D. 1899*, came on to be heard the petition of *John Doe* and *seven* others, freeholders of Precinct No. *2*, for a new road, beginning at (*describe the road, stating point of beginning, course and intermediate points*) and terminating at (*stating point of termination*).

And it appearing to the court that notice of said petition has been given as required by law,

It is therefore ordered by the court, that *Richard Roe, Samuel Short, William West, Francis Fern* and *John Smith, five* freeholders of said county, be and are hereby appointed a jury of view, a majority of

1. *Texas*. — Rev. Stat. (1895), art. 4633 *et seq.*

whom may, after taking the prescribed oath before a properly authorized person, proceed to assess damages, if any are claimed, and with the county surveyor, to lay out, survey and describe such road to the greatest advantage to the public, so that the same can be traced with certainty, and the field notes of such survey and description of the road, together with a statement of the damages assessed, if any, shall be included in the report of the jury, and, if adopted, shall be recorded in the minutes of the *Commissioners' Court*. And it is further ordered, that the said jury make a report in this cause at the next regular meeting of this court.

These are therefore to command you, *Richard Roe, Samuel Short, William West, Francis Fern and John Smith*, as said jurors, after taking and subscribing the oath provided by law, to proceed to lay out and describe such road, to the greatest advantage to the public, so that the same can be traced with certainty; and description of said road shall be included in your report. Before proceeding to lay out said road, you shall issue a notice in writing to the owners of the lands through which said proposed road may run, or to their agents or attorneys, of the times when you will proceed to lay out said road, and when you will assess the damages incidental to the opening of the same; which notice shall be served upon such owners, their agents or attorneys, at least five days before the day therein named. If such owners be nonresidents of the county, the notice may be given by publication in a newspaper published in the county. Should said owners present to you, in writing, a statement of the damages claimed by them, you will, after assessing such damages, if any, as you may deem proper and just, make your report in detail to the next term of this court, specifying the particular items of damage and the amounts allowed therefor, and accompany the same with the claim for damages presented to you by said owners.

Herein fail not, but make your report to the next regular term of this court, to be held at the court-house in *Fairfield*, in said county, on the *tenth* day of *September*, 1899.

Given under my hand and seal of office, this the *tenth* day of *June*, 1899.

(SEAL)

Calvin Clark,
Clerk County Court, *Freestone* County.

g. Return of Service of Warrant.

Form No. 19080.¹

State of *Colorado*, }
County of *Ouray*. } ss.

I hereby certify that I have duly served this warrant by delivering a copy thereof, with a copy of the said road petition attached thereto, to each of the road viewers named herein, viz.: *John Doe, Richard Roe and Samuel Short*, this *tenth* day of *May*, A. D. 1899.

John Lynch, Sheriff.

Form No. 19081.¹

Sheriff's Return.

Came to hand the *tenth* day of *June*, A. D. 1902, and executed the *tenth* day of *June*, A. D. 1902, by delivering to *Samuel Short, William West, Francis Fern, John Smith* and *John Black*, each of the within named jurors, in person, a true copy of the within order.

John Lynch, Sheriff,
Freestone County, Texas.

h. Oath of Commissioners or Viewers.

Form No. 19082.²

Oath of Viewers.

State of *Arkansas*, }
County of *Pulaski*. }

We, *John Doe, Samuel Short* and *William West*, having been appointed viewers to view and survey out the road described in the foregoing order, do swear that we will faithfully and impartially discharge the duties devolving upon us to the best of our abilities, so help us God.

John Doe.
Samuel Short.
William West.

Subscribed and sworn to before me this *tenth* day of *February*, 1899.

Abraham Kent, J. P.

Form No. 19083.³

The State of *Nebraska*, }
County of *Perkins*. } ss.

I do solemnly swear that I will, to the best of my ability, faithfully and impartially discharge my duty as commissioner appointed herein.

John Doe.

Subscribed in my presence and sworn to before me this *tenth* day of *June*, 1901.

(SEAL)

Calvin Clark, County Clerk.

Form No. 19084.⁴

The State of *Texas*, }
County of *Freestone*. }

I, *Samuel Short, William West, Francis Fern, John Smith* and *John Black*, do solemnly swear that I will lay out the road, now directed to be laid out by the order to us directed from the *Commissioners*

1. *Texas*. — Rev. Stat. (1895), art. 4688.

2. *Arkansas*. — Sand. & H. Dig. (1894), § 2824.

3. *Nebraska*. — Comp. Stat. (1899), § 4519.

4. *Texas*. — Rev. Stat. (1895), art. 4689.

Court according to law, without favor or affection, malice or hatred, to the best of my skill and knowledge, so help me God.

Samuel Short.
William West.
Francis Fern.
John Smith.
John Black.

Sworn to and subscribed before me this *tenth* day of *June*, 1902.

Calvin Clark, County Clerk,
Freestone County, Texas.

1. Notice to Land-owners of View by Commissioners or Viewers.¹

(1) THE NOTICE.

(a) *Personal Notice.*

Form No. 19085.²

To *Richard Roe*:

You are hereby notified that *John Doe* and others, being householders of said county residing in the vicinity of said proposed road, lately presented to the board of county commissioners of the county of *Linn*, in the state of *Kansas*, their petition praying that a road might be established as follows: (*describing the road as in the petition*), which road, if established, will run through certain lands in said county owned by you, to wit: (*specifying lands through which road will pass*), and that at a meeting of said board on the *first* day of *May*, A. D. 1899, viewers were duly appointed to view said road, and were ordered to meet at (*stating place*) on the *tenth* day of *May*, A. D. 1899, at *ten* o'clock A. M., and proceed to the discharge of their duties. You will therefore take notice of the meeting and proceedings of said viewers.

Dated the *first* day of *May*, 1899.

John Doe, one of said petitioners.

Form No. 19086.³

Road Notice to Land-owner.

In the matter of the petition of *John Doe* and others for a public road in the county of *Freestone*.

1. Precedent.—In *Kidder v. Peoria*, 29 Ill. 78, the notice was as follows:

"Commissioners' Notice. Opening of *Washington Street* in the City of *Peoria*.—Notice is hereby given to the owners of lots and lands in the city of *Peoria*, through and over which *Washington street* will run in opening the same from the east side of *North Fayette street*, in said city of *Peoria*, through *Mills' Addition to Washington street*, in *Morton, Voris and Laveille's Addition to Peoria*, that the undersigned, appointed by the County Court of *Peoria* county, to assess the amount of compensation and benefits accruing to the owners of lots and lands dam-

aged and benefited by the opening of said street, will meet at the office of *L. Keyon*, in *Curtis' Bank Building*, in said city of *Peoria*, on the *nineteenth* day of *October*, A. D. 1859, at the hour of *10 o'clock a. m.*, and that they will proceed to view the premises as required by law, when and where all persons interested may attend if they think proper."

It was held that this notice did not apply to persons whose lots or lands did not adjoin or lie near the proposed street.

2. Kansas.—Gen. Stat. (1897), c. 154, § 4.

3. Texas.—Rev. Stat. (1895), art. 469i.

The State of *Texas* to *John White*:

Take notice that the undersigned jury, appointed by the *Commissioners' Court of Freestone county, Texas*, to lay out, survey and assess damages resulting from the establishment of a public road, as petitioned for by *John Doe* and others, beginning at (*stating point of beginning, course and intermediate points*), and running to (*stating point of termination*), will on the *tenth* day of *June*, 1899, in discharge of our said duty, meet upon the following premises, to which you have some claim or title, to wit: (*describing premises*), and will then and there proceed to assess any damages to which you may be entitled on account of the laying out of said public road, and you are hereby requested and required to produce to us a statement in writing of the damages, if any claimed by you, and all evidences which you may desire to offer in relation to such damages, and do and perform such other acts as may be necessary and lawful in the premises.

In witness whereof we have hereunto set our hands this *first* day of *June*, 1899.

Richard Roe,
Samuel Short,
William West,
Francis Fern,
John Smith,
Jurors.

(*b*) *By Posting.*

Form No. 19087.¹

Highway Notice.

Notice is hereby given that a petition having been presented to the county commissioners of *Ouray county, Colorado*, to lay out and open a county road upon the following described route, to wit:

Commencing at the (*stating point of commencement*) and running thence in a northerly direction on the most eligible route to (*stating point of termination*).

The said commissioners do hereby give notice that they have appointed *John Doe, Samuel Short* and *William West* as road viewers, and have fixed on the *tenth* day of *May*, A. D. 1899, at *ten* o'clock A. M., as the day and hour on which the said road viewers will meet at (*stating place*), the starting point of said road, to attend to their duties as road viewers of the said proposed route, at which time and place all persons interested may appear.

By order of the county commissioners.

Calvin Clark, County Clerk.

Form No. 19088.²

Road Notice.

To whom it may concern:

In pursuance of an order made by the board of county commissioners of the county of *Linn*, in the state of *Kansas*, in regular

1. *Colorado*. — *Mills' Anno. Stat.* 2. *Kansas*. — *Gen. Stat.* (1897), c. (1891), § 3934.

session on the *first* day of *May*, A. D. 1899, notice is hereby given that (*naming the petitioners*), householders of said county residing in the vicinity where it is proposed to lay out and establish the road below mentioned, have presented to said board their certain petition praying the laying out and establishment of a public road in said county as follows: (*describing the proposed road*), and that *Richard Roe, Samuel Short* and *William West*, viewers duly appointed, will meet at (*stating place*), on the *tenth* day of *June*, A. D. 1899, *ten* o'clock A. M., and proceed to view said road, and to give all parties a hearing.

Witness my hand, and the seal of said county affixed at my office in said county, this *fifth* day of *May*, A. D. 1899.

(SEAL)

Calvin Clark, County Clerk.

(2) PROOF OF POSTING NOTICE.

Form No. 19089.¹

Affidavit of Posting.

State of *Colorado*, }
County of *Ouray*. } ss.

Charles Church, being duly sworn, doth depose and say that he did on the *tenth* of *May*, A. D. 1899, post *three* copies of the following notice, to wit: One on (*stating place each of said notices was posted*); each being in a public place along the line of the proposed new road, and within the county and state aforesaid.

Charles Church.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace.

j. Order to County Surveyor to Meet Viewers.

Form No. 19090.²

To *Charles Smith*, County Surveyor of the County of *Linn*:

At a meeting of the board of county commissioners of the county of *Linn*, on the *tenth* day of *May*, A. D. 1899, *John Doe, Richard Roe* and *Samuel Short* were appointed viewers to view a certain proposed road petitioned for, to wit: (*describing proposed road as in the petition*), and they were ordered to meet for that purpose at (*stating place*) on the *twentieth* day of *May*, A. D. 1899, and the said board directed that an order issue to you directing you to meet with said viewers at said time and place. You are therefore directed to meet with said viewers at said time and place and proceed to the discharge of your duties in that regard, as provided by law.

By order of the board.

Witness my hand and the seal of said county this *tenth* day of *May*, A. D. 1899.

(SEAL)

Calvin Clark, County Clerk.

1. *Colorado*. — Mills' Anno. Stat. 2. *Kansas*. — Gen. Stat. (1897), c. (1891), § 3934. 154, § 3.

k. Report of County Surveyor

Form No. 19091.¹

To the Board of County Commissioners of the County of *Martin* and State of *Minnesota*:

The undersigned, *James Smith*, having been employed by you to make a survey of a road in said county, would report that the following is a correct survey thereof, as made by me under your directions, to wit: (*describing the road*), and that below is a correct plat of said road according to said survey.

Dated at *Fairmont*, this *first* day of *September*, A. D. 1899.

James Smith, Surveyor.

(*Annex plat of the road.*)

Form No. 19092.

Surveyor's Report and Plat.

To the Board of Supervisors of the Town of *Canton*, *Lincoln* County, *South Dakota*:

The undersigned, having been employed by you to make a survey of a road in said town, would report that the following is a correct survey thereof, as made by me under your directions, to wit: (*describing the road*), and that below is a correct plat of said road according to said survey.

Dated at *Canton*, this *tenth* day of *June*, A. D. 1902.

Charles Adams, Surveyor.

(*Attach plat.*)

l. Report of Commissioners or Viewers.

Form No. 19093.²

Report of Viewers.

To the Honorable *County* Court:

The undersigned, having been appointed as viewers to view and survey the proposed public road described in the foregoing order, respectfully report that we proceeded on *Monday*, the *tenth* day of *February*, 1899, after first having taken the oath prescribed, to view, survey and mark out said road, and we are of the opinion that said road would be of sufficient importance to the public to have the same established. We therefore recommend that said road be established as a public road.

We assess damages to

Richard Roe, the sum of *two hundred* dollars.

Francis Fern, the sum of *one hundred* dollars.

Daniel Church, the sum of *fifty* dollars.

Respectfully submitted.

Dated the *first* day of *March*, 1899.

John Doe.

Samuel Short.

William West.

1. *Minnesota*. — Laws (1897), c. 199.
§ 2; Laws (1896), c. 202.

2. *Arkansas*. — Sand. & H. Dig. (1894),
§ 2824.

Form No. 19094.¹

Road Viewers' Report.

To the Honorable Board of County Commissioners, *Pueblo County, Colorado*:

Gentlemen: Your viewers appointed on the *first* day of *May*, 1899, to view a county road prayed for in a certain petition presented to your honorable body on the above named day and date, a copy of which has been received by us, viz: Commencing at (*describe the road as in the petition*), respectfully submit the following report, to wit: After receiving our authority to act, we met at the starting point of said proposed road on the *tenth* day of *May*, 1899, at the hour of *ten* o'clock *A. M.*, being the time and place specified in our appointment, and proceeded to view the road prayed for in said petition, as follows: We commenced at the starting point named in said petition and run (*give a description of the viewing*), the last named point being the terminus thereof, and the road as above laid out and viewed being over the most practicable route which we, in our judgment, can find. (*If changes have been made, say, "We found it necessary to make the following changes in the proposed route as prayed, viz:" stating changes.*)

We have caused to be surveyed and platted and have herein embodied a plat of said road as viewed by us and which forms a part of this report, as shown by the following map.

(*Here set out a map of the lands over which the road will pass.*)

We have taken into account all the damages and benefits to land-owners arising from the laying out of said road and report, in tabular form, as follows:

Name of land-owner.	Description of land.						Damages or value of land taken.	Damages to residue of land and other property.	Value of the benefits.	Amount of damages in excess of benefits.
	Part or width of strip taken.	Subdivision.	Section.	Township.	Range.	Number acres taken.				

We have taken the following government lands, viz: (*specifying the lands*).

We have taken the following railroad-grant lands, viz: (*specifying the lands*).

We have marked out the line of said road as located by us by turning a furrow on each side of said proposed road (*or in any other manner*).

We estimate the probable cost of opening said road to travel to be \$2,000.

(*Here insert any remarks.*)

Which viewing we have completed this *fifteenth day of May, 1899.*

*John Doe,
Samuel Short,
William West,
Viewers.*

Form No. 19095.

(Precedent in *Topeka v. Cowee*, 48 Kan. 348.)

To the Honorable Mayor and Councilmen of the City of *Topeka*:

The undersigned appraisers, duly appointed by your honorable body on *June 4, 1883*, for the purpose of assessing the value and damages of land to be appropriated for the use of the city of *Topeka* for streets and avenues, and more fully described in ordinance No. 484, approved *May 22, 1883*, a copy of which is hereto attached, marked "*Exhibit A*," respectfully submit their report:

On the *12th day of June, 1883*, the undersigned appraisers took and subscribed respectively the oath of office, which oath is hereto attached and marked "*Exhibit B*." On the *13th day of June, 1883*, we served written notice as required by law to *James Brewer, John Armstrong, F. W. Giles, and J. Q. Cowee*, owners of the several parcels of land to be appropriated by said city as aforesaid. Said boards of appraisers met on *June 25, 1883*, at the hour of 2 o'clock P. M., on the premises described in the ordinance hereinbefore mentioned, and assessed the value of damages of the several pieces of ground, and after careful investigation of the title in and to the several premises, set aside first appraisement. Thereupon, on the *18th of August, 1883*, said board of appraisers caused a notice to be issued and served upon *James Brewer, F. W. Giles, John Armstrong and J. Q. Cowee*, the three former persons residing in the city of *Topeka*, and *J. Q. Cowee* residing at *Grand Haven, Osage county, Kansas*. On the *23d day of August, 1883*, at 2 o'clock P. M., the undersigned appraisers met at the place described in the ordinance hereinbefore mentioned, and upon actual view assessed the value and damages of the several parcels of land to be appropriated for the use of the city of *Topeka* for streets and avenues, as follows: To *James Brewer*, damages for opening *King street* and *Western avenue*, \$2,400; to *F. W. Giles*, damages for opening *Western avenue*, \$56; to *John Armstrong*, damages for opening *Western avenue*, \$150; to *J. Q. Cowee*, damages for opening *Western avenue*, \$350. The location and also number of feet to be appropriated off of the several pieces of ground are shown upon the plat marked "*C*" and made a part of this report.

We submit also to your consideration the following: Mr *J. W. Cowee* will deed to the city of *Topeka* so much of his land as is necessary for the opening of *Western avenue* and *Twelfth street* for the sum of \$650, and we would recommend to your honorable body the

purchase at that price, it being in our judgment necessary that *Twelfth* street be opened to the public, and we deem the price reasonable.

All of which is respectfully submitted.

J. N. Strickler,
T. L. Stringham,
S. Gunther,
Board of Appraisers.

Form No. 19096.¹

To the Board of County Commissioners of the County of *Martin*,
Minnesota:

The undersigned committee, appointed by you to examine the proposed establishment of a highway, as stated in the petition referred to in your order of appointment made on the *fourteenth* day of *July*, 1899, would respectfully report that we met at the time and place designated in your said order and proceeded to examine the highway proposed to be established, viz: Beginning (*describing the road by course and distance, and if a surveyor be employed, his plat and report should be annexed*); and do hereby recommend that the prayer of the said petitioners be granted.

Given under our hands this *first* day of *September*, A. D. 1899.

John Doe,
Richard Roe,
Samuel Short,
Committee.

Form No. 19097.²

The State of *Nebraska*, }
Perkins County. } Road No. 10.

Report of Commissioner in Favor of Petition.

To the Board of County Commissioners of said *Perkins* County:

In pursuance to appointment, and copy of petition, hereto attached and made a part of this report, on the *twentieth* day of *June*, 1901, I proceeded to view and examine the proposed location of said road and other matters contained in said petition, and after making a general and careful examination, taking into consideration both public and private convenience and the expense of the proposed road, I deemed it expedient that the same be established.

For the purpose of performing the duties imposed by my commission I employed as assistants (*naming assistants employed*), who, before entering upon their duties, were by me duly sworn to discharge faithfully and impartially their respective duties in the premises as required by law.

As the precise location of the road could not be otherwise given, I caused the line of the road to be accurately surveyed and plainly marked out, and for that purpose *Richard Roe* was employed as surveyor.

The road was therefore laid out as directed by the statute in such case made and provided.

1. *Minnesota*. — Laws (1897), c. 199, § 4; Laws (1899), c. 202.

2. *Nebraska*. — Comp. Stat. (1899), § 4517 *et seq.*

The following is an estimate of the probable cost of doing the work required under this report:

Costs of bridges	\$2,000 00
Costs of culverts	1,000 00
Costs of ditches.....	500 00
Costs of grading.....	2,000 00
Other costs (<i>Here specify other costs</i>).....	

Total..... \$5,500 00

The expense incurred in laying out said road is as follows: (*Here specify the expenses incurred*).

A correct plat of the road, together with a copy of the field notes of the surveyor, is filed herewith and made a part of this report.

John Doe, Commissioner.

Form No. 19098.¹

In the County Court of the State of Oregon, for the County of Union.

In the matter of the petition of *John Doe* and others for a county road.

State of Oregon, }
County of Union. } ss.

To the Honorable County Court of the State of Oregon, for the County of Union:

The undersigned, who were duly appointed at the *June* term in the year 1902 of the above entitled court, as viewers of the road prayed for in the above named petition of *John Doe* and others, hereby report: That we met at (*stating place*), on the *tenth* day of *June*, 1902, that being the time and place prescribed for such meeting by the court, and, after taking an oath faithfully and impartially to discharge the duties of our appointment, which oath is herewith filed, we took to our assistance *Charles Adams* and *John Smith* as chain bearers, and *Henry Black* as marker, and proceeded to view, survey and lay out said road as prayed for in said petition, as near as in our opinion a good road can be made at a reasonable expense, taking into consideration the utility, convenience and inconvenience and expense which will result to individuals as well as to the public, if such road shall be established and opened.

We also caused *Francis Fern*, the surveyor appointed for that purpose, to survey the proposed road, under our direction, and caused the proposed road to be conspicuously marked throughout, and the corners and distances thereon noted, all in the manner required by law. Reference for particulars of said survey is hereby made to the plat and survey of said proposed road, made by said *Francis Fern* and herewith filed.

We are of the opinion that said proposed road should be established, as described in said plat and survey, for the following reason, viz: (*describing the road as established*).

Dated the *tenth* day of *August*, 1902.

Richard Roe,
Samuel Short,
William West,
Viewers.

Form No. 19099.¹(Precedent in Road to Ewing's Mill, 32 Pa. St. 283.)²

We, the viewers mentioned in the within order of court, having met and been duly sworn, did proceed to view the ground between the points mentioned, and after carefully viewing the same, do find the old road altogether useless on account of hills and often crossing of *Montour's Run*; did proceed to lay out a road between the points within mentioned, as represented by the annexed draft, with courses and distances, and the improvements through which it passes. The grade not exceeding *five* degrees, and but a small distance at that, and we do report the same for a public road or highway, *thirty-three* feet wide. We also think that *John Phillips* and the heirs of *David Ewing* are entitled to *forty* dollars damages, and that no other persons on the route are entitled to any damages.

Witness our hands and seals, the *4th* day of *May*, 1855.

Stephen Woods.
John Young, Jr.

Form No. 19100.³

To the Board of County Commissioners of the County of *Lincoln*,
South Dakota:

The undersigned committee, appointed by you to examine the proposed location of a highway, as stated in the petition referred to in your order of appointment made on the *tenth* day of *June*, 1902, would respectfully report that we met at the time and place designated in your said order and proceeded to examine the highway proposed to be located, viz: Beginning (*describing the highway by course and distance, and if a surveyor is employed attaching his report and plat*); and do hereby recommend that the prayer of the said petitioners be granted.

Given under our hands this *tenth* day of *July*, A. D. 1902.

John Doe,
Richard Roe,
Samuel Short,
Committee.

Form No. 19101.⁴

Report of Jury in Road Cases.

In the matter of the petition of *John Doe, Richard Roe* and others for a public road:

To the Honorable *Commissioners'* Court of *Freestone* County, *Texas*:

We, the undersigned, freeholders and residents of the county of *Freestone* and state of *Texas*, duly appointed a jury by the *Commissioners'* Court of said county, at the *June* term thereof, 1902, as appears by the records of said court, to lay out, survey and describe a certain road designated in the petition of *John Doe* and others for

1. *Pennsylvania*. — Bright. Pur. Dig. orders subsequent to the report of the viewers. (1894), p. 1873, § 1 et seq.

2. The proceedings in this case were held to be void because of failure of the court to make certain

3. *South Dakota*. — Stat. (1901), § 1815.
4. *Texas*. — Rev. Stat. (1895), arts. 4690, 4691.

a public road; having first been duly sworn according to law and having given the *five* days notice in writing to the land-owners through whose land said proposed road may run, or their agent or attorneys, as required by law, did on the *tenth* day of *July*, 1902, proceed to view, lay out, survey and describe the premises designated in said petition, and would recommend that said road be established in accordance with the field notes, survey and description of same, as follows: (*describing the road*).

We would also report that having notified all the parties interested of our intended meeting, and of the purpose thereof, we did then and there hear all the testimony offered in relation to the damages sustained by the laying out of said road, and do assess the damages thereof due to each particular land-owner (who presented to us a written claim for damages, which is hereto attached) as follows, to wit:

Name of land-owner.	Description of land.	Damages.	
<i>Total damages</i>			

We would also report that the following named persons have relinquished the right of way for said road, as will be seen from conveyances hereto attached, marked Exhibits *A, B, C, D, E, F* and *G*.

Name of land-owner.	Description of land.

All of which is respectfully submitted.

In testimony whereof, we have hereunto set our hands this *tenth* day of *September*, 1902.

Samuel Short,
William West,
Francis Fern,
John Smith,
John Black,

} Jurors.

m. Notice to Land-owner of Report of Commissioners and to File
Objections or Claim for Damages.

Form No. 19102.¹

(Neb. Comp. Stat. (1899), § 4525.)

State of *Nebraska*, } ss. Road No. 10.
County of *Perkins*. } Notice to Land-owners.

To all whom it may concern:

The commissioner appointed to locate and establish a road commencing at (*stating point of commencement*), in *Perkins* county, *Nebraska*, running thence (*describe in general terms all the points as in the commissioner's report*), and terminating at (*stating point of termination*), has reported in favor of the establishment thereof, and all objections thereto, or claims for damages, must be filed in the county clerk's office on or before noon of the *first* day of *September*, A. D. 1901, or such road will be established without reference thereto.
Calvin Clark, County Clerk.

n. Damages Occasioned by Establishing Highway.

(1) AGREEMENT AS TO DAMAGES.

Form No. 19103.²

State of *South Dakota*, } ss.
County of *Lincoln*.

Whereas, a county road has been located by the board of county commissioners of said county of *Lincoln*, by their order filed in the office of the county clerk of said county on the *tenth* day of *May*, A. D. 1902, which said road is set forth and described in the commissioners' order as follows, viz: Beginning (*describing the road as in the order*), which said road passes through certain lands owned by the undersigned as described below:

Now, therefore, know all men by these presents, that we, the owners of the land described below, for value received, do hereby agree to and with said board of county commissioners that the damages sustained by us by reason of laying out said road be ascertained and fixed and the same are hereby ascertained and fixed, as follows:

Owners.	Description.	Sec.	Town.	Range.	Damages.

1. *Nebraska*. — Comp. Stat. (1899), § 4525. 2. *South Dakota*. — Stat. (1901), § 1800.

In testimony whereof, we have hereunto set our hands and seals this *twentieth* day of *May*, A. D. 1902.

Signed, sealed and delivered in

presence of *Charles Adams*.

John Smith.

Henry Black.

John Doe. (SEAL)

Richard Roe. (SEAL)

Samuel Short. (SEAL)

William West. (SEAL)

Francis Fern. (SEAL)

(2) RELEASE OF DAMAGES.

Form No. 19104.

Linn County, *Kansas*, May 1, 1899.

We, the undersigned land-owners, do hereby relinquish all claims against *Linn* county, *Kansas*, for damages that we may sustain by reason of the location of the following described road, to wit: Commencing at (*describing road as in the petition*).

Name.	Description.	Sec.	Twp.	Range.

State of *Kansas*, *Linn* County, ss.

I, *John Doe*, do solemnly swear that the above named persons are the only land-owners along the line of the above described road. So help me God.

John Doe, Principal Petitioner.

Subscribed in my presence and sworn to before me this *first* day of *May*, A. D. 1899.

Calvin Clark, County Clerk.

Petitioner's Affidavit.

I, *John Doe*, one of the petitioners aforesaid, do solemnly swear that all the persons who have signed the foregoing petition are householders of *Linn* county, *Kansas*, and reside in the vicinity of the road therein prayed for.

John Doe.

Sworn to and subscribed before me this *first* day of *May*, 1899.

Calvin Clark, County Clerk.

Form No. 19105.

State of *Minnesota*, }
County of *Martin*. } ss.

Whereas, a county road has been located and established by the board of county commissioners of said county of *Martin*, by their order filed in the office of the county auditor of said county on the *second* day of *November*, A. D. 1899, which said road is set forth and described in the commissioners' order as follows, viz: Beginning

(describing the road as in the order), which said road passes through certain lands owned by the undersigned as described below:

Now, therefore, know all men by these presents, that we, the owners of the lands described below, for value received, do hereby release all claims to damages sustained by us by reason of the laying out and opening said road through our lands, viz:

Owners of lands.	Description of lands.	Sec.	Town.	Range.

In witness whereof, we have hereunto set our hand and seal this tenth day of November, A. D. 1899.

Signed, sealed and delivered in
presence of *Charles Smith.* }
William Brown. }

John Doe. (SEAL)
Richard Roe. (SEAL)
Samuel Short. (SEAL)
William West. (SEAL)
Francis Fern. (SEAL)
John Smith. (SEAL)
James Jones. (SEAL)
Henry Black. (SEAL)

Form No. 19106.¹

State of *South Dakota*, } ss.
County of *Lincoln*.

Whereas, a county road has been located by the board of county commissioners of said county of *Lincoln* by their order filed in the office of the county clerk of said county on the tenth day of May, A. D. 1902, which said road is set forth and described in the commissioners' order as follows, viz: Beginning (describing the road as in the order), which said road passes through certain lands owned by the undersigned as described below:

Now, therefore, know all men by these presents, that we, the owners of the lands described below, for value received, do hereby release all claims to damages sustained by us by reason of the laying out and opening said road through our said lands, viz:

Owners.	Description.	Sec.	Town.	Range.

In testimony whereof, (concluding as in Form No. 19105).

(3) CLAIM FOR DAMAGES.**Form No. 19107.**(Precedent in *State v. Hedeon*, 47 Kan. 403.)**Application for Damages.**

To the Board of County Commissioners, *Allen county, Kansas*, engaged in laying out a road on the east and west quarter line of section 15, township 25, range 18, in *Allen county, Kansas*, petitioned for by _____ and others:

Gentlemen: *The Southern Kansas Railway Company* respectfully claims \$249 42-100 as its damages and compensation on account of laying out said road across the railroad track and right-of-way 100 feet wide of said company in the east half of section 15, in township 25 south, range 18 east of the 6th principal meridian, in *Allen county, Kansas*.

Dated this 21st day of *March*, 1888.

The Southern Kansas Railway Company.

By *M. N. Wells*, its Agent, Engineer.

Form No. 19108.

State of *Nebraska*, } ss. Road No. 10.
County of *Perkins*. }

Claim for Damages.

To the Board of County Commissioners of said County:

I, *Richard Roe*, hereby claim from *Perkins county* the sum of *three hundred* dollars as damages to my property by reason of the establishment of county road No. 10 through the following described lands, to wit: _____ qr. of _____ qr. of Sec. _____, T. _____ N., R. _____ E., _____ acres.

Richard Roe, Claimant.

(4) SUMMONS TO PROVE DAMAGES.

(a) *Where Highway is in County Under Township Organization.*

Form No. 19109.

(Starr & C. Anno. Stat. Ill. (1896), c. 121, par. 41.)

State of *Illinois*, } ss.
Greene County. }

The People of the State of *Illinois*, to any constable of said county, greeting:

You are hereby commanded to summon *John Doe* to appear before me at my office in the town of *Kane*, in said county, on the *tenth* day of *May*, 1899, at *ten* o'clock in the forenoon, and prove to a jury then and there to be impaneled such damages as he (or they) may sustain on account of the establishing, altering, widening or vacating the road described in a certificate of the town of *Kane*, in said county, which said certificate is now on file in my office.

Given under my hand and seal this *first* day of *May*, 1899.

Abraham Kent, Justice of the Peace. (SEAL)

(b) *Where Highway is in County Not Under Township Organization.*

Form No. 19110.

(Starr & C. Anno. Stat. Ill. (1896), c. 121, par. 241.)

State of *Illinois*, }
Greene County. } ss.

The People of the State of *Illinois*, to any constable of said county, greeting:

You are hereby commanded to summon *John Doe* to appear before me at my office in the town of *Kane*, in said county, on the *tenth* day of *May*, 1899, at *ten* o'clock in the *forenoon*, and prove to a jury then and there to be impaneled such damages as he (or *they*) may sustain on account of the establishing, altering, widening or vacating the road described in a certificate of the commissioners of road district No. 2, in said county, which certificate is now on file in my office.

Given under my hand and seal this *first* day of *May*, 1899.

Abraham Kent, Justice of the Peace. (SEAL)

(5) APPLICATION TO JUSTICE OF THE PEACE TO APPOINT COMMISSIONERS TO APPRAISE DAMAGES OCCASIONED BY LAYING OUT OF A HIGHWAY BY SELECTMEN.

Form No. 19111.¹

To *Abraham Kent*, Esq., of *Westminster*, in the county of *Windham*, one of the justices of the peace within and for the county of *Windham* aforesaid:

The undersigned, *John Doe*, of *Rockingham*, in the county of *Windham* aforesaid, represents to your honor that heretofore, to wit, on the *first* day of *May*, A. D. 1903, the selectmen of said town of *Rockingham* laid out and caused to be surveyed a public highway in said town, extending from (*describing the highway*), in said town, and that the said highway passes through lands in which he, the said *John Doe*, then and there and still is interested, and that he, the said *John Doe*, is not satisfied with the sum offered to him by said selectmen as damages, occasioned by the laying out of said highway through the lands aforesaid; and the said *John Doe* therefore prays your honor, in pursuance of the statute in such case made and provided, to appoint commissioners to appraise the damages so occasioned to your petitioner by the laying out of the highway aforesaid through the lands aforesaid.

Dated this *tenth* day of *June*, A. D. 1903.

John Doe.

(6) PETITION TO COUNTY COURT TO APPOINT COMMISSIONERS TO APPRAISE DAMAGES.

Form No. 19112.²

To the Honorable *County Court* next to be holden at *Newfane*, within and for the county of *Windham*, on the *tenth* day of *March*, A. D. 1902:

1. *Vermont*. — Stat. (1894), § 3306.

2. *Vermont*. — Stat. (1894), § 3376 et seq.

The petition and representation of the subscribers, freeholders of the town of *Rockingham*, in said county, respectfully show that heretofore, to wit, at the *September* term of said *County Court*, A. D. 1902, *John Smith, William Jones* and *Henry Black* were by said court appointed commissioners, on the petition of *John Doe* and others, to lay out and survey (if they deemed it expedient) a highway in the town of *Rockingham* aforesaid; that on the *first* day of *November*, A. D. 1902, the said commissioners did lay out and survey a highway in said town of *Rockingham*, according to said petition of said *John Doe* and others, extending from (*describe the highway*), in said *Rockingham*, through lands then and still severally owned by your petitioners, reference being had to the report of said commissioners now in the files of said *County Court*, for a more particular description of said survey, and the termini and boundaries thereof; that the said commissioners assessed the damages of your petitioners, sustained in consequence of the laying out of the said highway through the lands of your petitioners, as aforesaid, at the sum of *five hundred* dollars (or as follows, the damages sustained by the said *John Jones* at the sum of *two hundred* dollars and the damages sustained by the said *John Grey* at the sum of *three hundred* dollars); that said commissioners made report of their doings to said *County Court*, which said report was, by said *County Court*, at their *March* term, A. D. 1903, accepted, and the said town of *Rockingham* was, by the said court, ordered to build the said highway by a certain time, in the said order of said court limited; and that the said town of *Rockingham* did, in pursuance of the said report, and of the order of the said court thereon made, as aforesaid, on the *first* day of *September*, A. D. 1903, lay open said highway to be worked.

And your petitioners further represent that they were prevented, by absence, from having a fair trial before the said commissioners in reference to the amount of damages severally sustained by your petitioners in consequence of the laying out of the highway aforesaid through the lands of your petitioners aforesaid, and that they are dissatisfied with the sum reported by the said commissioners and allowed by said court as the amount of such damages; and they therefore pray that commissioners may be appointed by this honorable court, in pursuance of the statute in such case made and provided, to appraise such damages and report in the premises.

Dated this *first* day of *February*, A. D. 1904.

John Jones,
John Grey.

(Add a citation to the selectmen in common form.)

(7) APPOINTMENT OF APPRAISERS OR COMMISSIONERS.

(a) *In General.*

Form No. 19113.¹

The State of *Nebraska*, }
County of *Perkins*. } ss. Road No. 10.

Appointment of Appraisers.

Grant, Perkins County, Nebraska, June 10, 1901.

To *Samuel Short, William West, Francis Fern* :

You, and each of you, suitable and disinterested electors of the county of *Perkins*, have been and hereby are appointed appraisers to ascertain and fix the amount of damages sustained by the following named claimants (*naming claimants*), and each of them, by reason of the establishment of a county road, as follows: Commencing at (*stating point of commencement*), in *Perkins* county, and running thence (*describing in general terms all the points*), and terminating at (*stating point of termination*), through their lands, and the lands of each of them. You will proceed and view said grounds on the *tenth* day of *July, 1901*, and ascertain, fix and report upon the amount of damages sustained by said claimants, and each of them, which report you will make and file in the county clerk's office of this county within *thirty* days from this date, *June 8, 1901*.

(SEAL)

Calvin Clark, County Clerk.

(b) *Where Highway has been Laid Out by Selectmen.*

Form No. 19114.¹

State of *Vermont*, }
Windham, ss. }

To *John Smith, William Jones and Henry Black*, of *Westminster*,
 in the County of *Windham* aforesaid, Greeting:

Whereas *John Doe*, of *Rockingham*, in the county of *Windham* aforesaid, by petition in writing, dated the *tenth* day of *June, A. D. 1903*, has represented to me, *Abraham Kent*, one of the justices of the peace within and for the county of *Windham* aforesaid, that the selectmen of said town of *Rockingham*, heretofore, to wit, on the *first* day of *May, A. D. 1903*, have laid out and caused to be surveyed a public highway in said town, extending from (*describe the highway as in the petition*) in said town, and that said highway extends through the lands in which he, the said *John Doe*, then was and still is interested, and that he, the said *John Doe*, is not satisfied with the sum which the said selectmen offered to him as damages occasioned to him by the laying out of the said highway through the lands aforesaid, and praying that commissioners may be appointed, in pursuance of the statute in such case made and provided, to appraise the damages, so occasioned to him by the said *John Doe* by the laying out of the highway aforesaid through the lands aforesaid; and whereas due notice of the pendency of the said petition, and of the time and place of the hearing to be made thereon, has been given, by causing a copy of the said petition and of a citation in due form of law, thereto attached, to be delivered to *Richard Roe*, one of the selectmen of the said town of *Rockingham*; and whereas I, the said *Abraham Kent*, justice as aforesaid, have, agreeably to the statute in such case made and provided, selected you, the said *John Smith, William Jones and Henry Black*, as commissioners for that purpose:

Therefore, I do hereby empower and direct you, the said *John*

Smith, William Jones, and Henry Black, to proceed as such commissioners, and justly and impartially to appraise the damages sustained by the said *John Doe*, by reason of the laying out of the highway aforesaid through the lands aforesaid, set forth in said petition, and to make return of your doings, on oath, if the damages sustained by the said petitioner shall not exceed *forty* dollars, to me, at my office at *Westminster*, on the *first* day of *October*, 1903, at *ten* o'clock in the *forenoon*, to which time and place this court will stand adjourned, for the purpose of receiving such return, and establish the same, if no sufficient cause be shown to the contrary, according to law; but if the damages sustained by the said *John Doe* shall exceed *forty* dollars, then you will cause such return to be made to the *County* Court next to be holden at *Newfane*, within and for the county of *Windham*, on the *tenth* day of *March* next.

Given under my hand at *Westminster*, this *first* day of *September*, A. D. 1903.

Abraham Kent, Justice of the Peace.

(8) OATH OF APPRAISERS.

Form No. 19115.¹

Appraiser's Oath.

The State of *Nebraska*, }
County of *Perkins*. } ss.

We, the undersigned appraisers, appointed as above set forth, do hereby, each for ourselves, solemnly swear that we will, to the best of our ability, faithfully and impartially view the ground and appraise the damages sustained by the several claimants, and done to their lands by reason of the establishment of the road, as herein-before set forth, and that we will faithfully and impartially, and without fear or favor, discharge the duty imposed upon us in the premises.

Richard Roe.

Samuel Short.

William West.

Subscribed in my presence and sworn to before me this *tenth* day of *June*, 1901.

(SEAL)

Calvin Clark, County Clerk.

(9) REPORT OF APPRAISERS OR COMMISSIONERS.

(a) *In General.*

Form No. 19116.²

Report of Appraisers.

To the Board of County Commissioners, *Perkins* County, *Nebraska*:

We, the undersigned, appraisers appointed to view the grounds and appraise the damages by reason of the establishment of road No. 10, as heretofore set forth, respectfully submit the following report:

1. *Nebraska*. — Comp. Stat. (1899), § 4531.

2. *Nebraska*. — Comp. Stat. (1899), 4528 *et seq.*

After taking and subscribing to the oath above set forth, and at the time directed and commanded by the county clerk, we viewed the grounds and premises in question, and the grounds, premises and property for which damages are claimed by the several claimants named in our appointment, and we have and do hereby assess and appraise the amount of damages sustained by each of said claimants by reason of the establishment of said road as follows:

To *Charles Adams*, land in the _____ qr. of _____ qr. of sec. _____, T. _____ N., R. _____ E., _____ acres, \$50.

To (*continuing as above, setting forth amount awarded to each claimant*).

Witness our hands this *tenth* day of *June*, 1901.

Richard Roe,
Samuel Short, } Appraisers.
William West,

(b) *Where Damages are Less than Forty Dollars.*

Form No. 19117.¹

To *Abraham Kent*, Esq., one of the justices of the peace within and for the county of *Windham*:

The undersigned, *John Smith*, *William Jones* and *Henry Black*, respectfully report that, having given due notice to the said *John Doe*, and also to *Richard Roe*, one of the selectmen of the town of *Rockingham*, that they would attend to the duties devolving upon them by virtue of the foregoing commission, at (*stating place*), on (*stating time*), and having, at said time and place, after being duly sworn justly and impartially to make the appraisal in the commission named, made examination of the premises set forth in the said petition of the said *John Doe*, and heard the proofs and allegations of the respective parties, they appraise the damages sustained by the said *John Doe*, by reason of the laying out of the highway aforesaid through the lands of the said *John Doe* aforesaid, at the sum of *thirty* dollars; and that the time and expenses of the said commissioners in and about the discharge of their said duties have been according to the bill thereof hereto annexed.

Dated this *first* day of *October*, 1903.

John Smith,
William Jones, } Commissioners.
Henry Black,

(10) JUSTICE'S RECORD OF PROCEEDINGS.

(a) *Where Amount of Appraisal is Greater than the Sum Offered by the Selectmen.*

Form No. 19118.²

State of *Vermont*, }
Windham, ss. }

Be it remembered that, at *Westminster*, in the county aforesaid, on

1. *Vermont*. — Stat. (1894), § 3311 et seq. 2. *Vermont*. — Stat. (1894), § 3306 et seq.

the *tenth* day of *May*, A. D. 1903, *John Doe*, of *Rockingham*, in the county of *Windham*, preferred his petition to me, *Abraham Kent*, one of the justices of the peace within and for the county of *Windham* aforesaid, representing that the selectmen of the said town of *Rockingham* heretofore, to wit, on the *first* day of *May*, A. D. 1903, laid out and caused to be surveyed a public highway in said town of *Rockingham*, extending from (*describe the highway as in the petition*), in said town, and that said highway passes through lands in which he, the said *John Doe*, then was and still is interested, and that he, the said *John Doe*, is not satisfied with the sum which the said selectmen offer to him as damages occasioned to him by the laying out of the said highway through the lands aforesaid, and praying that commissioners might be appointed, in pursuance of the statute in such case made and provided, to appraise the damages occasioned to the said *John Doe* by the laying out of the highway aforesaid through the lands aforesaid; whereupon it is ordered that the parties interested be heard in the premises, at the town hall in *Westminster*, on the *first* day of *September*, A. D. 1903, at *ten* o'clock in the forenoon, and a citation is thereupon issued to the selectmen of the said town of *Rockingham*, to appear at said time and place and show cause, if any they have, why the prayer of the said petition should not be granted. And on the said *first* day of *September*, A. D. 1903, the said parties appear, and their respective proofs and allegations being heard, it is thereupon ordered that *John Smith*, *William Jones* and *Henry Black* be commissioners to appraise the damages aforesaid, and that they make return of their doings on oath, if the damages sustained by the said *John Doe* shall not exceed *forty* dollars, to the said justice, at his office in said *Westminster*, on the *first* day of *October*, A. D. 1903, at *ten* o'clock in the forenoon, to which time and place this court stands adjourned for the purpose of receiving such return, and establishing the same, if no sufficient cause be shown to the contrary, according to law. And now, on this *first* day of *October*, A. D. 1903, the said parties appear, and the said commissioners make return that they have examined the premises set forth in the said petition of the said *John Doe* and heard the proofs and allegations of the respective parties, and that they appraise the damages sustained by the said *John Doe*, by reason of laying out of the highway aforesaid through the lands aforesaid, at the sum of *thirty* dollars; and thereupon, no sufficient cause being shown to the contrary, it is ordered by the court here, that the said appraisal be established, that the said *John Doe* recover of the said town of *Rockingham* the said sum of *thirty* dollars, for his damages by him sustained by reason of the laying out of the highway aforesaid through the lands aforesaid.* And it appearing to the said court here that the said sum of *thirty* dollars is a larger sum than was offered to the said *John Doe* by the said selectmen, as his damages by him sustained by reason of the laying out of the highway aforesaid through the lands aforesaid, it is further ordered that the said *John Doe* recover of the said town of *Rockingham* his costs in and about this proceeding, taxed and allowed at *twenty* dollars. Which said several sums, damages and costs shall be paid by the said town of *Rockingham* to the said *John Doe* on or

before the *first* day of *September*, A. D. 1903, and in default thereof he, the said *John Doe*, may have execution therefor.

Abraham Kent, Justice of the Peace.

(b) *Where Amount of Appraisal is Less than the Sum Offered by the Selectmen.*

Form No. 19119.¹

(Commencing as in Form No. 19118, and continuing down to *.)

And it appearing to the said court that the said sum of *thirty* dollars is a less sum than was offered to the said *John Doe* by the said selectmen, as his damages by him sustained by reason of the laying out of the highway aforesaid through the lands aforesaid, it is further ordered that the said town of *Rockingham* recover of the said *John Doe* the costs of the said town in and about this proceeding, taxed and allowed at *twenty* dollars, for which the said town may have execution; and the said sum or damages shall be paid to the said *John Doe* by the said town of *Rockingham* on or about the *first* day of *November*, A. D. 1903, and in default thereof the said *John Doe* may have execution therefor.

Abraham Kent, Justice of the Peace.

(11) AWARD OF DAMAGES BY SUPERVISORS.

Form No. 19120.²

State of *South Dakota*,
County of *Lincoln*,
Town of *Canton*. } ss.

Whereas, a road was laid out on the *tenth* day of *May*, A. D. 1902, by us, the supervisors of said town of *Canton*, on the petition of *six* legal voters who own real estate or who occupy real estate under the homestead or pre-emption laws of the United States, or under contract from the state of *South Dakota*, within *one* mile of said road; which said road is set forth and described in the foregoing supervisors' order, made by us, and

Whereas, a part of the damages sustained by reason of the laying out said road has been ascertained by the agreement of the owners of the lands through which said road passes, with us, and a part of the owners of said lands have in writing released all claims to damages; but not being able to agree with the owners of the following described lands, claiming damages by reason of said highway passing through, and the owners of some of the said lands being unknown, we have assessed the damages to each of such individual claimants with whom we could not agree, and awarded damages to the owners of such lands through which said highway passes as are unknown, at what we deemed just and right; taking into account and estimating

1. *Vermont*. — Stat. (1894), § 3306 et seq.

2. *South Dakota*. — Stat. (1901), § 1800.

the benefits and advantages the said road will confer on the claimants and owners, as well as the disadvantages. We have assessed and awarded damages as follows, viz:

Owners.	Description.	Section.	Town.	Range.	Damages.

And in the case of the following lands and claimants for damages, we estimate that the benefits and advantages said road will confer on them are equal to all damages sustained by them by reason of laying out said road, to wit:

Owners.	Description.	Section.	Town.	Range.	

Given under our hands this *twentieth* day of *May*, A. D. 1902.

John Doe,
Richard Roe,
Samuel Short,
 Supervisors.

**(12) PROCEEDING TO RECOVER FROM COUNTY DAMAGES AWARDED
IN OPENING OF HIGHWAY.**

Form No. 19121.

(Precedent in Lancaster County *v. Frey*, 128 Pa. St. 593.)¹

[To the Honorable the Court of Quarter Sessions of Lancaster County:

The petition of *Jacob L. Frey*, of Lancaster, of said county of Lancaster, respectfully represents,]²

That at the *April* sessions, in the year 1884, of the said court, a petition was presented praying for the appointment of viewers to assess the damages caused by the opening of *First* street in the city of Lancaster, from *West End* avenue to *Dorwart* street, and the court therefore appointed (*naming viewers*) viewers to assess the

1. It was held in this case that the plaintiff was entitled to recover.

2. The matter enclosed by [] will not be found in the reported case.

same; that the said viewers, in pursuance of the said appointment, assessed the said damages, and on *August 20, 1884*, made their report to the *August* sessions in 1884 of the said court, which said report was absolutely confirmed; that the said viewers awarded to your petitioner for land taken by the opening of said *First* street, the sum of \$750, to be paid by the county of *Lancaster*, and from the said assessment no appeal was taken; that on *November 19, 1887*, the said court ordered the said *First* street to be opened; that he has demanded payment of the said damages, so awarded to him, from the commissioners of *Lancaster* county, and they have refused to pay the same. He therefore prays the court to direct the said damages to be paid to him by the county of *Lancaster*, and to issue a writ to the commissioners of *Lancaster* county commanding them to pay him the amount thereof with interest.

[(*Date and signature as in Form No. 15164.*)]¹

(13) ACTION TO RECOVER FOR LAND UNLAWFULLY TAKEN AND APPROPRIATED FOR A HIGHWAY.

Form No. 19122.

(Precedent in *Longworth v. Cincinnati*, 48 Ohio St. 638.)²

[(*Venue and title of court and cause as in Form No. 5929.*)]¹

Joseph Longworth, Catherine L. Anderson and John L. Stettinius, the plaintiffs above named, by way of amended petition say, that they are and were, prior to the grievances hereinafter mentioned, the legal owners in fee simple of the following described land in the city of *Cincinnati* and state of *Ohio*, viz.: Commencing at a point in the west line of *Kemper's* subdivision, distant *one hundred and sixty-six 60-100 (166 60-100)* feet from the south corner of the same; thence north *13 1-2°* east along said line *ninety-one 66-100 (91 66-100)* feet; thence north *54° 22'* west *eighty-three hundredths (0.83)* feet to the east line of the *Montgomery* pike; thence along the same south *65° 53'* west *fifty-nine 39-100 (59 39-100)* feet; thence south *54° 22'* east *one hundred and two 23-100 (102 23-100)* feet to the place of beginning, containing *nine hundred and five ten thousandths* of an acre (*0.0905* acre).

That said defendant, the city of *Cincinnati*, in constructing a public street from said *Montgomery* pike to *Gilbert* avenue, in said city, has taken possession of all of said property, and constructed said street thereon, without ever having appropriated the same by law, or having made any compensation therefor, in money or otherwise, and is now in possession of all of said land, and wholly refuses to surrender the possession thereof to these plaintiffs, or to make any compensation to them therefor.

1. The matter to be supplied within [] will not be found in the reported case.

2. This was an action for compensation for land unlawfully taken and appropriated. Judgment was rendered for plaintiffs on the trial in the superior

court, at special term. The general term reversed the judgment. On appeal to the supreme court, the judgment of the general term was reversed and the judgment of the special term affirmed.

On the discovery by plaintiffs of the unauthorized and unlawful appropriation by defendant of the above described premises in the manner and for the purposes aforesaid, plaintiffs offered to convey the same to the defendant by deed in fee-simple upon the payment by defendant of the value of the same, which defendant refused to pay.

Plaintiffs now offer to convey said premises in fee-simple to defendant upon the payment by defendant of the value of the same, and they agree that upon the value of said premises being fixed in this case, and the payment of the same, the decree of this court may be entered ordering a conveyance in fee-simple of said premises to defendant, and plaintiffs here tender said conveyance and surrender of title to said premises upon payment as aforesaid.

That said land is justly worth the sum of *ten thousand* (\$10,000.00) dollars.

Wherefore said plaintiffs pray that said defendant be decreed to make compensation to them in money for the value of said land so unlawfully taken and appropriated as aforesaid, and that they recover judgment against defendant for the sum of *ten thousand* dollars, with interest and costs, and for such other and further relief as under the circumstances of the case they may be entitled to.

[(*Signature of attorney, and verification as in Form No. 5929.*)]¹

o. Remonstrance or Protest Against Road.

Form No. 19123.

To the Honorable the County Court of *Lincoln County, Missouri*:

The undersigned freeholder, residing in *Bedford* township, in said county of *Lincoln*, would most respectfully remonstrate against the establishment of the following public road in said township: (*Here give description of road as set forth in the petition*), for the following reasons, to wit: 1st, that there is no public necessity for the establishment of said road; 2d, that the ground over which said proposed road will run is not practicable for road purposes; 3d, (*set out any other reasons why the road should not be established*). And your petitioners, as in duty bound, will ever pray.

Dated (*concluding as in Form No. 15164*).

Form No. 19124.²

State of *Nebraska*, }
County of *Perkins*. } ss. Road No. 10.

To the Board of County Commissioners of said County:

We, the undersigned electors, residents of said county residing within *five* miles of the proposed road, reported in favor of by *John Doe*, commissioner, on the *tenth* day of *July*, A. D. 1901, do object to the establishment of said road as reported, and make the following

1. The matter to be supplied within 2. *Nebraska*. — Comp. Stat. (1899), §
[] will not be found in the reported case. 4523.

statement of our objection and protest, to wit: (*specifying objections*).

Dated the *fifteenth* day of *July*, 1901.

(*Signatures of protestants.*)

State of *Nebraska*, }
County of *Perkins*. } ss.

I, *Samuel Short*, being duly sworn, depose and say that I am a bona fide resident of said county of *Perkins*, and have personal knowledge of the residence of the within named protesters, and that they are electors of said county and residing within *five* miles of said proposed road, except (*naming protestants, if any, who are not electors of the county or do not reside within five miles of the proposed road*).

Samuel Short.

Subscribed and sworn to before me this *fifteenth* day of *July*, 1901.

(SEAL)

Norton Porter, Notary Public.

p. Final Order Establishing Road.

Form No. 19125.¹

State of *Minnesota*, }
County of *Martin*. } ss.

Whereas, a petition signed by *twenty-five* freeholders of said county, praying for the location of a certain highway in said county, as hereinafter described, was laid before this board at its session commencing on the *fourteenth* day of *July*, A. D. 1899, by the auditor of said county, and this board having determined that the said petition was reasonable on its face, and having at its said session aforesaid, and on the *fourteenth* day of *July*, A. D. 1899, ordered that a hearing be had upon said petition on (*stating time*) at (*stating place*), and having by its written order duly given and made, appointed from the members of this board a committee to examine such proposed location of a highway, to wit: Beginning at (*describe the proposed highway as in the petition*), which said committee, after having completed their examinations, did make their report of their proceedings in manner and form as by law required, and thereby recommended that the prayer of said petitioners should be granted; a copy of which said committee's report was duly returned and laid before this board at the session thereof held on said *second* day of *September*, A. D. 1899; and whereas, at the meeting of the said board of county commissioners held on said *second* day of *September*, A. D. 1899, the same being the time appointed by the aforesaid order for the hearing upon said petition, the prayer of said petition was considered and determined by this board, and a majority of the board so agreeing,

It is ordered and decreed hereby that the prayer of said petition be and the same is granted, and said highway is hereby located so as to run according to said committee's report, by courses and distances, as follows, to wit: Beginning at (*stating point of beginning*), and running thence (*stating line of direction*), and terminating at (*stating point of termination*), and to be connected with other roads as.

1. *Minnesota*. — Laws (1899), c. 202.

follows (*stating roads, if any, with which proposed road will connect; if there are none, state that fact*).

And it is further ordered and decreed that the county auditor notify the supervisors of the several towns through which such road is located of the fact of such location and that they shall cause to be opened so much of said highway as lies in their respective towns.

And whereas, certain land-owners over whose lands said road passes have not released all claims to damages sustained by reason of locating and opening the same, and not having agreed with them upon the amount of such damages, though we applied to them, and each of them, for that purpose, and endeavored to make such agreement, this board proceeded to assess the same at what we deemed just and right to each individual land-owner with whom we could not agree, taking into account and estimating the advantages and benefits the highway will confer on each land-owner, as well as all disadvantages, and this board have assessed and hereby do assess the damages to each as follows, to wit:

Names of owners.	Description of lands.	Sec.	Town.	Range.	Damages.

In witness whereof, the chairman of this board has hereunto set his hand and affixed our seal at *Fairmont* in said county, this *second* day of *September*, A. D. 1899.

(SEAL)

John Doe,

Chairman of Board of County Commissioners
of *Martin County, Minn.*

Attest: *Charles Adams,*
County Auditor, and ex-officio Clerk of Board.

Form No. 19126.¹

State of *South Dakota*, }
County of *Lincoln*, } ss.
Town of *Canton*.

Whereas, upon the petition of *six* legal voters, who own real estate, or who occupy real estate under the homestead or pre-emption laws of the United States, or under contract from the state of *South Dakota*, within *one* mile of the road proposed in said petition to be laid out, copies of said petition having been first duly posted up in *three* of the most public places of said town at least *twenty* days before any action was had in relation thereto, proof of which posting

1. *South Dakota*. — Stat. (1901), § 1797.

was duly shown to us by affidavit, which said proposed road to be laid out is set forth and described in said petition as follows, viz: Beginning (*describing the road as in the petition*).

And whereas, upon receiving said petition, we did, within *thirty* days thereafter, make out a notice and fix therein a time and place at which we would meet and decide upon such application, to wit, on the *tenth* day of *June*, A. D. 1902, at (*stating place*), causing copies of such notice to be posted in *three* public places in said town at least *ten* days previous to such meeting; and having met at such time and place as above named in said notice, and being satisfied that the applicant had, at least *ten* days previous to said time, caused said notice of time and place of hearing to be given to all the occupants of the land through which such highway might pass, by serving the same personally or by copy left at the usual place of abode of each of said occupants, proof of which was shown by affidavit, we proceeded to examine personally such highway, and heard any and all reasons for or against laying out the same; and being of the opinion that such road was necessary and proper, and that the public interest would be promoted thereby, we granted the prayer of said petitioners, and determined to lay out said road, and caused a survey thereof to be made according to the report and plat herewith accompanying, the description of which as so laid out is as follows, viz: Beginning (*describing the road as laid out*).

It is therefore ordered and determined that a road be and the same is hereby laid out and established according to the description last aforesaid and the report and plat herewith accompanying, which is hereby made a part of this order, and it is hereby declared to be a public highway *four* rods wide, the said description above given being the center of said road.

Given under our hands this *tenth* day of *July*, A. D. 1902.

Richard Roe,
Samuel Short,
William West,
Supervisors.

Ownership and description of lands as given in the petition:

Owners.	Description.	Sec.	Town.	Range.	

The names of the petitioners, the place where and the time when the copies of the petition and of the supervisors' notice of hearing were posted, and the names of the persons served with the supervisors' notice, and how served, personally or "by copy," are as follows, viz:

Names of petitioners.	Petitions and notices, when and where posted.	Supervisors' notice, on whom served.	How served.

Form No. 19127.

(Precedent in *Keystone Bridge Co. v. Summers*, 13 W. Va. 479.)*(Title of cause.)*

Upon the petition of *E. S. Arnold* and *N. Fitzhugh*, and *forty-two* others, in writing, and upon the report in writing of *Henry Fry Aultz*, *W. W. Wheeler* and *John W. M. Appleton*, who were appointed by a former order of this court viewers of the proposed way from *Elk River*, at the *Keystone* bridge, along *Kanawha* street of *West End*, to the intersection with the *Charleston* and *Point Pleasant* turnpike near *Holly Hunt's* residence, and upon the written evidence, filed with said report, of the important facts that the said road has been well made and turnpiked by private parties, at their own expense, and tendered to the county of *Kanawha* free of costs, and it is the shortest road to the court-house, is perfectly straight and level, and *sixty* feet wide, and that the *West End Extension Company*, through whose land the same passes throughout, having consented in writing to the same, and to the establishment thereof as a public road, and upon the map and survey thereof, as filed with said report, showing accurately the said *Kanawha* street throughout, and the adjacent localities; and upon consideration whereof, and of all the evidence touching the same, it is ordered by the court that the said proposed road be established as a public road, and the bounds of the said road precinct shall be as set out and described in the said petition and report and map; and that *Elisha Williams* be and is hereby appointed overseer of said road; and that all the hands residing within the bounds of said road do aid him in keeping the said road in repair.

q. Notice to Supervisors to Open Road.

Form No. 19128.¹

State of *Minnesota*,)
 County of *Martin*.) ss.

To the Board of Supervisors of the Town of *Fairmont* in said County:

Whereas, a county road has been located by the board of county commissioners of said county, by their order filed in my office on the *fourteenth* day of *July*, 1899, the following portion of which said highway passes through your town, to wit: (*describing it*), and more

1. *Minnesota*. — Laws (1899), c. 202.

than *thirty* days having elapsed since the filing of said road order, and no appeal having been taken therefrom,

Now, therefore, you are hereby notified that you cause the above described road passing through your said town to be opened and worked and put in repair for use as a public highway.

Given under my hand this *twentieth* day of *August*, 1899.

(SEAL)

Charles Adams, County Auditor.

Form No. 19129.¹

State of *South Dakota*, } ss.
County of *Lincoln*.

To the Board of Supervisors of the Town of *Canton*, in said County:

Whereas, a county road has been located by the board of county commissioners of said county, by their order filed in my office on the *tenth* day of *May*, A. D. 1902, the following portion of which said highway passes through your town, to wit: (*describing the portion of the highway which passes through the town*), and more than *thirty* days having elapsed since the filing of said road order, and no appeal having been taken therefrom;

Now, therefore, you are hereby notified that you cause the above described road passing through your said town to be opened and worked and put in repair for use as a public highway.

Given under my hand this *tenth* day of *June*, 1902.

Calvin Clark, County Clerk.

r. Notice to Road Overseer to Open Road.

Form No. 19130.²

State of *Colorado*, } ss.
County of *Pueblo*.

Road Overseer, Road District No. 2.

Dear Sir: You are hereby notified that the board of county commissioners of *Pueblo* county, *Colorado*, did, on the *tenth* day of *May*, A. D. 1899, locate and lay out the following described road, to wit: (*describing the road*), and also that you are to open and work said described road as a public highway from and after *sixty* days from the *first* day of *June*, A. D. 1899.

By order of the board of commissioners.

Calvin Clark, Clerk.

The said proposed line of road is more fully shown by the following map or plat, to which reference is herein made: (*Here set out a plat of the lands over which the road passes.*)

Form No. 19131.³

To *Charles Smith*, Overseer of the Road District No. 2, *Prescott* Township:

Whereas the board of county commissioners of *Linn* county have ordered me, as trustee of said *Prescott* township, to cause the following road recently established, namely (*describing road*), so far as it

1. *South Dakota*.—Stat. (1901), § 1816.

3. *Kansas*.—Gen. Stat. (1897), c. 154,

2. *Colorado*.—Mills' Anno. Stat. (1891), § 7.
§ 3949.

lies within said township, to be opened for the public travel: You are therefore hereby directed to open, for the public travel, so much of said road as lies within your district, as provided by law.

Dated this *tenth* day of *September*, A. D. 1899.

John Doe, Prescott Township Trustee.

s. Notice to Road Supervisor to Open Road.

Form No. 19132.¹

(Precedent in *State v. Smith*, 12 Mont. 387.)

Office of the Clerk and Recorder, *Yellowstone County, Montana.*

Billings, Mont., March 11, 1891.

Mr. *Frank Church*, Road Supervisor, District No. 4, *Billings, Montana*. — Dear Sir: You are hereby directed, from, on and after *May thirteenth (13)*, 1891, to open and work the following described county road, to wit: (*description of road*).

By order of the Board of County Commissioners of *Yellowstone county, Montana*.

Witness my hand, and seal of said county, this *eleventh* day of *March*, 1891.

(SEAL)

Fred. H. Foster, County Clerk.

t. Notice by Road Overseer to Land-owner to Open Road.

(1) IN GENERAL.

Form No. 19133.²

To *Richard Roe*:

The road petitioned for by *John Doe* and others, and which runs through a portion of your lands, to wit: (*describing the lands*), situated in *Prescott township, Linn county, Kansas*, was, on the *tenth* day of *May*, A. D. 1899, duly established by the board of county commissioners of said *Linn county*, and said board has ordered the trustee of said township to cause said road to be opened to public travel. You are therefore notified to open said road through your said lands, as surveyed and marked by the county surveyor of said county, under the direction of the viewers of said road, on the *first* day of *January*, 1900, or it will become my duty to enter, or to depute someone to enter, upon said lands and open said road.

Witness my hand this *tenth* day of *June*, A. D. 1899.

Samuel Short, Road Overseer,

District No. 2, of *Prescott Township, Linn County*.

Form No. 19134.³

(Precedent in *State v. Hedeon*, 47 Kan. 404.)

To the *Southern Kansas Railway Company*:

The road petitioned for *R. L. Thompson* and others, and which runs through a portion of your lands, to wit: Commencing at the

1. *Montana*. — Pol. Code (1895), § 2766. 2. *Kansas*. — Gen. Stat. (1897), c. 154, § 15.

southwest corner of the northeast quarter of section 16, town 25, range 18, and running thence east 11-2 miles, and ending at the northeast corner of the southeast quarter of section 15, town 25, range 18, situated in *Iola* township, *Allen* county, *Kansas*, was, on the 4th day of *January*, 1887, duly established by the board of county commissioners of said *Allen* county; and said board has ordered the trustee of said township to cause said road to be opened to public travel. You are therefore notified to open said road through your said lands, as surveyed and marked by the county surveyor of said county under the direction of the viewers of said road, within 90 days after the service of this notice on you, or it will become my duty to enter, or to depute someone to enter, upon said lands and open said road.

Witness my hand this 9th day of *February*, 1889.

D. C. Neer, Road Overseer

of District No. 6, of *Iola* Township, *Allen* County, *Kansas*.

(2) SECTION-LINE ROAD.

Form No. 19135.¹

To *Richard Roe*:

The section lines in the county of *Pratt* being declared public highways by chapter 209 of the Laws of the state of *Kansas*, 1895, you are hereby notified to open on the first day of *January*, 1896, that portion of a road, fifty feet in width on the line between section — of township — south, range — west of the sixth principal meridian, and section — of township — south, range — west of the sixth principal meridian, which passes through or over your lands, namely, (*describing it*), or it will become my duty to enter, or to depute someone to enter, and open said road.

Witness my hand this tenth day of *June*, A. D. 1895.

Charles Smith, Road Overseer

of District No. —, of — Township, *Pratt* County.

u. Certificate of Selectmen of Opening of Road.

Form No. 19136.²

The undersigned, selectmen of the town of *Rockingham*, in the county of *Windham*, hereby certify that the public highway heretofore laid out and established by them (or by the Honorable County Court within and for the county of *Windham* aforesaid, at the session of said court holden at *Newfane*, within and for said county, on the tenth day of *March*, A. D. 1903), in said town of *Rockingham*, extending from (*describe the highway*), in said town, has been completed and is this day laid open for the use of the public.

Dated this first day of *June*, A. D. 1902.

Richard Roe,
Samuel Short,
William West, } Selectmen.

1. *Kansas*. — Gen. Stat. (1897), c. 154, § 15. 2. *Vermont*. — Stat. (1894), § 3303 et seq.

v. Notice by County Clerk of Opening of Road.

Form No. 19137.¹

Highway Notice.

State of *Colorado*, }
Ouray County. } ss.

County Clerk's Office.

Notice is hereby given, that at a meeting of the board of county commissioners of *Ouray* county, in the state of *Colorado*, holden on the *tenth* day of *May*, A. D. 1899, an order was made for the opening of a county road as follows: (*describing the road*), and that the same be worked by the proper officers from and after *sixty* days from the date of this notice, according to law.

Given under my hand and the seal of said county of *Ouray* this *tenth* day of *May*, A. D. 1899.

Calvin Clark, County Clerk.

w. Order Fixing Compensation of Commissioners, Their Counsel and Engineer.

Form No. 19138.

(Precedent in *Sites v. West Hoboken Tp.*, 45 N. J. L. 430.)²

(Title of cause.)

The commissioners in the above entitled matter, having made and presented their report, and the same having been confirmed, and application being now made to the court to fix the compensation to be paid to the said commissioners, and to their counsel and engineer:

It is, on this *16th* day of *September*, A. D. 1879, ordered by the court that the compensation of said commissioners, viz., *Garret D. Van Reipen*, *Elijah T. Paxton* and *Andrew Clerk*, be, and the same hereby is, fixed at the sum of \$64 each; and that the compensation of *William W. C. Sites*, the engineer employed by said commissioners, be, and the same is hereby, fixed at the sum of \$156; and that the compensation of *Augustus A. Rich*, the counsel employed by said commissioners, be, and the same hereby is, fixed at the sum of \$50. And it is further ordered that the several amounts aforesaid be paid to the respective persons aforesaid, by the township committee of the township of *West Hoboken*.

And it is further ordered that the said township committee of the township of *West Hoboken* pay to the clerk of the court the fees of the court and clerk in these proceedings, to be taxed by said clerk.

Dated *Jersey City*, *September 16th*, 1897.

M. M. Knapp, J.

Filed *September 16th*, 1879.

Form No. 19139.

(Precedent in *Sites v. West Hoboken Tp.*, 45 N. J. L. 429.)³

(Title of cause.)

The commissioners in the above entitled matter, having made and presented their report, and the same having been confirmed, and

1. *Colorado*.—Mills' Anno. Stat. (1891), § 3942.

2. It was held that the plaintiff was entitled to recover under this order.

application being now made to the court to fix the compensation to be paid to the said commissioners, and to their counsel and engineer:

It is, on this 16th day of *September*, 1879, ordered by the court that the compensation of the said commissioners, viz., *Garret D. Van Reipen*, *Elijah T. Paxton* and *Andrew Clerk*, be, and the same is hereby, fixed at the sum of \$56 each; and that the compensation of *Wilmon W. C. Sites*, the engineer employed by said commissioners, be, and the same hereby is, fixed at the sum of \$111.50; and that the compensation of *Augustus A. Rich*, the counsel employed by said commissioners, be, and the same hereby is, fixed at the sum of \$50. And it is further ordered that the several amounts aforesaid be paid to the respective persons aforesaid, by the township committee of the township of *West Hoboken*.

And it is further ordered that the said township committee of the township of *West Hoboken* pay to *Alfred E. Gregory*, the proprietor of the "*Palisade News*," the sum of \$11.40, for publishing notices and printing hand-bills for the said commissioners, and to *M. Mullone*, the proprietor of the "*Argus*," the sum of \$10.50, and to the "*Evening Journal*" Association, the sum of \$10.50, for printing notices for said commissioners.

And it is further ordered that the said township committee of the township of *West Hoboken* pay to the clerk of this court the fees of the court and clerk in these proceedings, to be taxed by the said clerk.

Dated *September 16th*, 1879.

M. M. Knapp, J.

X. Injunction to Restrain City from Opening Street.

Form No. 19140.

(Precedent in *Schock v. Falls City*, 31 Neb. 601.)¹

[(Title of court and cause as in Form No. 5923.)

The plaintiff, for cause of action herein, alleges and shows to the court:]²

That on the 17th day of *February*, A. D. 1870, one *A. J. Weaver* was the owner of the N. W. 1-4 of section 14, in town 1, range 16, in *Richardson* county, *Nebraska*, and said *A. J. Weaver* and *Martha Weaver*, as his wife, caused said above described tract of land to be all surveyed, platted and laid out into lots, blocks, streets and alleys, and caused a map or plat of said survey, showing said streets, alleys, lots and blocks, to be made, signed, acknowledged and filed for record in the county clerk's office of said county and recorded in the records of said county, showing said land so platted and laid out as "*Weaver's Addition to the City of Falls City, Nebraska*." At such time nearly all of said land was cultivated field, and used and occupied only as such; that upon said map was shown a strip of land marked as "*Cameron street*," commencing at a point on the north line of said land and about 508 feet west of the N. E. corner of N. W.

1. It was held that this petition supplied within [] will not be found in stated a cause of action. the reported case.

2. The matter enclosed by and to be

1-4 of section 14, and running thence south to the south line of said quarter section.

That said "*Cameron street*" was never opened or worked or prepared for a public street, or used, traveled or accepted as such, or used for public travel, but passed along a portion of said cultivated field where there were no occupants or residents, and no one to travel or pass over the same, and in a secluded, out of the way and unoccupied locality; that a very short time after the filing of the plat, plaintiff cannot give exact date, the owner of all of what is shown on said plat as blocks 7 and 8, and lots 11, 12, 13 and 14, in block number 9, took actual adverse possession of, fenced, enclosed and cultivated, commencing at a point 50 feet west of N. E. corner of said block 9, and on the north line of said block, running thence east on and along the south side of 6th street to the east line of said quarter section, thence south on and along the east line of said quarter section to the south line of 5th street, thence west on and along the south line of 5th street to a point 50 feet west of the S. E. corner of block 9, and thence north on and along the west line of lots 14 and 11, in said block 9, to the place of beginning, and the same was all fenced together in one enclosure, including therein that part called "*Cameron street*," between blocks 8 and 9, and was so actually held, occupied and used by said owner, who was one of the grantors of plaintiff in direct line, and said land was so actually adversely held, occupied and in the continuous undisputed quiet possession of grantors of plaintiff up to the year 1878.

The plaintiff in *October*, 1878, finding said grantors in actual, adverse, quiet, undisputed, peaceable, continuous possession of all the lands in said enclosure, purchased the same and received from the grantors of plaintiff undisputed, actual and adverse possession of all the lands in said enclosure, including said "*Cameron street*," at that point, and from said last date, to-wit, *October*, 1878, at all times plaintiff has claimed and held actual, adverse, undisputed, continuous and quiet possession of all said land in said enclosure, including said "*Cameron street*," at that point, and now has said possession and has held the same personally for more than *eleven* years before the filing of this petition, and plaintiff and said grantors have so held, used and occupied and been in said continuous adverse possession of same for more than *fifteen* years last past before the commencement of this action, and said enclosure has during said time remained the same.

That defendant, the city of *Falls City*, *Richardson* county, *Neb.*, has not during all said years set up or claimed any right in any land in said enclosure, but now sets up and claims a right by its officers, agents and servants, by reason of said plat as aforesaid, to cause to be in a summary way taken away the fences and property of plaintiff around said enclosure, and all obstruction so far as the same may be found within the former limits of what was marked on said plat as "*Cameron street*," and asserts that said defendant and its officers and agents have the right, authority and power to throw open said enclosure and open up said strip of land marked on said map as "*Cameron street*," and without any proceedings to condemn the same or legally

acquire such right, but such defendants and its officers and servants, acting in an arbitrary and unlawful way, threaten and are about to forcibly remove the fences and enclosure of plaintiff and open up a public street through said land of plaintiff as it now is and has existed and remained continuously for over *fifteen* years last passed.

Plaintiff further shows that if defendant is permitted to remove said fences, open up a street and destroy said enclosure, as defendant threatens and is now about to do, the same will leave the surrounding property of plaintiff in narrow strips and small patches and of such shape as to be worthless, and will destroy the value of the same and render the same worthless.

That said land is in a secluded, out of the way and remote locality, where same is worthless except as farming land, and where there is no public travel.

That the defendant, its officers and servants, have no right, power, authority or jurisdiction to open said "*Cameron street*" at that point where the same may appear on said tract of land. That said "*Cameron street*," and all rights to the same, have been and are completely barred, vacated and lost by the laws of limitation and an entire failure to use, occupy, travel or work said street, and by the entire failure to at any time open up or use said land as a street at any time for more than *ten* years last passed, and if at any time said defendant had any such right to open said "*Cameron street*" the same has been lost, barred and destroyed by the open, notorious, actual, undisputed, exclusive and continuous possession of said land by plaintiff and his grantors for more than *fifteen* years last passed, and by the laws of limitation of the state of *Nebraska*, and thereby plaintiff has become the owner of all said street and land.

Defendant, its agents, officers or servants have no right, authority or jurisdiction to come upon said land or any part of said enclosure, or to interfere with, remove, or take the fences or improvements of plaintiff or any part thereof away, or to disturb plaintiff in the continued enjoyment and possession of same, or to attempt in a summary way to open a street through said tract of land or any part thereof without first proceeding to condemn or obtain such right as provided by law.

That said defendant, the city of *Falls City*, *Richardson* county, *Nebraska*, now threatens to and is about to proceed in a summary, oppressive and illegal way to tear down, remove and destroy plaintiff's fences and improvements upon said land, and plow up, dig, excavate, waste and burrow earth therein, which said act, if permitted to be done, will destroy the value of said property and render useless the surrounding property of plaintiff for any purpose for which plaintiff purchased or has personally used the same for over *eleven* years last passed and now uses the same; and said defendant, unless restrained by the order of this court, will attempt to assert and put in force said claim of right to open and remove plaintiff's enclosure and will commit the acts and wrongs hereinbefore set forth to the great and irreparable injury of the plaintiff.

That said defendant asserts said right only because of the said strip of land being marked "*Cameron street*" upon said plat so filed.

by said *Weaver*. That said plat so marked and claim so made by said defendant, and the said acts and threats of said defendant, casts a cloud upon the rights and titles and possession of plaintiff in and to said tract of land, and casts discredit upon, lessens and depreciates the value of plaintiff's title and property and his right to occupy the same, and plaintiff is entitled to have his title and possession to all of said land quieted as against the city of *Falls City, Richardson county, Neb.*, and, all its agents, officers and servants, and against any right to open or cause to be opened any street or public way through said land, except after having secured said right by condemnation and payment of damages found.

That no proceedings have ever been had for the condemnation of the right or appraisalment of damages for the opening of said street, [through said land of plaintiff.

Wherefore plaintiff prays that his title to the said land shall be forever quieted as against said city of *Falls City, Richardson county, Nebraska*, all its agents, officers and servants, and against any right to open or cause to be opened any public street or public way through said land except after having secured said right by condemnation and payment of damages found, and that the said city of *Falls City*, all its agents, officers and servants, be forever enjoined from coming upon said land or any part of said enclosure and from interfering with, removing or taking the fences or improvements of plaintiff or any part thereof away and from disturbing plaintiff in the continued enjoyment and possession thereof and from attempting in a summary way to open a street through said land or any part thereof without first proceeding to condemn such right as provided by law, and for all other proper relief.

(*Signature and verification as in Form No. 5923*).]¹

y. Alternative Mandamus to Compel Commissioners of Highways to Open Street.

Form No. 19141.

(Precedent in *People v. Highway Com'rs*, 1 Cow. (N. Y.) 29.)²

The People of the State of *New York*, by the Grace of God free and independent — To the Commissioners of Highways of the Town of *Salem*, Greeting:

Whereas, in and by a certain act of the legislature of the said state of *New York*, made and passed the 19th day of March, in the year of our Lord 1813, entitled "An act to regulate highways," it is, amongst other things, enacted and declared, "that it shall not be lawful for any commissioners of highways to lay out any road through improved or cultivated land without the consent of the occupant or owner thereof, unless upon the application of twelve reputable freeholders of the town in which such road shall be laid

1. The matter enclosed by and to be supplied within [] will not be found in the reported case. 2. The rule for a peremptory mandamus was granted.

out, certifying upon oath that such road is necessary and proper; and that all public roads, to be laid out by the commissioners of any town, shall not be less than four rods wide;" and it is further, by said act, enacted, "that whenever any person or persons shall conceive himself or themselves aggrieved, by the determination of the commissioners of highways, either in laying out, altering or discontinuing, or in refusing to lay out, alter or discontinue any road, it shall be lawful for such person or persons, within forty days thereafter, to appeal to any three of the judges of the Court of *Common Pleas* for the county in which such road is situated; whose duty it shall be to convene, as soon as may be convenient, and decide such appeal; and their decision, or that of any two of them, shall be conclusive in the premises;" and whereas it appears to us, and we have been given to understand in our Court, before our Justices of our *Supreme Court of Judicature*, upon the oath of *John McFarland*, that a petition, bearing date the *25th* day of *August*, in the year of our Lord *1819*, was duly presented to the commissioners of highways of the town of *Salem*, in the county of *Washington*, and that said petition certified to said commissioners, under the oaths of *twelve* reputable freeholders of the said town of *Salem*, that a certain road was necessary and proper to be laid out in said town, according to the following metes and bounds, to wit: beginning (*describing the road by courses*), and that said petition prayed that a road might be laid out, pursuant to said courses and distances, as above mentioned; and that all that part of the old road running northwardly, where the survey intersects the same, at or near the said small bridge near the house of the said *Solomon Heath*, until it intersects the road leading from *John McFarland's* to the house of *Daniel Matthews*, in said town, might be discontinued; and that *two* of said commissioners, by an indorsement on the back of said petition, bearing date the *30th* day of *September*, *1819*, did disapprove of said application, and refuse to lay out the said road: whereupon, the said *John McFarland* and *William M. McFarland* appealed to *three* of the Judges of the Court of *Common Pleas* of the county of *Washington*, pursuant to the provisions of the said act above mentioned; and that *three* of the said Judges, to wit, *Asa Fitch*, *Nathaniel Hall* and *Jonathan Wood*, duly proceeded to act on said appeal, according to law; and that, after viewing the premises and hearing the proofs and allegations of the parties, the said Judges reversed the doings of the said commissioners, and ordered that the said new road be laid out according to the courses and distances above recited; and published their decision, by an indorsement on the back of said appeal, in the words and figures following, to wit: "We, the undersigned, Judges of the Court of *Common Pleas* in and for the county of *Washington*, to whom the appeal of *William M. McFarland* and *John McFarland*, as within stated, is made, having considered and reviewed the said premises, and having heard the proofs and allegations of the respective parties, and after due deliberation had thereon, do order, determine and adjudge, that the said *John McFarland* and *William M. McFarland* were aggrieved by the decision of the commissioners within named, in refusing to lay out said road,

in the said petition mentioned; and, also, in refusing to order the old road, therein specified, to be discontinued. And we, therefore, order the decision of the said commissioners to be, and the same is hereby, reversed, pursuant to the provisions of the act in such case made. And we do further order, determine and adjudge, that the prayer of the petitioners in the said application specified ought to have been granted; and we therefore order the said road to be laid out and opened, according to the survey set forth in the said petition hereunto annexed; and we also order the old road in the said petition specified to be discontinued. Dated this 20th of October, 1819.

Asa Fitch.

Nathaniel Hall.

Jonathan Wood."

And whereas it further appears unto us, in our said Court, that the said commissioners, after the doings of the said Judges as aforesaid, sued out of our said Court, before us, a certain writ of certiorari, directed to the said Judges, returnable before our Justices of our said Court, at the *City Hall* of the City of *New York*, on the first Monday of May, 1820; and that the said Judges made due return to our said Court, in obedience to the command of said writ of certiorari; and that afterwards, to wit, in the term of *January*, 1822, our said Court, before our said Justices, duly affirmed, in all things, the proceedings of the said Judges as likewise appears of record. And whereas it further appears unto us, that you, the said commissioners, had due notice of the proceedings of the said Judges of the said Court of *Common Pleas* of the county of *Washington*, and of the affirmance of the said proceedings, in all things, by our said Court, before our said Justices, and that you have been often requested to lay out and open said road above mentioned, but that you have, hitherto, wholly refused, and still do absolutely refuse, to lay out and open said road, to the great damage and grievance of the said *John McFarland*, as by his complaint we are informed: Wherefore, the said *John* besought of us a fit and proper remedy in this behalf; and we being willing that those things should be done which are right and proper in this behalf; do therefore command you, the said commissioners, and every of you, firmly enjoining you, that you do, without further delay, forthwith lay out, and cause to be opened, a certain road in the said town of *Salem*, according to the following metes and bounds, that is to say: Beginning (*describing the road by courses, etc., as before*), and that you cause all that part of the old road (*as before described*) forthwith to be discontinued; or that you show cause why you do not, before our Justices of our *Supreme Court of Judicature*, at the *Academy*, in the town of *Utica*, in the county of *Oneida*, on the third Monday of October next. And have you then there this writ.

Witness, *Ambrose Spencer*, Esquire, Chief Justice, at the *Capitol* in the city of *Albany*, the 17th day of *August*, in the year of our Lord 1822.

Fairlie, Bloodgood & Breese, Clerks.

C. L. Allen, Att'y.

2. Alteration and Vacation.

a. Petition.

(1) FOR ALTERATION OF HIGHWAY.

Form No. 19142.¹

Petition for Change of County Road.

To the Board of County Commissioners of the County of *Martin*,
Minnesota:

The undersigned, freeholders of the county of *Martin*, hereby petition your honorable board for the change of a highway running into more than one town of said county, and not within the limits of any incorporated city, and described as follows: (*describe the road, setting forth the beginning, course and termination*).

And your petitioners pray that you will change all that portion of said above described highway which runs as follows: (*describe the portion of the road to be changed, setting forth the beginning, course and termination*), so that the same when changed will run as follows: (*set forth the beginning, course and termination of the portion of the road as changed*).

The names of the owners of the lands, so far as known, through which the same now passes, as well as the names of the owners of the lands, so far as known, through which the same may pass when changed, are:

Owners of lands.	Description of lands.	Sec.	Town.	Range.

And your petitioners pray that you will proceed to change said road and cause the same to be opened according to law.

Dated at *Fairmont*, this *first* day of *May*, 1901.

(*Signatures of petitioners.*)

Form No. 19143.²

(Precedent in East Deer Tp. Road, 155 Pa. St. 54.)³

[To the Honorable the Court of Quarter Sessions of *Allegheny* County:
 The undersigned, citizens of *East Deer Township*, in said county of *Allegheny*, respectfully represent to the court:]⁴

That a public road was long since laid out and opened, leading from the *Pittsburgh* and *Freeport* road, at or near *Hites* station, *West Penn.* railroad, to *Logan* and *Butler* road, as the property of *Henry*

1. *Minnesota*.—Laws (1897), c. 199, § 1. pointed pursuant to this petition was

2. *Pennsylvania*.—Bright. Pur. Dig. affirmed.
 (1894), p. 1873, § 1 et seq.

3. The report of the viewers ap- 4. The matter enclosed by [] will
 not be found in the reported case.

Nevergold, which is known and usually designated as the *Crawford Run* road, that a part of said road through the township of *East Deer*, beginning at a point on the *Pittsburgh* and *Freeport* road at *Hites* station, the beginning of said road, to a point on the line of said road in said township, at the property of *Thomas Norman* (which is now kept by *August Johnston*, a tenant of *Norman*); and also another portion between what is known as *Simon's* property, on the line of said road, to the terminus of said road, on the *Logan* and *Butler* road, in said township, have become inconvenient and burdensome by reason of the very steep grades of said road, coming up from *Pittsburgh* to *Freeport* road, and other points and places of said road in said township of *East Deer*.

Petitioners therefore pray the court to appoint qualified persons to have the premises inquired into, and the expediency of making said change, and report to the *next* term of court whether the same is inconvenient and burdensome, and report such change or vacation thereof, if any, as they may deem necessary to avoid the steep grade aforesaid.

[(Date, and signatures of petitioners.)]¹

Form No. 19144.²

(Precedent in *Road to Ewing's Mill*, 32 Pa. St. 282.)³

To the Honorable the Judges of the Court of Common Pleas of *Allegheny* County:

The undersigned, citizens of *Moon* and *Robinson* townships, wish to represent to your honorable body — That whereas the public road leading from the farm of *Wm. P. Ferree*, in *Moon* township, to *Ewing's* mill, being of such a steep grade, and crossing *Montour's Run* so often, rendering said road almost useless in winter, your petitioners pray your honorable body to appoint suitable persons to review and alter the location of said road, from a point on the *Pittsburgh* and *Phillipsburg* state road, at or near the crossing of said road over *Montour's Run*, on the farm of *Samuel McKeown*, up the valley of said run, as near the desire of petitioners as may be, to intersect the *Sharon* grade road, at or near *Ewing's* mill, and your petitioners, as in duty bound, will pray, etc.

[(Signatures of petitioners.)]¹

Form No. 19145.⁴

(Precedent in *Franklin v. Raborn*, 60 S. Car. 80.)⁵

[State of *South Carolina*, }
County of *Aiken*.]⁶

To the honorable board of county commissioners in and for the county aforesaid:

1. The matter to be supplied within [] will not be found in the reported case.

2. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 1873, § 1 *et seq.*

3. The proceedings in this case were held to be void because of failure of the court to make certain orders subsequent to the report of the viewers.

4. *South Carolina*. — Civ. Code (1902) § 1343 *et seq.*

5. An order changing the road in accordance with the prayer of the petition was granted.

6. The matter enclosed by [] will not be found in the reported case.

The humble petition of *Richard McNamee* and *James Gresham Gardner*, copartners as *R. McNamee & Co.*, respectfully shows to your honorable board:

That they are the owners in fee simple and in possession of a large body of land in the county aforesaid, on both sides of the *Pine Log Road*, one of the highways of the county, which said road runs through their land at and near *Kaolin*, in said county; and that as the owners of the land on both sides of said road, they own all the land over which the public travel just at the place occupied by their manager, *Mr. F. E. Henderson*, and for a good many hundred yards in both directions, east and west, from said place (except at the church), and that they are desirous of using the land over which the said *Pine Log Road* runs at said place, and wish to obtain the permission of your honorable board to deviate the public road along the line, and in the way, as indicated by the plat of *John N. Hankinson, Esq., C. E. & S.*, which said plat is made a part and parcel of this petition. And these petitioners are willing, and do hereby offer to your honorable board at said deviation of said public road, to make as good a roadbed, and place it in as good condition as the original road now is, so that the public can use it without let or hindrance or inconvenience, all at the expense of petitioners, without costing the county a cent.

Wherefore, your petitioners pray your honorable body to take the matter into consideration and to grant them such relief as in the premises is in accordance with justice and the law in such cases made and provided.

[(*Date, and signatures of petitioners.*)]¹

Form No. 19146.²

To the Honorable *Commissioners' Court* of *Freestone County, Texas*:

We, the undersigned, freeholders, residing in the precincts through which the following described proposed change of road will run, respectfully represent that the public road commencing at (*stating point of beginning*), in precinct No. —, and (*describing the road by its course*), and ending at (*stating point of termination*), in precinct No. —, is (*set out the reasons for the proposed change in the road*).

And your petitioners therefore pray for the following change in said road: Commencing at (*describe the proposed road, specifying the beginning, course and intermediate points*) and ending at (*stating point of termination*), in precinct No. —, the whole distance being (*stating distance*). And your petitioners pray that a jury be appointed to lay out and survey said road, and to assess damages. And your petitioners will ever pray, etc.

Dated the *first* day of *May*, A. D. 1902.

1. The matter to be supplied within [] will not be found in the reported case. 2. *Texas*. — Rev. Stat. (1895), art. 4696.

Petitioners.	Precinct where residing.

State of *Texas*, }
 County of *Freestone*. } ss.

John Doe, one of the petitioners herein, makes oath and says that notices of intended application for change of the within road were posted at the court-house door in *Fairfax*, in said county, and at (*stating place*) and (*stating place*), two other public places in the vicinity of the route of the proposed change of road, at least *twenty* days before the *first* day of the term of the *Commissioners'* Court at which this petition is presented.

Subscribed and sworn to before me this *first* day of *June*, 1902.

John Doe.

(2) FOR VACATION OF HIGHWAY.

Form No. 19147.¹

State of *Illinois*, }
 County of *Greene*. }

To the Commissioners of Highways in the Town of *Carrollton* in said County:

The undersigned, who are land-owners (or *two-thirds of the land-owners*) residing in said town of *Carrollton* and within *two* miles of the route of the following road, to wit, (*describing the road*), do hereby petition you to vacate said road (or *the following portion of said road*, describing portion desired to be vacated).

And your petitioners pray that the said road (or *the aforesaid described portion of said road*) be vacated according to law.

Dated (*concluding as in Form No. 19149*).

Form No. 19148.

(Precedent in *Pillsbury v. Augusta*, 79 Me. 71.)²

To the Honorable Mayor and Aldermen of the City of *Augusta*:

The undersigned, taxpayers and citizens of *Augusta*, respectfully represent that *Oak* street, directly west of the railroad track, is very steep and narrow, and inconvenient and dangerous for public travel by horses and vehicles, on account of the natural formation of the rock which forms the earth's surface at that point; that it is necessarily expensive, difficult and almost impossible to have the same kept safe and convenient at all times for travelers with teams; that *Dickman* street, having an easy grade, unites with *Oak* street near

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 121, § 31 *et seq.*

2. The street was closed in accordance with the petition.

that point and affords convenient and ample access by teams to and from all points on *Oak* street; that it would be no injury to persons or property to have said street at the point between the railroad and the east line of *Dickman* street closed to travel with horses and teams.

Your petitioners also represent that the sidewalk of said street at the point aforesaid (and westerly) is of wood, uneven, rotten, and dangerous to foot travelers, and of a steep grade, and ought to be entirely rebuilt of granite, and its grade made easier and the foot path wider.

Therefore your petitioners respectfully ask that you cause the portion of *Oak* street which lies westerly of the railroad track and easterly of *Dickman* street, to be closed to travel by horses and teams, so that it will be practicable to widen and improve the sidewalk in a permanent manner, and as in duty bound will ever pray.

(Signatures of petitioners.)

b. Notice of Petition for Alteration.

Form No. 19149.¹

Notice is hereby given, that the following is a true copy of a petition which will be presented to the board of county commissioners of *Greene* county, after the expiration of *twenty* days from this date.

Dated this *first* day of *May*, 1899.

State of *Illinois*, }
Greene County. } ss.

To the Board of County Commissioners of said County:

The undersigned, who are land-owners, residing within *three* miles of the road known as (*giving name and description of road*), do hereby petition you to alter said road as follows: Commencing at (*stating point of commencement*), in said road district, and running the line of said road as follows, viz: (*stating line in which it is desired the road should run*).

And your petitioners pray that you will proceed and alter said road accordingly.

Dated at *Kane*, this *first* day of *May*, 1899.

(Signatures of petitioners.)

Form No. 19150.²

Public Road Notice for Change of Road.

We, the undersigned freeholders, residing in the precincts through which the following described proposed road will run, hereby give notice, according to law, that on the *tenth* day of *June*, 1899, we will petition the honorable *Commissioners'* Court of *Freestone* county, *Texas*, for a change of a public road in said county, *fifty* feet in width, having its points of beginning and termination, course and intermediate points as follows:

Commencing at (*describing the road by its course*) and ending at (*stating point of termination*).

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 121, par. 231. 2. *Texas*. — Rev. Stat. (1895), arts. 4686, 4696.

The petition will ask for the following change to be made in said road: Commencing at (*describe the proposed road, specifying the beginning, course and intermediate points*) and ending at (*stating point of termination.*)

Dated the *tenth* day of *May*, 1899.

(*Signatures of petitioners and precinct where residing.*)

c. Proof of Posting Notice.

Form No. 19151.¹

State of *Oregon*, }
County of *Union*. } ss.

I, *John Doe*, being first duly sworn, say that the persons whose names are signed to the annexed notice of application to the *County* Court therein named, to alter (or *vacate*) a county road therein described, are each and all householders, and reside in said *Union* county, in the vicinity of said proposed road, to wit, within *two* miles thereof, and are the identical persons who signed the petition mentioned in said notice, and herewith presented to said *County* Court; that each name signed to said notice, as there appears, is the true and genuine signature, respectively, of the person whose name appears thereunto subscribed. I further say on oath that on the *tenth* day of *June*, 1903, I posted one copy of said notice at the place of holding said *County* Court, viz.: at the *county court-house* in *Union*, in said *Union* county, and likewise on said *tenth* day of *June*, 1903, I posted one copy of said notice in each of *three* public places in said *Union* county, in the vicinity of said proposed road, to wit, within *one* mile thereof, which *three* public places are here named, to wit: (*specifying the places*); that all of said notices, *four* in number, posted as aforesaid, were signed by all the persons whose names are subscribed to the annexed notice, and to the petition therein mentioned, and were posted in plain view of the public.

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, 1903.

Calvin Clark, County Clerk.

Form No. 19152.²

State of *Texas*, }
County of *Freestone*. } ss.

John Doe, one of the petitioners herein, makes oath and says that notices of intended application for change of the within road were posted at the court-house door in *Fairfax* in said county, and at (*stating place*) and (*stating place*), *two* other public places in the vicinity of the route of the proposed change of road, at least *twenty* days before the *first* day of the term of the *Commissioners'* Court at which this petition is presented.

John Doe.

Subscribed and sworn to before me this *tenth* day of *June*, 1903.

Calvin Clark,

County Clerk, *Freestone* County, *Texas*.

1. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 4783.

2. *Texas*. — Rev. Stat. (1895), arts 4686, 4696.

d. Notice of Final Hearing on Commissioners' Report Recommending Alteration of Highway.

Form No. 19153.¹

(Iowa Code (1897), § 1495.)

To all whom it may concern:

The commissioner appointed to alter (or *vacate* or *locate*, as the case may be) a road commencing at (*stating point of commencement*), in *Harrison* county, running thence (*describe in general terms all the points as in the commissioner's report, giving the names of the owners of the land through which the proposed road passes as they appear upon the transfer books in the auditor's office*), and terminating at (*stating point of termination*), has reported in favor of the alteration (or *vacation* or *establishment*) thereof, and all objections thereto or claims for damages must be filed in the auditor's office on or before *noon* of the *first* day of *September*, A. D. 1903, or such road will be altered (or *established* or *vacated*) without reference thereto.

Charles Adams, County Auditor.

e. Order Changing Location of Road.

Form No. 19154.²

(Precedent in *Franklin v. Raborn*, 60 S. Car. 81.)³

Aiken, South Carolina, April 13, 1900.

The board met in extra meeting at 11 o'clock A. M. Present, *T. P. Raborn*, chairman, and Commissioner *J. C. Courtney*. The chairman stated that the meeting was for the purpose of final action on the petition of *R. McNamee & Co.*, to change the location of the *Pine Log Road*, at or near his kaolin mines. The board of commissioners, after visiting the place where the said change is desired, as set forth in the resolution at the last meeting of this board, granted the following order:

After due consideration of the petition of petitioners herein, and the plat of *J. H. Hankinson*, Esq., it is ordered that the prayer of said petitioners be granted, and in accordance therewith the petitioners be permitted to change the *Pine Log Road* in the manner indicated upon said plat, and that when the change is completed by the petitioners and accepted by the county commissioners, then the original road deviated from be abandoned, and the new road be accepted as a part of the *Pine Log Road*, one of the highways of this county. All expenses of said change to be borne by the petitioners, without cost to the county. It is further ordered, that the petition and the plat accompanying the same, and this order, be spread upon the minutes of the board of county commissioners, the recording to be paid by petitioners as a part of the expense. It is further ordered, that after such change is made, said *McNamee & Co.* shall, at their cost, keep in repair said changed road to the extent of the

1. *Iowa*. — Code (1897), § 1495.

2. *South Carolina*. — Civ. Code (1902),

§ 1343 *et seq.*

3. This order was affirmed.

deviation for the period of *five* years. The changed road shall be *thirty* feet wide, and have such fills and grades as will make the roadway of easy grade as required by law, and that the county shall be saved from all expense of making such change, and the maintenance for the period above named. It is further ordered, that the said *McNamee & Co.*, before making the change in said road, do enter into a bond to the county of *Aiken*, in the sum of \$1,000, binding them to perform the terms and comply in all respects with the conditions upon which said change is granted. These resolutions were passed after the county commissioners had visited the present road-bed, and they became convinced that the old road is already dangerous, and is gradually becoming more so, and in their judgment, a change in the said road, as above indicated, will be safer, and if made with proper grades, will best serve the interests of the public, and also save the expense of maintaining the same for the period aforesaid, and this is another reason which induced the action of the board in the premises. The changed road, when finished, shall be acceptable to the county commissioners. It is further understood that in laying out and locating said change, the county commissioners reserve the right to make such deviations in its location as they may think best from the plat which accompanies the petition, to be changed or altered, so as to conform to the direction of the commissioners.

T. P. Raborn, County Supervisor.

Attest: *J. C. Courtney*.

A. W. Sanders, Clerk of County Commissioners.

f. Damages Resulting from Alteration of Highway.

(1) NOTICE TO SELECTMEN OF CLAIM FOR DAMAGES.¹

Form No. 19155.

To *Richard Roe*, *Samuel Short* and *William West*, selectmen of the town of *Walpole*, in the county of *Cheshire*:

You are hereby notified that by the alteration and repair by you of that part of *Spring* street between *West* and *Center* streets and in front of the land owned by the undersigned *John Smith*, in said

1. Precedent.—In *Sawyer v. Keene*, 47 N. H. 173, the notice was as follows: "To *Augustus T. Wilder*, *Chester Nims* and *Thomas C. Rand*, Selectmen of the town of *Keene*, in the county of *Cheshire*:"

Whereas, by the alteration and repair of the highway, and by raising the same in front and northwest of the house owned by *Jemima N. Sawyer*, and occupied by *Nelson N. Sawyer* and the said *Jemima N. Sawyer*, wife of the said *Nelson N. Sawyer*, in *Spring* street, in said *Keene*, great damage has been done to the land and buildings thereon,

situate on the south side of said *Spring* street, in said *Keene*, and owned by the said *Jemima N. Sawyer*, now by reason whereof you are hereby requested to assess the damages occasioned by such alteration in conformity to sections 18 and 19 of chapter 52 of the Compiled Statutes.

Dated at *Keene*, this 26th day of *December*, A. D. 1863.

Jemima N. Sawyer.
Nelson N. Sawyer.

D. H. Woodward, for plaintiffs."

It was held that this notice was sufficient.

Walpole, to wit, by the raising of said street and by digging a ditch thereon, all the water accumulated upon said street has been turned from its original course and has flowed and still does flow upon and over the said land of the undersigned and into the cellar of the building situated thereon, and great damage has been thereby done to the said land and to the said building thereon.

You are therefore hereby requested to examine the said premises and to assess the damages occasioned by said alteration and repair in said street in conformity to the statute in such case made and provided.

Dated at *Walpole*, this *twenty-sixth* day of *December*, A. D. 1903.

John Smith.

(2) PETITION TO COURT TO ASSESS DAMAGES.

Form No. 19156.¹

(Precedent in *Sawyer v. Keene*, 47 N. H. 174.)²

To the Honorable *Supreme Judicial* Court of *New Hampshire*, next to be holden at *Keene*, within and for the County of *Cheshire*, on the *first Tuesday* of *April*, A. D. 1864:

Nelson N. Sawyer, of *Keene*, in said county of *Cheshire*, carpenter, and *Jemima N. Sawyer*, of said *Keene*, wife of the said *Nelson N.*, complain against the town of *Keene*, in said county of *Cheshire*, and say that heretofore, to wit: on the *fifteenth* day of *August*, A. D. 1863, there was and ever since has been and still is a public highway called *Spring* street in said *Keene*, leading from *Washington* street to and by the house, messuage and land of the said *Jemima N. Sawyer*, in said *Keene*, and which said highway on the day and year aforesaid, in front and northwest of said house of the said *Jemima*, was so altered and raised by the selectmen of the said town of *Keene*, and by their servants under the direction of the said selectmen, [and by digging a ditch,] that all the rain, sleet and water accumulating from a long distance from said house and messuage were turned from their original course and flowed and still do flow upon said messuage and land, and that on the day and year aforesaid, and on divers other days and times between that day and the day of the filing of this petition, the water, in consequence of said alteration and raising [and by said ditch] of the said highway, as aforesaid, flowed and forced itself in large quantities upon said messuage and land belonging to the said *Jemima*, [and of which she is seised and possessed in her own right,] and washed and forced large quantities of sand and stones upon said land, and the said water so turned from its original course by said alteration and raising of the said highway as aforesaid [and in consequence of said ditch] ran into the cellar under the house aforesaid in large quantities, insomuch so and by means whereof the walls of the cellar aforesaid were greatly injured and sunk a large space, to wit: the space

1. *New Hampshire*. — Pub. Stat. & Sess. L. (1901), c. 68, § 2.

2. This was the amended complaint in the case and was held sufficient.

of *four* inches, together with the buildings thereon, to the great injury of said message and to the great damage of your petitioners.

And although the selectmen of said town of *Keene* have been applied to in writing, more than *thirty* days before the filing of this petition, to wit: on the *twenty-ninth* day of *December*, A. D. 1863, by your petitioners, to assess the damages occasioned by the alteration and raising of the said highway as aforesaid, yet the said selectmen have neglected and still do neglect to attend to their duties in this behalf, or in any wise to assess the damages occasioned as aforesaid. Wherefore your petitioners pray that the same may be inquired of by the court and that such redress may be granted as justice requires.

Jemima N. Sawyer.
Nelson N. Sawyer.

(3) EQUITABLE PROCEEDINGS WHERE RIGHT TO APPEAL FROM AWARD OF SELECTMEN HAS BEEN LOST.

(a) Petition.

Form No. 19157.¹

Chilson C. Fairbank et al. } State of *Vermont*, *Windham* county, ss.
vs. }
Town of Rockingham. } To the Court of Chancery in said County.

Your petitioners, *Chilson C. Fairbank*, *Asenath Walker*, *Lily A. Fairbank* and *Amanda M. Wright*, all of *Rockingham*, in the county of *Windham* aforesaid, and *Jessie M. Parker*, of *Chicago*, in the county of *Cook* and state of *Illinois*, respectfully represent that the said *Chilson C. Fairbank*, *Asenath Walker* and *Lily A. Fairbank* are owners in fee as tenants in common of a certain dwelling-house, outbuildings and lands connected therewith, situate on the easterly side and fronting upon *Pine* and *Center* streets in the village of *Bellows Falls*, in said *Rockingham*; that said *Amanda M. Wright* is the owner in fee of a certain other dwelling-house, outbuildings and lands connected therewith, situate upon the westerly side of and fronting upon said *Center* street; and that said *Jessie M. Parker* is the owner in fee of a certain other dwelling-house, outbuildings and lands connected therewith, situate upon the westerly side of and fronting upon said *Center* street; and that each have been such owners continuously since a long time prior to the date of the petition to said the selectmen of the town of *Rockingham* hereinafter referred to; that *Pine* street is a public highway leading from the extension of *George* street, in the village of *Bellows Falls*, southerly past *Burt Place*, so called, to its junction with *Center* street on the *Old Terrace*, so called, in said village, and that said *Center* street is in effect a continuation in a south-easterly direction of said *Pine* street. Your petitioners further represent that the *Bellows Falls* and *Saxtons River Street Railway*

1. This is the petition in *Fairbank v. Town of Rockingham*, 73 Vt. 124. A demurrer was held that the petitioner was entitled to relief. The petition was overruled and it

Company are duly chartered as a corporation by No. 135 of the Acts of the General Assembly of the state of Vermont, approved November 22, 1892, and that your petitioners are informed, and for the purpose of this proceeding admit, that said corporation thereafterwards effected an organization, and by the consent of the bailiffs of said *Bellows Falls Village Corporation*, located its line of railroad in part along said *Pine* and *Center* streets and past your petitioners' said dwelling-houses and grounds; that thereafterwards, to wit, on or about the 13th day of *February*, A. D. 1899, *Geo. A. Weston, Arthur H. Thompson, Charles E. Howard* and others, residents and freeholders in said town of *Rockingham*, preferred their petition to the selectmen of the town of *Rockingham*, praying that said selectmen cause said *Pine* street "extending from *George* street, so called, to *Center* street on the *Hapgood Terrace*, so called, and said *Center* street to *West* street, to be graded so that the grade between said *George* and *West* streets shall not be over five per cent. in any of its parts." That said selectmen gave notice to the abutters and parties interested, and after hearing said parties, thereafterwards, to wit, on the 15th day of *March*, A. D. 1899, returned said petition to the office of the clerk of said town with the following report of their findings and conclusions, viz:

"Notice given to abutters and parties interested that petition would be considered at town clerk's office, *February 25*, 1899, at ten o'clock A. M.

February 25, 1899, consideration of and hearing upon petition adjourned two weeks, same hour and place.

The foregoing petition having been presented to us, we thereupon gave notice to said petitioners and to the owners of lands bordering upon said *Pine* street that we would meet at the town clerk's office on the 25th day of *February*, 1899, at ten o'clock in the forenoon, when and where they might be heard in the premises if they saw fit.

And agreeably to said notice we met on the day and year aforesaid, at said town clerk's office, when said hearing was continued to the 11th day of *March*, 1899, at the same hour and place.

At which time we heard said petitioners, as well as all who desired to be heard, in opposition to the granting of said petition.

We are of the opinion that the public good does not require the grading of the highway described in the manner as set forth, except wherein the building of the *Bellows Falls and Saxtons River Railway* may be of public benefit, and then not to the extent asked for in said petition.

In the interest of said railway, we adjudge that the grade of said street be changed in this, that from the point of the intersection of the south side of *Burt Place* with said *Pine* street to *West* street, the grade may be changed for the convenience of said railway, to the extent of cutting eight feet at the deepest point from the present surface of the highway.

Provided, however, upon condition that said railway company settle and adjust all claims for damages made by adjacent land-owners, and satisfy us that same has been done, before work shall be commenced upon said changing of grade, and provided further that

sufficient room shall be left on the westerly side of the tracks of said railway company for a sidewalk *five* feet in width within the limits of said highway, and that the costs of said grading, including all changes of bank walls and ditches, water and sewer pipes, shall be borne by said railway company. Said grading to be done under the control and superintendence of the selectmen.

Rockingham, Vt., March 14, 1899.

C. H. Williams,

M. R. Lawrence,

Selectmen of *Rockingham.*

Received 15th day of *March*, A. D. 1899, at 2 o'clock P. M.

Attest: *A. I. Bolles*, Asst. Town Clerk."

That thereafterwards, to wit, on the *first* day of *April*, A. D. 1899, *C. H. Williams* and *George M. Cory*, two of the selectmen of the town of *Rockingham*, duly issued and posted a warrant for the meeting of the inhabitants of said town to be held at the town hall in *Bellows Falls*, in said *Rockingham*, on the 13th day of *April*, A. D. 1899, at ten o'clock A. M., to take action upon the following article, namely, article 1.

"To see if the town will vote to instruct and direct the selectmen to order the cutting down and grading of the hill on *Pine* and *Center* streets, lying between *Burt Place* and *West* street, in the village of *Bellows Falls*, to the extent of *twelve* feet at least at the highest point of the same and to thereafter fully comply with the provisions of sections 3357, 3358 and 3359 of the Vermont statutes of 1894, or any other statute in relation thereto, and provide means therefor, provided the *Bellows Falls and Saxtons River Street Railway Company* will agree to do said cutting down and grading free of expense to the town."

That thereafterwards, to wit, on said 13th day of *April*, a special meeting of the inhabitants of said town was held pursuant to said warning, at which said meeting the following business was transacted, namely:

"At a special meeting holden at *Rockingham*, in accordance with the above recorded warrant, the following business was transacted:

Meeting called to order by *George A. Weston*, moderator, and warrant read.

A. N. Swain called to act as moderator. Under article 1, the following resolution was offered by *George A. Weston*:

Resolved, That the public good, and the necessity or convenience of individuals, require that the highway on *Pine* and *Center* streets, in the village of *Bellows Falls*, be cut down or altered by lowering the same to the extent of *twelve* feet at the highest point of said highway and that the same be properly graded. In the event that the *Bellows Falls and Saxtons River Railway Company* will furnish to the town a good and sufficient agreement, in writing, to do said cutting down and grading free of expense to the town, the selectmen are instructed and directed to immediately thereafter give notice to the owners of any dwelling-house or other building standing upon the line of said highway where the same is to be altered by lowering the same more than *three* feet, of a time when the selectmen will

examine the premises, hear them upon the question of making such alterations and damages by reason of such alterations, and the selectmen are hereby instructed and directed to order said highway to be altered by lowering the same *twelve* feet at the highest point of the same and seeing to it that the same is properly graded.

And if the selectmen are of the opinion that such owners will sustain damages by reason of such alteration, they are instructed and directed to determine and award the amount thereof to the owners respectively, taking into account, by way of offset thereto, such special benefit, if any, to such owners as shall accrue to them by reason of such alteration. And the selectmen are instructed and directed to make their orders and awards for damages and refusal to award damages to such owners, in writing, and cause the same to be recorded in the office of the clerk of the town within *ten* days from the time of making the same, and at the final determination of the question of damages, to draw their orders on the town treasurer for the payment of the same."

The following resolution was offered by *Edward R. Campbell* as a substitute for the resolution offered by *Mr. Weston*:

"Resolved, That no appropriation be made or sum of money paid for land damages or other expenses in connection with the construction and equipment of the *Bellows Falls and Saxtons River Street Railway Company*, but that the sum of \$1,000 be appropriated and paid to the treasurer of said railway company *thirty* days after its completion and full equipment both for passenger and freight business. The above sum of money being appropriated in consideration of the probable benefit of the people of this town from the construction and operation of said road."

The latter resolution ruled out of order.

The following was offered as an amendment to the resolution offered by *Mr. Weston*, between the words of "town" and "the" in the *tenth* line of said resolution (the same being the *tenth* line in the record and indicated by a caret), insert the words "and provided that the railroad company shall assume to pay any and all land damages exceeding \$1,000," and voted.

Voted to adopt the resolution offered by *Mr. Weston* as amended.

Moved and voted to adjourn.

A true record.

Attest: *F. A. Bolles*, Town Clerk.

Your petitioners further represent that thereafterwards, to wit, on the *6th* day of *October*, A. D. 1899, without petition for that purpose, *C. H. Williams* and *M. R. Lawrence*, two of the selectmen of said town, gave written notice to your petitioners in substance as follows:

"You are hereby notified that the roadbed of the street in front of your dwelling and lot, called *Center* street, in *Bellows Falls, Vt.*, is to be altered by lowering the same not more than *twelve* feet, and you are further notified that we will examine said premises and hear you upon the question of making such alterations and damages to your premises, by reason of such alteration, at the town clerk's office in said *Rockingham, Vt.*, on *Saturday*, the *14th* day of *October*, A. D. 1899,

at nine o'clock A. M., at which time and place you can be heard in the premises if you see fit.

Rockingham, Vt., October 6, 1899.

C. H. Williams, }
M. R. Lawrence, } Selectmen of *Rockingham*."

And that no other or further notice was given, and your petitioners believing that said selectmen purposely made no reference to *Pine* street in said notice, and that said town of *Rockingham* would claim that sec. 3357 did not apply to said *Pine* street, owing to its location with reference to the buildings of your petitioners located thereon, offered no evidence in reference to lowering the grade of said *Pine* street and offered no evidence in reference to the damages occasioned thereby.

And your petitioners aver that said selectmen had no right to insert in their report of the hearing held in consequence of said notice that they had considered *Pine* street in their assessment of damages. And that thereafterwards, to wit, on the 14th day of *October*, A. D. 1899, a meeting of the selectmen was held at the town clerk's office in said town, at which meeting your petitioners were represented by their attorney and at which meeting no evidence was introduced on the part of your petitioners, and as a result of said meeting said selectmen, thereafterwards, to wit, on the 16th day of *October*, A. D. 1899, filed their report in the office of the town clerk of said town of *Rockingham*, which report followed the report of the selectmen of *March 14th*, A. D. 1899, and which said last named report is as follows, viz:

"Believing that the public good and convenience of individuals requires the lowering of the grade of *Pine* street and *Center* street in *Bellows Falls*, in *Rockingham, Vt.*, beginning at the point of intersection of the south side of *Burt Place* with said *Pine* street southerly and easterly to *West* street, to the extent of not more than twelve feet at the highest point of the present grade, we gave written notices to owners of dwelling-houses and other buildings standing upon the line of said streets where the proposed alteration would be made, that we would be in session at the town clerk's office in said *Rockingham* on *Saturday*, the 14th day of *October*, 1899, at nine o'clock A. M., when and where they might be heard in relation to the proposed alteration and their respective damages by reason of such alteration.

Agreeably to said notice we met the parties, with their respective counsel, at the town clerk's office in *Rockingham, Vermont*, on *Saturday*, *October 14th*, A. D. 1899, at nine o'clock A. M., and after examining the premises and having heard the parties in relation to the proposed alteration of grade, and as to the damages resulting to said abutting land-owners, we are of opinion that the public good and convenience of individuals requires the lowering of the grade of said streets between the points indicated, and do order that the grade be altered by lowering the same as follows: Beginning at the point of intersection of the south side of *Burt Place* and *Pine* street, thence southerly to *Center* street, thence easterly to the intersection of *Center* and *West* streets. Said grade not to exceed twelve feet at the highest point of the present surface.

To owners of dwellings on lands abutting on the streets where said alteration is ordered that will exceed *three* feet, we determine and award damages as follows:

To *Chilson C. Fairbank, Asenath Walker and Lilly A. Fairbank*..... \$508 33
 To *Jessie M. Parker* 216 66
 To *Amanda M. Wright* 25 00

Done at *Rockingham*, this *16th* day of *October*, A. D. 1899.

C. H. Williams, }
M. R. Lawrence, } Selectmen of *Rockingham*.

Received *16th* day of *October*, A. D. 1899, at 6 o'clock P. M.

Attest: *F. A. Bolles*, Town Clerk."

Your petitioners further represent that thereafterwards, to wit, on the *6th* day of *October*, A. D. 1899, said *Electric Railway Company* entered into an agreement with said town of *Rockingham* in terms as follows:

"Memorandum of an agreement made on the part of the *Bellows Falls and Saxtons River Street Railway Company* to the town of *Rockingham, Vt.*

If said town, by its selectmen or otherwise, will order the cutting down or altering, by lowering the same to the extent of *twelve* feet at its highest point, the highway on *Pine* and *Center* streets, lying between *Burt Place* and *West* street in the village of *Bellows Falls*, the said *Bellows Falls and Saxtons River Railway Company*, in consideration thereof, hereby proposes and agrees to do said cutting down or altering by lowering the same to the extent above stated at its highest point, free of expense to said town, and to pay any and all land damages that may be legally assessed above the sum of *one thousand* dollars.

October 6, 1899.

Bellows Falls and Saxtons River Street Railway Company, by
Joel H. Holton, President.
D. A. Blakeslee, Director.
C. L. Barber, Director.
Samuel C. Morehouse, Director.
Joel H. Holton, Director."

And that thereafterwards said electric railway company, claiming to act for and in behalf of said town of *Rockingham*, entered upon said *Pine* and *Center* streets and proceeded to grade the same in front of and adjacent to your petitioners' said dwelling-houses and grounds to the depth permitted by the vote of said town and action of said selectmen, thereby cutting off all access from said streets to your petitioners' said grounds and to the damage of your petitioners greatly in excess of the amount of damages awarded by said selectmen as appears by their said report, and that no payment or tender of damages has ever been made your petitioners.

Wherefore your petitioners thereafterwards, on the *13th* day of *December*, A. D. 1899, and within *sixty* days of the date of filing of the last named report of said selectmen, feeling themselves aggrieved at the said last named report of said selectmen, referred their petition to *Henry C. Lane*, who was then and still is a justice of the

peace and resident of *Westminster*, in said county of *Windham*, which said town of *Westminster* adjoins said town of *Rockingham*, setting forth in substance the acts of said selectmen of *Rockingham* in ordering the grading of said streets as last aforesaid and praying that commissioners be appointed, pursuant to the statute in such case made and provided, to rehear and reappraise the damages sustained by your petitioners in the grading and cutting down of said highway as aforesaid, and that they make report as provided by the laws of this state: That thereafterwards, to wit, on said *13th* day of *December*, A. D. 1899, said justice of the peace issued his citation addressed to any sheriff or constable in the state and commanding him to summon *Charles H. Williams*, *Martin R. Lawrence* and *George M. Cory*, selectmen of said town of *Rockingham*, to appear before said justice in the town hall in *Westminster* on the *sixth* day of *January*, A. D. 1900, *ten* o'clock in the forenoon, to show cause, if any they had, why the prayer of said petitioners should not be granted, which said citation was duly served upon said selectmen, and that on said *sixth* day of *January*, A. D. 1900, said town of *Rockingham*, by *Francis A. Bolles*, its attorney, and your petitioners, by *Charles H. Robb*, their attorney, duly appeared before said justice of the peace at the time and place designated in said citation.

Whereupon said town of *Rockingham*, by its said attorney, moved to dismiss said petition because said justice of the peace was a taxpayer in said town of *Rockingham* at the time said petition was presented to and said citation issued by him. Whereupon said petition was continued by said justice to the *11th* day of *January*, A. D. 1900, at *two* o'clock P. M., at the same place, at which last mentioned time and place further hearing was had upon said motion of said town of *Rockingham* and the question held by said justice until the *30th* day of *January*, A. D. 1900, on which day said justice announced to your petitioners' attorney that he had decided to dismiss said petition for want of jurisdiction; and said justice of the peace, as of the *11th* day of *January*, A. D. 1900, indorsed upon your petitioners' said petition the following, viz: "This case dismissed for want of jurisdiction of the subscribing justice.

Henry C. Lane, Justice of the Peace."

Your petitioners further represent that no evidence was introduced before said justice upon the subject-matter of said motion, but they admit that at the time of the issuing of said citation and at the time of the hearing before said justice as aforesaid, said justice was the owner of a dwelling-house, outbuildings and lands connected therewith situate in the village of *Bellows Falls*, in said *Rockingham*, and that said property was set to him as the owner thereof in the grand list of said town of *Rockingham* for the year 1899.

And your petitioners aver that at the time of the filing of said petition with said justice of the peace neither of them had any knowledge or intimation that said justice was the owner of said real estate or a taxpayer in said town of *Rockingham*, and that the first knowledge they had of the fact came to them after the expiration of more than *sixty* days from the date of the filing of said last named return by said selectmen.

And your petitioners aver that prior to the signing of said petition by said justice of the peace, your petitioners, by their attorney, *Charles H. Robb*, had an interview with said justice at the office of said attorney and read to said justice the statute under which said petition was brought and then asked said justice whether he knew of any reason why he was not qualified to act, and he replied that he did not. That it was then known to your petitioners' attorney that said *Henry C. Lane* was an old and experienced justice and said attorney relied upon this fact and made no further inquiry in reference to his qualifications.

And your petitioners further aver that the damage to them and each of them caused by the cutting down and grading said streets as aforesaid is greatly in excess of the sums awarded by said selectmen and in each case greatly in excess of the sum of *forty* dollars; that said justice of the peace has refused and still does refuse to proceed under your petitioners' said petition and under the provisions of the statute in such case made and provided.

And your petitioners further aver that thereafterwards, to wit, on the *23d* day of *February*, 1900, they petitioned the *Supreme* Court for a writ of mandamus commanding said justice to proceed to the appointment of commissioners to reappraise your petitioners' said damages, and that the *Supreme* Court thereafterwards, to wit, on the *19th* day of *July*, 1900, dismissed said petition.

And your petitioners aver that solely by reason of the premises and without fault or neglect on their part they have been deprived of their day in court, and of the right to have the question of damages suffered by them by reason of the grading of said streets passed upon by disinterested commissioners, and of any appeal from the decision of said selectmen. And forasmuch as your petitioners have no adequate remedy at law; therefore your petitioners pray that said court take cognizance of said cause, and that a master or commissioners be appointed to hear and determine the question of the damages so suffered by them and make their report to this court, and that a decree be entered commanding the payment of the same to your petitioners and for such other and further relief in the premises as to equity may appertain.

And that a citation may issue commanding said town of *Rockingham* to appear and answer this petition, and that such further order may be made in the premises as may be necessary and proper.

Jessie M. Parker.

Asenath Walker.

Amanda M. Wright.

Chilson C. Fairbank.

By their attorney, *Charles H. Robb.*

Lily A. Fairbank.

State of *Vermont*, } At *Rockingham*, in said county, on the *22d*
Windham County, ss. } day of *August*, 1900, personally appeared *Chil-*
son C. Fairbank, *Lily A. Fairbank* and *Amanda M. Wright*, who signed
the foregoing petition and made oath that the statements therein
are true to the best of their knowledge and belief.

Before me, } *Charles H. Robb*, Master in Chancery.
State of *Vermont*, } At *Rockingham*, in said county, on the *22d*
Windham County, ss. } day of *August*, 1900, personally appeared
Charles H. Robb, who signed the foregoing petition as attorney for

Asenath Walker and *Jessie M. Parker*, and made oath that the statements therein are true to the best of his knowledge and belief.

Before me, *Zina H. Allbee*, Master in Chancery.
L. M. Reed,
Charles H. Robb, } Solicitors.

Charles H. Robb recognized to the town of *Rockingham* in the sum of fifty dollars, as surety for the costs of prosecution as the law directs.

Before me, *Zina H. Allbee*, Master in Chancery.
 To the Town of *Rockingham*, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded to make your appearance before the Court of Chancery to be held at *Newfane*, in the county of *Windham*, on the fifth day of *September*, 1900, and then and there to make answer to the foregoing petition of *Chilson C. Fairbank*, *Asenath Walker*, *Lily A. Fairbank*, *Amanda M. Wright* and *Jessie M. Parker*, and further to stand to and abide by such order, direction and decree therein as to the court shall seem meet.

To any sheriff or constable in the state, to serve and return.

Given under my hand at *Rockingham*, in the county of *Windham*, this 22d day of *August*, 1900.

Zina H. Allbee, Master in Chancery.

(b) Report of Special Master.

Form No. 19158.¹

(Title of court and cause.)

To the Court of Chancery within and for the County of *Windham*, State of *Vermont*:

The undersigned, special master in the above entitled cause, hereby reports that, after being duly sworn, he met the parties and their solicitors and heard said case and finds and reports the following facts:

Chilson C. Fairbank, *Asenath Walker* and *Lily A. Fairbank* were at the date of the bringing of this bill owners of a certain dwelling-house, outbuildings and lands connected therewith, situate on the easterly side of *Pine* and *Center* streets, in the village of *Bellows Falls*, in said *Rockingham*; that *Amanda M. Wright* was at the date of the bringing of this bill the owner of a certain other dwelling-house, outbuildings and lands connected therewith, situate on the westerly side of said *Center* street and on *West* street; that *Jessie M. Parker* was at the time of the bringing of this bill the owner of a certain other dwelling-house, outbuildings and lands connected therewith, situate on the westerly side of said *Center* street, and said parties had respectively owned their said houses and lots for some years; that the lot in which each of said houses was located adjoined and came to the line of the street on which they were situated; that the

1. This is the report in *Fairbank v. Rockingham*, 73 Vt. 124. In that case it was held that the petitioner was entitled to equitable relief and the report was confirmed.

Wright premises are at the corner of *Center* and *West* streets, the front door of the house opening onto *West* street and the driveway to the barn was partly on *West* street and partly on *Center* street, and the side of the barn was on *Center* street. *West* street enters *Center* street making a slight angle at the junction, which is directly in front of the center of the driveway to the *Wright* barn.

The *Parker* premises are on *Center* street, and the front door of the house opens onto said street.

The *Fairbank* premises are on what is known as the *Old Terrace* in said *Bellows Falls*. *Pine* and *Center* streets bound said *Fairbank* place on the westerly side and the approach to said place for carriages or teams was by two driveways that were nearly level, running from the said streets to the house and outbuildings, and the main entrance for persons was by a walk nearly level from said *Pine* street between hedges to the dwelling-house; the barn was on the line of the traveled track on *Pine* street and had an entrance thereto by a door directly from said *Pine* street, although the main entrance to said barn was from the street through the above mentioned driveways onto the *Fairbank* premises and then into said barn on its easterly side; the front door of the *Fairbank* dwelling-house was on the easterly side; there was a side door, which from the location the master judged was more commonly used, on the southerly side; the back or kitchen door was on the westerly side and opened nearly opposite a driveway from the barn; the lot was level where the house stood and for quite a space about the house in which were graveled walks and driveways with shrubbery and plants; the land to the east and north of the level portion was very abrupt and not approachable from those directions except for persons on foot, and then only by winding paths or flight of stairs; the entrances from *Pine* and *Center* streets were practically level. This *Fairbank* place was in fact, before the grading hereinafter mentioned, a finely situated home, on high ground overlooking the greater part of the village of *Bellows Falls*, its main way of reaching was by way of *Pine* street and through either the driveways or the walk to the dwelling-house. *Pine* street is a public highway leading from the extension of *George* street, in the village of *Bellows Falls*, southerly past *Burt Place*, so called, to its junction with *Center* street, and said *Center* street is in effect a continuation in a southeasterly direction of said *Pine* street. Said *Pine* street was laid out October 30, 1873, and was worked, graded and opened for travel before either the *Fairbank*, *Parker* or *Wright* lots were improved or either of the houses built. The grade of *Pine* street and *Center* street remained substantially as they were left after the opening of *Pine* street up to the time they were graded in the fall of the year 1899. The *Bellows Falls and Saxtons River Street Railway Company* was organized and desired to have the hill on *Pine* and *Center* streets graded so that they would be available for use in constructing its railway, and according to the selectmen of *Rockingham*, in the fall of 1899, ordered said hill on said streets graded. This was done commencing at *Burt Place*, so called, and continuing past all the premises of the orators and up into *West* street.

At the top of the hill the street was cut down *twelve* feet and then the excavation was less each way until there was none.

The orators claimed damages to their respective premises by reason of such excavation or cutting down of and grading said streets.

The defendant claimed that in no event was it liable unless it was for what was in excess of *three* feet, and that it was not liable to any expense of putting in bank walls to sustain the land of the orators and prevent sliding. *Pine* street was built up onto the summit of the hill where it joins *Center* street through a natural gully, and when built and graded as it was when built the land on each side of *Pine* street was very steep and abrupt up to the level ground on top, and this was so much so that on the *Fairbank* premises Mr. *Bridgeman*, who then owned them, put in a bank wall several feet high to sustain his land from sliding down, and even with this wall put in the bank was very steep.

When said *Bridgeman* put in said wall he drew dirt and filled back of said wall to some extent and particularly filled up a gully that ran up into his land. It did not appear with any degree of accuracy how much was thus filled, and as the witness called by the defendant on this subject testified that such filling would not materially affect the amount of expense in putting in a wall to support the bank, I have not considered the same as of any practical consequence in this case.

Said *Pine* street was laid out *three* rods wide and the bank wall and filling put in by Mr. *Bridgeman* extended into said *Pine* street about *seven* feet. The barn on the *Fairbank* premises was built by Mr. *Bridgeman*, and that also extended into said *Pine* street between *seven* and *eight* feet. This encroachment into *Pine* street was not of great moment, as the street was not worked its full width and nothing appeared before me to indicate any necessity of so doing until the street railway was to be built on said *Pine* street. When this grading was done in the fall of 1899, the town of *Rockingham* worked *Center* street and *Pine* street down past a large part of the *Fairbank* premises the full laid out width of said streets.

The *Fairbanks* thereupon moved back their barn onto a line of the surveyed limits of the street and put in a wall to sustain it.

From the testimony before me I find that to put a wall in along the *Fairbank* premises sufficient to support the bank down to the point on *Pine* street where the excavation began to be *three* feet would cost, including driveway and suitable steps, *twenty-five hundred* dollars. From that point to *Burt Place*, along the *Fairbanks'* lands, the excavation in *Pine* street is less than *three* feet and the street has not been worked any greater width than it was originally worked when laid out. On this distance the old wall put in by Mr. *Bridgeman* is still there and the street is only worked up to the wall.

In case the selectmen should decide to work this portion the full width of the surveyed limits of the street, then a wall would be required to support the bank on the *Fairbank* premises that would cost *six hundred* dollars, and this last sum is to be added to the sum before mentioned in case the court should be of the opinion that it could be recovered. In case there can be no recovery except for the excess of grading over *three* feet and the wall required for such

excess, then there should be deducted from the cost of the wall before found the sum of *nine hundred and fifty* dollars. Besides the damage to the owners of the *Fairbank* property occasioned by the grading of *Pine* and *Center* streets in the fall of 1899, in being compelled to build walls as before stated, I find that when said walls are built the fair cash value of said *Fairbank* premises is reduced *one thousand* dollars, and in arriving at this amount I have considered as well as I could the advantage of having a street railroad pass the premises. No witness gave any estimate of the amount of benefit to the premises this would be and I fix no amount, but still I think the passing of a street railroad, kept in operation as this is, past premises situated as the *three* houses in this case are situated, is an advantage, and I have so considered it in arriving at the damages sustained by the owners in the case of each of the premises.

The *Parker* premises on *Center* street would require a wall to sustain its banks and to make the driveway suitable for use that would cost *six hundred* dollars, and besides the cost of this wall the premises are worth less by reason of said grading the sum of *five hundred* dollars. I have in this case and in the case of the *Fairbank* property included in the cost of the wall the necessary expense of grading said excavation.

The railroad company built the wall along the *Wright* place on *Center* street without expense to the owner of the property. This property is, in my opinion, from the evidence in the case before me, of equal value to what it was before said grading, taking into account the building and operating of said railroad past said premises and the lowering of the grade of said *Pine* and *Center* streets. I can find no damage in the case of said *Wright* property since the wall has been built. The orators seasonably objected to consideration being taken of the building and operating of a street car railway past said premises. I have considered it as an advantage, but have not and cannot put any specific amount as an exact measure of such advantage, but I was taken to view the premises by the parties during the hearing, and in looking at the premises and considering the question of damage as claimed by the orators I considered their present value and I could not but think them more salable on account of the railroad than they would be without.

At the beginning of the hearing and before any testimony was taken the defendant objected to the assessment of the damages in this case by a master in chancery for the reason that if the petitioners are entitled to damages it is solely by statute and damages must be assessed by the persons and in the manner prescribed by statute.

Said objection was overruled against the objection and exception of the defendant. Said defendant also seasonably objected to all testimony on the ground that the master had no jurisdiction to determine the damages sustained, which was overruled and to which defendant excepted.

I append hereto photographs marked *A, B, C, D, E, F*, respectively, which will enable the court to better understand the situation before and after the grading in the fall of 1899. The houses of the orators are in what is now a thickly settled portion of the village.

I am requested to report damages, if any, to *Fairbank* property if street be cut back to street line and grade lowered *three* feet, allowing bank to slope itself without a wall.

If street cut back to street line as surveyed and no wall put in, the street being lowered *three* feet, the bank would slide down and the value of the property be lessened, but how much it would be lessened is largely a matter of opinion, and from the evidence I cannot find any definite sum. I should certainly think a wall would be needed.

The soil there is sandy and Mr. *Nash*, the engineer, who testified as a witness called by the defendant, testified it would stand on a slope of *one and one-half* at the base to the perpendicular.

I cannot find the cost of sufficient wall to support the *Fairbank* property on *Pine* street by itself, for in all the estimates *Pine* and *Center* streets were estimated together, and not separated. I do find that the wall, the cost of which I have given in this report, is needed and necessary to preserve the property, and is required for the sole reason that the streets were lowered as they were in the fall of 1899. I am further requested to find what offers were made to either *Fairbank*, *Wright* or *Parker* by responsible parties as to building wall and grading, and whether the offers were rejected.

I find that the contractor for the railroad company offered to put in the wall for the *Fairbank* property for *five hundred* dollars, provided no claim would be made for damages. Mr. *Fairbank* understood the offer to be to build part of the wall where the old wall now is, that is, about *seven* feet into the highway, and not on the line of the highway, and on this account and on account of having to waive all claims for damages, Mr. *Fairbank* rejected the offer. No other offer was made.

I have made no allowance for benefit to *Fairbank* property or *Parker* property on account of lowering the grade of *Pine* street, as I do not think there is any advantage, but, as to the *Wright* property, I have considered that fact, and the building and operating of the railroad, and without naming any definite sum, I think the advantage and benefit to the *Wright* property from these two sources, considering that the railroad company built the wall on *Center* street, is equal to any damage sustained. All the questions of law raised by the parties at the hearing before me can be determined from the foregoing facts.

All of which is respectfully submitted.

William E. Johnson, Special Master.

(c) *Decree Affirming Report of Special Master.*

Form No. 19159.¹

(Title of court and cause as in Form No. 12131.)

Decree.

This case came on for hearing upon the bill and answer and the special master's report. The report is accepted and ordered to be

1. This is the decree confirming the report in *Fairbank v. Rockingham*, 73 Vt. 124.

filed. Upon consideration it is adjudged and decreed that, upon the findings of the master, the orator *George Wright*, executor of the will of *Amanda M. Wright*, is not entitled to damages; that the oratrix *Jessie M. Parker* recover of the defendant the sum of \$1,100 as her damages; that the orators *Chilson C. Fairbank*, *E. C. Fairbank*, administrator upon *Asenath Walker's* estate, and *Lily A. Fairbank* recover of the defendant the sum of \$2,550 as their damages, which sum is obtained by taking the aggregate of the two sums of \$2,500 and \$1,000, found as their damages, and deducting therefrom \$950 found by the master as the damages for grading not in excess of three feet and for the wall — which sum of \$950 is disallowed — leaving the sum of \$2,550.

It is further adjudged and decreed that if the defendant hereafter decides to work and does work that portion of the street described in the report the full width of the surveyed limits of the street, then these orators may recover of the defendant the further sum of \$600.

Interest upon the several sums recovered to be computed from the day of filing of the master's report.

The defendant to recover costs from *George Wright*, executor, and pay costs to the other orators.

The defendant excepted to the master taking jurisdiction of the case as appears by the report, which exception is overruled and the defendant appeals; appeal allowed. The orators *Chilson C. Fairbank*, *E. C. Fairbank*, administrator, and *Lily A. Fairbank* appealed from the disallowance of the \$950, the finding upon the allowance of that item being in the alternative, — which appeal is allowed.

James M. Tyler, Chancellor.

(d) *Final Decree Upon Mandate of Supreme Court.*

Form No. 19160.

State of Vermont, }
Windham County. }

Chilson C. Fairbank et al. } In Chancery,
vs. } April Term, 1903.
Town of Rockingham.

Be it remembered that at a Court of Chancery begun and held at *Newfane*, in and for the county of *Windham*, on the second Wednesday of *April*, 1903, this case came on to be determined at this term according to the mandate of the *Supreme Court* made thereon, and thereupon, on consideration thereof, it is ordered, adjudged and decreed as follows, viz:

That the said defendant pay to the petitioner *Jessie M. Parker* the sum of *twelve hundred and five and 60-100* dollars, as her damages, being the sum of *eleven hundred* dollars found in said master's report with interest thereupon since the day of the filing of the master's report; that the defendant pay to *Chilson C. Fairbank*, *E. C. Fairbank*, administrator upon *Asenath Walker's* estate, and *Lily A. Fairbank* the sum of *twenty-seven hundred and ninety-four and 80-100* dol-

lars, as their damages, being the sum of *two thousand five hundred and fifty* dollars, with interest thereon since the day of the filing of the master's report.

It is further adjudged and decreed that if the defendant hereafter decides to work and does work the portion of the street described in the report the full width of the surveyed limits of the street, then these petitioners may recover of the defendant the further sum of *six hundred* dollars.

That *George Wright*, executor of the will of petitioner *Amanda M. Wright*, does pay to the defendant the sum of no dollars costs, that the defendant pay to the petitioner *Jessie M. Parker* the sum of no dollars costs; and that the defendant pay to the petitioners *Chilson C. Fairbank*, *E. C. Fairbank*, administrator upon *Asenath Walker's* estate, and *Lily A. Fairbank* the sum of *one hundred and seventeen and 48-100* dollars costs.

Done in court this *29th* day of *April*, *1903*.

Loveland Munson, Chancellor.

I certify that the foregoing decree conforms to the petition and orders in the case.

Clarke C. Fitts, Solicitor.

(4) ACTION TO RECOVER DAMAGES OCCASIONED BY ALTERATION OF OR CHANGE IN GRADE OF HIGHWAY.¹

1. Precedent.—In *Hatch v. Tacoma*, etc., R. Co., 6 Wash. 1, the complaint alleged:

"That on the date plaintiffs became the owners in fee, and obtained possession, and now are such owners, and have possession, and at all times herein-after mentioned were such owners, and had possession, of that certain tract of land situate at the northeast corner of *Franklin* street and *Seventh* street, in the city of *Olympia*, county of *Thurston* and State of *Washington*, known, designated, and numbered on the original plat of the town (now said city) of *Olympia* as lots numbered, respectively, *eight* (8) and *seven* (7), in block numbered *thirty-six* (36), which plat is, and for many years has been, on file in the auditor's office in said county; said lots being the southwest quarter of said block.

4. That each of said lots fronts, and is *sixty* (60) feet wide, on said *Seventh* street, and extends northward, at right angles with said street, *one hundred and twenty* (120) feet; the west line of said lot numbered *eight* (8) being on *Franklin* street aforesaid.

5. That plaintiffs are the owners in fee of so much of the land on which *Seventh* street aforesaid is located as lies on the front of, and adjacent to, said

lots and extends to the middle line of said street, and they are the owners in fee of so much of the land on which said *Franklin* street is located as lies on the west of, and adjacent to, lot numbered *eight* (8), and extends to the middle line of said *Franklin* street. Each of said streets is *sixty* (60) feet wide.

6. Plaintiffs say that heretofore, to wit, on the — day of *May*, *1891*, and on divers and sundry days thereafter, the defendant, the *Tacoma, Olympia & Gray's Harbor Railroad Company*, aforesaid, its officers, agents, servants and employees, without the consent of these plaintiffs, or of either of them, and wrongfully and unlawfully, entered upon the land of plaintiffs on *Seventh* street, described in the *fifth* paragraph of this complaint, and without the consent of the plaintiffs, or either of them, and wrongfully and unlawfully, did dig up and carry away the soil thereof, and did cut a deep tunnel along and across said land, to the full extent of the width and length of said *Seventh* street, in front of said lots, and greatly to plaintiffs' damage.

7. That plaintiffs' said land, described in paragraphs 3 and 4 herein, is improved property, and has thereon a valuable dwelling-house, in which plaintiffs reside, and have for several years

Form No. 19161.

(Precedent in *Cook v. Ansonia*, 66 Conn. 414.)¹[[Commencement as in Form No. 5912.]]²

1. The plaintiff is the owner of a certain piece of land with dwelling-house and other buildings thereon, situated on *Tremont* street, a public highway in said city of *Ansonia*, and bounded and described as follows: northerly, by land of the *Ansonia Land and Water Company*, 30 feet; easterly, by land of *Harriet Cook*, 100 feet; southerly, by *Tremont* street, 30 feet; and westerly, by land of *Joseph Gilpin*, 100 feet.

2. On *March 23d*, 1892, and until *December 1st*, 1893, said *Tremont* street was a public highway, within the limits of the borough of *Ansonia*.

3. On said *March 23d*, 1892, the warden and burgesses of said borough of *Ansonia* at a regular meeting voted to change the grade of said *Tremont* street, which vote was taken in pursuance of the power given them by the borough charter granted by the legislature of this state.

resided, and other valuable buildings, fruit trees, and other improvements.

8. That the said defendant, its officers, agents, servants and employees, have constructed a railway along said tunnel, and have covered said tunnel with timbers and plank for the purpose of making a roadway over said tunnel and along said *Seventh* street, for public travel and passage, and have wrongfully and unlawfully changed and raised the grade of said street *five* (5) feet above the grade that has been established theretofore on said street by the city of *Olympia*, and that existed at the time said tunnel was cut and made as aforesaid.

9. That said defendant, its officers, agents, servants and employees, have wrongfully and unlawfully changed and raised the grade of *Franklin* street, making the approach on said street to said covered way *five* (5) feet at the point said streets intersect with said covered way, and have wrongfully and unlawfully extended said altered grade along said *Franklin* street, in front of said plaintiffs' said land, buildings and improvements.

10. That said defendant, its officers, agents, servants and employees, by doing the acts and things alleged in paragraphs 8 and 9 herein, have put and left plaintiff's aforesaid lots, buildings and improvements at a depth of *five* (5) feet below the top of said covered way on *Seventh* street, and at the intersection of *Seventh* and *Franklin*

streets, and along *Franklin* street, have destroyed ingress and egress to and from said property on *Seventh* street, and for *one-half* the length thereof on *Franklin* street, and have thereby greatly impaired and lessened the value of said lots, buildings and improvements.

11. That said defendant is actively engaged, through its officers, agents, employees and servants, in operating its railroad, and in running in passenger and freight trains, drawn by steam engines, along and through said tunnel daily, and that in so doing the smoke and sparks from said engines are thrown off in said tunnel in great quantities, and the rumble and noise produced by said trains are very great, and that plaintiffs' residence and buildings aforesaid are daily endangered and rendered unsafe and uncomfortable thereby, and that the value thereof is materially and greatly impaired and lessened.

12. That said defendant, its officers, agents, servants and employees, by reason of the acts and things alleged herein, have damaged plaintiffs in the sum of *five thousand* (\$5,000) dollars."

It was held that this complaint stated a cause of action against the railroad company.

1. It was held that this complaint was sufficient.

2. The matter to be supplied within [] will not be found in the reported case.

4. On or about *May 1st*, 1892, the said warden and burgesses did cause the grade of said *Tremont* street to be changed by lowering said street about *three* feet in front of and adjoining said property of the plaintiff, and did cause to be destroyed a good and sufficient sidewalk in front of said land on said *Tremont* street, and did cause to be destroyed a large and valuable shade tree standing between the sidewalk and the wrought part of the highway in front of said land on *Tremont* street. By reason of such change of grade the plaintiff was compelled to change and did change the grade of his said land to conform to the new grade of said *Tremont* street; also, to relay and did relay water pipes running from said street to said dwelling-house, all of which has caused the plaintiff to suffer great expense and damage.

5. On *December 1st*, 1893, the said borough of *Ansonia* became merged into the city of *Ansonia* by virtue of the charter of the city of *Ansonia*, Special Acts 1893, page 938, sec. 16, which charter provides that all the rights and liabilities of said borough of *Ansonia* shall be assumed by said city of *Ansonia*, and that said borough of *Ansonia* shall transfer all its rights and liabilities to said city of *Ansonia*.

6. The plaintiff has never received any notice of a hearing on the assessment of damages and benefits by reason of such change of grade, and in fact no provision has been made by either the borough or the said city of *Ansonia* for the assessment of damages and benefits.

7. That the borough of *Ansonia* has never paid the plaintiff for said damage, neither has the said city of *Ansonia* paid the plaintiff said damage.

[The plaintiff claims \$500 damages.

(Concluding as in Form No. 5912.)]¹

Form No. 19162.

(Precedent in *Smith v. Wayne County*, 50 Ohio St. 628.)²

[(Title of court and cause as in Form No. 5929.)]³

The plaintiffs say that they now are and at the time of the committing of the grievances by defendant, as hereinafter set forth, were the owners in fee simple of the following described real estate situated in *Chippewa* township, *Wayne* county, *Ohio*, to-wit: A part of the southeast quarter of section No. 3, township No. 18, of range No. 11, containing in all about *45* acres of land.

That for a period of more than *fifty* years a certain public road or highway leading from the village of *Doylestown*, in *Wayne* county, *Ohio*, to *Akron*, in *Summit* county, has run and passed through said tract of land, and which said road or highway has been kept in repair and condition for public use and travel by the public authori-

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. It was held that this petition was sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

ties vested with the control and management of public roads in said *Wayne* county.

That the grade of said road has been established, kept and maintained in reference to and respect to adjacent land, and that the grade and surface of said road or highway and plaintiff's lands have through all the years, for at least *fifty*, and until the time hereinafter set forth, been kept and maintained at practically the same level.

That said tract of land is improved farming land, with dwelling-house, barn and suitable farm buildings erected thereon adjacent to and along the said road or highway, and was at the time hereinafter mentioned, and for said period of *fifty* years, so as aforesaid improved with suitable buildings, and the same had been improved, and said buildings erected and maintained with reference to the established grade of said road or highway, and with reasonable reference to its prospective improvement and future enjoyment by the public authorities vested with the control and management of the said road or highway; and that by reason of the established grade and relative level of said road or highway as hereinbefore alleged, said lands and buildings were of ready and easy access to and from the same.

That in the summer of 1884, the defendant herein, being the public body vested with the control and management of said road or highway, for and in behalf of the public, changed and altered the grade and surface level of said road or highway that had been established and maintained through said lands as hereinbefore set out, by excavating a part thereof to a depth of *sixteen* feet, and along in front of the buildings already mentioned, excavating the same to a depth of from *five* to *nine* feet.

And along other portions of said lands defendant has changed and altered the grade and level, so as aforesaid established and maintained, and caused the same to be filled to a height of *fifteen* feet at different points.

That by reason of the said acts of defendant the means of access to plaintiff's lands, buildings and improvements, from said road or highway, and their access to the same from their said land have been greatly impaired and rendered inconvenient and difficult, and the value of their said property has been by reason thereof greatly diminished.

Plaintiffs say further that they held and had the right to hold and enjoy their said lands so as aforesaid improved without change or alteration in the relative level of said road or highway, subject only to the right of eminent domain to be exercised by the defendant representing the public in respect to roads, and the same to be exercised only in manner provided by law, suitable and adequate compensation being first made in money for the deprivation of private rights and property.

The plaintiffs say that the defendant herein proceeded to make the change and alteration as hereinbefore set out, without notice to them and without having paid them any compensation in money for the same, and without having caused a jury to inquire into and assess to them such compensation as they, the plaintiffs, were entitled to in

the premises, and without having in manner provided any means or tribunal to ascertain and assess the compensation and damages for the acts of defendant as hereinbefore set out.

Therefore, and by reason of the premises, these plaintiffs say that they are entitled to have a jury assess their damages in the premises, and say they have been damaged in the sum of \$1,500, for which amount they ask a judgment.

[(Signature and verification as in Form No. 5929.)]¹

II. IMPROVEMENT AND REPAIR OF HIGHWAYS.

1. Petition to County Commissioners for Improvement of Highway.

Form No. 19163.

(Precedent in Putnam County v. Young, 36 Ohio St. 289.)²

To the Honorable the Board of County Commissioners of *Putnam* county, *Ohio*:

The undersigned petitioners, resident land-holders of the said county of *Putnam*, residing along the road hereinafter described, and whose lands will be assessed for the proposed improvement, respectfully petition your honorable body to improve the county road running east from the eastern terminus of *Fourth* street in the village of *Ottawa*, in said county, and on the east corporation line of said village, between sections 23 and 26 and 24 and 25 in *Ottawa* township, and between sections 19 and 30 and 29 and 20 in *Blanchard* township in said county of *Putnam*; that said road be laid out and established beyond its present terminus as follows: To run east from the present terminus between sections 21 and 28, and 22 and 27, and 23 and 26, and 24 and 25, until it intersects the *Ottawa* and *Findlay* state road; that said improvement be then made upon said *Ottawa* and *Findlay* state road to where it crosses the county line between *Putnam* and *Hancock* counties, and there terminate; that said road improvement be ordered and made by grading, macadamizing and draining said road so above described, as provided by the laws of the state of *Ohio*.

[(Signatures of petitioners.)]¹

2. Petition for Construction of Sidewalk.

Form No. 19164.

(Precedent in Des Moines v. Dorr, 31 Iowa 91.)³

To the city council of *Des Moines*:

Gentlemen:—The undersigned most respectfully ask your honorable body to establish a sidewalk on the west side of *Sixth* street,

1. The matter to be supplied within [] will not be found in the reported case.

2. It was held that this petition conformed strictly to the act.

3. The walk was built in compliance with the petition.

between *Mulberry* and *Sycamore* streets, or along so much thereof as in your wisdom you may think necessary for the public convenience of foot passengers. Petitioners further represent that the sidewalk on the east side of said *Sixth* street is not sufficient to accommodate those who pass over the same; for passengers on said sidewalk are frequently crowded off of the walk and into the street and mud. Petitioners further represent that many of the lots along west side of *Sixth* street, where said sidewalk is asked for, are used for business lots at very high rents, and that said sidewalk will be of great benefit to the lessees of said lots as well as to the public generally in getting to and from places of business. Petitioners therefore ask that a sidewalk not less than *eight* feet wide, made of plank not less than *two* inches thick, be ordered on the west side of *Sixth* street, as above stated.

J. M. Dorr,
lessee of part of lots 5 and 6, in block 12,
on said *Sixth* street.
A. W. Voodry. *T. W. Vincent.*
Foster Brothers. *R. R. Maple.*
J. D. Rambo. *Kuntz Brothers.*
A. D. Boyd.

3. Petition for Construction of Gutter.

Form No. 19165.

(Precedent in *Main v. Fort Smith*, 49 Ark. 485.)

To the Honorable Mayor and Aldermen of the City of *Fort Smith*:

The undersigned property owners, owning property on *Garrison* avenue between *Franklin* and *Green* streets, respectfully ask your honorable body that you order a gutter *eight* feet wide to be made on both sides of said avenue, from *Franklin* to *Green* streets, at the expense of the property owners, in accordance with the provisions of City Ordinance No. (41) *forty-one*.

(*Signatures of petitioners.*)

4. Notice of Intention to Levy Special Assessment for Improvements.

Form No. 19166.

(Precedent in *Wilson v. Salem*, 24 Oregon 505.)¹

Notice of Assessment.

Notice is hereby given that the common council of the city of *Salem, Oregon*, will, at 8 o'clock P. M. of the *fifth* day of *April*, 1892, at the common council chambers at *Salem, Oregon*, proceed to assess upon each lot, or part thereof, liable therefor, its proportionate share of the cost of grading, graveling and curbing all that part of *Chemeketa* street described as follows: (*Here follows a particular*

1. This notice was held sufficient.

description of that portion of the street to be improved, according to the plans and specifications thereof on file in the office of the city surveyor of Salem, Oregon.)

Done by the city of *Salem, Oregon*, this *fifteenth* day of *March*,
A. D. 1892.

M. E. Goodell, Recorder.

Form No. 19167.

(Precedent in *Armstrong v. Ogden City*, 9 Utah 258.)¹

Notice of intention of the city council of *Ogden City* of creating a district for paving, and of paving and macadamizing the streets therein, and to defray the expenses of such improvement by local assessment.

The city council of *Ogden City*, in the Territory of *Utah*, gives notice that it intends to make the following improvements, to wit: Pave and macadamize the following streets: *Twenty-fifth* street, from the west line of *Washington* avenue to the west line of *Wall* avenue. This shall be known as "Paving District No. 2." The boundaries of the district to be affected and benefited are lines running 150 feet back, and parallel with the outer lines of each side of the streets on each and every block, and for the full length thereof, therein. The estimated cost of such improvement is \$40,000. For the payment of the costs and expenses thereof, the city council intends to levy local taxes upon the real estate lying and being within said paving district to the extent of the benefits to such property by reason of such improvements. The city council will, on *March 29*, 1892, at 10 A. M., hear objections, in writing, from any and all persons interested in said local assessments.

By order of the city council.

T. P. Bryan, City Recorder.

5. Order for Special Assessment.

Form No. 19168.

(Precedent in *Manor v. Jay County*, 137 Ind. 369.)

Hickman Free Gravel Road, Additional Assessment.

Whereas, the engineer's estimate for the gravel for the construction of the *Hickman* free gravel road was made and the costs based on the gravel being obtained from the *Hickman* Pit; and

Whereas, the gravel above referred to was condemned by the engineer in charge of said works, and by the board of commissioners of *Jay county, Ind.*, as being insufficient in quantity and quality for the construction of said gravel road, and said engineer and board of commissioners ordered the gravel for said above named gravel road to be hauled from the pits of *J. B. McKinney*, thereby increasing the average haul and creating an additional expense over and above the original estimate; and

Whereas, there was, on the *25th* day of *February*, 1886, *ten thousand* (10,000) dollars of bonds issued and sold to pay said expenses; and

1. This notice was held sufficient.

Whereas, the committee appointed by this court, on the *12th* of *March*, 1884, to apportion the cost of the construction of said road upon the lands as reported benefited, which report was approved and equalized by said court on the *9th* day of *June*, 1884, and before the completion of the construction of said road. It is, therefore, considered and adjudged, and this board does find, that the assessment and apportionment heretofore made for the payment of the costs and expenses of said road is insufficient to pay said bonds and the accruing interest thereon, and costs of said road. And it is also found by this board to be necessary, in order to meet the payment of \$7,693, to make an additional assessment upon all the lands as heretofore reported benefited by said road.

It is, therefore, ordered by the board that an additional assessment of \$7,693 be levied upon the lands heretofore reported as benefited by said road; and that *Jonas Votaw*, *W. H. Harkins* and *Nimrod Headington*, freeholders of said county, be and they are hereby appointed a committee to apportion the additional assessment of \$7,693 upon the lands heretofore reported as benefited by said road, being the actual cost of said road, and that the same be the assessment in full for said free gravel road for the year 1889.

And it is further ordered that the said committee meet at the auditor's office, in the city of *Portland*, *Jay* county, *Indiana*, on the *28th* day of *May*, 1889, at 10 o'clock A. M., and, after being duly qualified according to law, proceed to make said apportionment and report according to law.

6. Petition to Restrain City from Collecting Special Assessment.

Form No. 19169.

(Precedent in *Pretzinger v. Sunderland*, 63 Ohio St. 132.)¹

[(Title of court and cause as in Form No. 5929.)]²

The plaintiff, *Rudolph Pretzinger*, says that he is the owner of that part of outlet *twenty-three* on the plat of the city of *Dayton*, *Ohio*, which lies on the corner of *Main* street and *Wyoming* street, fronting 305 feet on *Main* street and about 235 feet on *Wyoming* street. The defendant, *Sunderland*, is treasurer of *Montgomery* county, and of the city of *Dayton*. The defendant, the city of *Dayton*, is a city of the *second* grade of the *second* class. The city of *Dayton*, in the year 1895, paved *Main* street in front of the property of the plaintiff aforesaid, and assessed against it upon the tax duplicate for such paving the sum of about \$950. The taxable valuation of said property at the time, as it stood upon the tax duplicate (which is the same now), was only *thirty-seven hundred and thirty* dollars (\$3730), and the authorities of the city of *Dayton*, upon application, remitted the excess over *twenty-five* per cent. and placed against the said property the sum of \$932.50, being the *one-fourth* of such taxable valuation, divided into *ten* annual instalments, with interest,

1. It was held that a demurrer to this petition was properly overruled. 2. The matter to be supplied within [] will not be found in the reported case.

the unpaid portion being yet upon the premises under such assessment. In the year 1894, the city of *Dayton* passed a resolution to make new sidewalks on *Wyoming* street along the south line of the property of the plaintiff herein described, and in the year 1896 proceeded to make the same out to *Main* street. For the cost of making said sidewalk the said city assessed against the property aforesaid the sum of \$159.90, and upon the refusal of the plaintiff to pay, it assessed a penalty of \$32.16, and placed upon the duplicate for collection by said *Sunderland* the sum of \$183.06, which said *Sunderland* is demanding, and will proceed to collect, if not restrained, by the sale of the property, or other process of law. The plaintiff says that, as alleged, his property has already been assessed for its full assessable value for any street improvement, and further assessment is illegal for the period of five years from the year 1895.

Wherefore he prays for an injunction against the said *Sunderland*, as treasurer, to prevent him from attempting to collect the same during the pendency of this suit, and upon the final hearing for a perpetual injunction, and for costs and other relief.

[(Signature and verification as in Form No. 5929.)]¹

7. Proceedings to Enjoin City from Improving Street.

a. Complaint for Injunction.

Form No. 19170.

(Precedent in *Evansville v. Evans*, 37 Ind. 230.)²

[(Title of court and cause as in Form No. 5915.)]¹

Said plaintiff complains of said defendants, and says that she is the owner as tenant in fee and is in the possession of the southeast one-half of a block of ground in the eastern enlargement of the city of *Evansville*, known on the plat of said enlargement as the "*Evans homestead*," more particularly hereinafter described; and that she is the owner in fee in reversion, after an estate for years, of one hundred by one hundred and fifty feet in the northwest corner of said block, being one hundred feet on *Main* street and one hundred and fifty feet on *Fifth* street; and she is the owner in reversion, as tenant for life, after an estate for years, of the remainder of said block, to wit, two hundred and nine feet on *Main* street by one hundred and fifty feet on *Sixth* street, of the northeast part of said block. And plaintiff avers that said block of ground lies between *Main* and *Locust* streets, which are three hundred feet apart, said block extending from one street to the other, and said block extends from *Fifth* street to *Sixth* street, a distance of three hundred and nine feet. And plaintiff further complaining, says that said eastern enlargement was originally platted and laid off by *Robert Evans* and others, and that said *Robert Evans* was at that time the owner of said block, and that by the plat of said enlargement there is no alley through said block; and said plaintiff avers that neither she nor any other of the persons under whom she claims said block, have ever dedicated any portion of said block to

1. The matter to be supplied within 2. A temporary injunction was
[] will not be found in the reported case. granted.

the use of the public as and for a public alley; nor have they, nor the plaintiff, ever consented that the city authorities or the public, should appropriate any portion of said block to the public use as an alley.

And the plaintiff avers that said block is within the corporate limits of the city of *Evansville*; and the common council of said city, pretending that there is an alley through the center of said block, from *Fifth* street to *Sixth* street, have entered upon their minutes an order directing an alley to be executed and paved through said block. A copy of said order, marked "Exhibit A," is herewith filed; and in pursuance of said order, said common council have awarded the contract for making said excavation and pavement of said pretended alley to said defendant *Richardt*, who, if not enjoined, will proceed to carry out said improvement; and plaintiff avers that by the grading so threatened, a deep excavation in the rear of her premises will be made, whereby her yard and premises, now occupied by her, will be greatly damaged, or will require the building of a stone wall at great cost and expense. And plaintiff says that said city has never taken any steps to open an alley through said block, according to the provisions of the charter, by-laws and ordinances of said city. But unlawfully assuming that an alley exists through said block, has proceeded to order its improvement by grading and paving, as aforesaid. And plaintiff says, that by means of said order of said council, and that following the same, said city is threatening to appropriate, and if not enjoined will appropriate, *twelve* feet in breadth by *three hundred and nineteen* feet in length through the center of said block of private property to the public use, without making the plaintiff any compensation, or without taking any steps to have damages assessed.

And plaintiff avers, that if not restrained, said common council will proceed to assess and charge to the plaintiff at least *one-half* the cost of making said grading and paving.

All which actings and doings of the defendants are contrary to equity and good conscience, and if not enjoined, will produce great and permanent injury and injustice to the plaintiff.

Therefore, plaintiff prays that upon the final hearing, the defendants may be perpetually enjoined from opening, excavating and otherwise improving said alley, and for all other proper relief; and until the final hearing, the plaintiff prays a temporary restraining order.

*[(Signature and verification as in Form No. 5915.)]*¹

b. Answer to Complaint.

Form No. 19171.

(Precedent in *Evansville v. Evans*, 3 Ind. 232.)²

*[(Commencement as in Form No. 1323.)]*¹

The said defendants, for answer to the plaintiff's complaint, admit that said block, in the complaint mentioned, was originally platted

1. The matter to be supplied within [] will not be found in the reported case. 2. This answer was held sufficient.

by *Robert M. Evans*, as a part of the eastern enlargement, and that no alley was designated or laid off in said block by said *Evans*; but they say that said *Robert M. Evans* departed this life in the year 1847, and that subsequent to his death, *De Witt C. Evans* and others became owners by devise of said block, subject to plaintiff's life estate therein, and that in the year 1858, said *De Witt C. Evans* and his co-devisees, with the full knowledge and consent of plaintiff, opened and laid out said alley through the whole width of said block, in such manner as to make it correspond exactly with the other alleys in said enlargement, and with the alleys in the donation enlargement of *Evansville*, which adjoined said eastern enlargement; and afterward said *De Witt C. Evans* and his co-owners of said block divided the same into lots by metes and bounds, all of which said lots fronted on *Main street* or on *Locust street*, and abutted on said alley; and said *De Witt* and plaintiff made, executed and delivered to divers persons leases to said lots, which leases extended to and covered a period of *ninety-nine* years, and all of them described said alley, and described said lots as extending in the rear to said alley, and from, after and during said year 1858, with the full knowledge and consent of said *De Witt*, who is now dead, having departed this life in the year 1864, and with the full knowledge and consent of the plaintiff, and said alley has always been used, traveled, and gone through and over by all the citizens of *Evansville*, by the public generally, and by the tenants holding under said leases; which user by the citizens, public and tenants has been open, notorious and exclusive of the use of the said alley by the owners thereof; whereupon defendants ask that said injunction be dissolved and judgment for their costs.

[(*Signature and verification as in Form No. 7228.*)]¹

8. Notice to Land-owner to Drain Swamp Lands Through Which Highway Passes.

Form No. 19172.²

(Minn. Stat. (1894), § 1907.)

State of *Minnesota*, county of *Martin*.

Mr. *John Doe*,

Notice is hereby given, that whereas it appears that the affidavit of overseer of road district No. 2, in the town of *Fairmont*, that the road running from (*stating point of beginning*) to (*stating point of termination*) runs into or passes through a swamp (or *bog* or *pond* or *low land*), which swamp (or *bog* or *pond* or *low land*) is situated on section 2 in said town, and that it is the opinion of said overseer that a ditch or ditches should be opened through land belonging to (*stating name of owner of land*) for the purpose of draining said swamp, therefore you are hereby notified that the board of town supervisors will, on the *tenth* day of *June*, A. D. 1899, personally examine the

1. The matter to be supplied within [] will not be found in the reported case.

2. *Minnesota*. — Stat. (1894), § 1907.

premises over which said ditches are to pass, and decide upon said application, and will also hear any objections which may be made in the matter, and will consider the amount of damages which, in their opinion, will be just compensation to the owners of land in consequence of the opening of such ditch or ditches.

Richard Roe, Chairman of the Board of Supervisors.

Charles Adams, Clerk of Town of *Martin*.

Form No. 19173.¹

(S. Dak. Stat. (1901), § 1836.)

State of *South Dakota*, }
County of *Lincoln*. } ss.

Mr. Richard Roe:

Notice is hereby given that whereas it appears by the affidavit of *John Doe*, overseer of road district No. 2, in the town of *Canton*, that a road running from (*stating point of beginning*) to (*stating point of termination*) runs into or passes a swamp, bog, pond or low land, which swamp, bog, pond or low land is situated in section —, in said town, and that it is the opinion of said overseer that a ditch or ditches should be opened through land belonging to you for the purpose of draining said swamp; therefore you are hereby notified that the board of town supervisors will on the *tenth* day of *June*, A. D. 1902, personally examine the premises over which said ditch or ditches are to pass and decide upon said application, and will also hear any objection which will be made in the matter and will consider the amount of damages which in their opinion will be just compensation to the owners of land in consequence of the opening of such ditch or ditches.

Dated this *twentieth* day of *May*, A. D. 1902.

Richard Roe,

Chairman of the Board of Supervisors.

Calvin Clark, Clerk of Town of *Canton*.

9. Application for County Road Money for Improvement of Road Where Revenues of Town are Insufficient.

Form No. 19174.²

To the Honorable Board of County Commissioners of *Martin* County
Minnesota:

The undersigned, supervisors of the town of *Fairmont*, in the county of *Martin*, respectfully represent that the public convenience and necessities require the repair and improvement of the public highway leading from the town of *Fairmont*, in the town of *Blank*, in said county, where the same is located, upon and over (*describing portion of the road which requires repair*), in the town of *Fairmont*; that it is necessary, in order to render said road safe and suitable for public use, that the sum of *eight hundred* dollars be expended thereon, in (*stating nature of repair required*); that the revenues of said

1. *South Dakota*. — Stat. (1901), 1836. 2. *Minnesota*. — Stat. (1894), § 1846
et seq.

town are wholly insufficient therefor: Wherefore, your petitioners pray that the sum of *three hundred* dollars be appropriated by you from the road and bridge funds of the county, applicable to such purpose, to aid in making said improvements and repairs.

Dated the *first* day of *June*, 1899.

John Doe, Chairman.
Richard Roe, Supervisor.
Samuel Short, Supervisor.

Attest: *James Clark*, Town Clerk.

10. Appointment of Road Overseer.

Form No. 19175.¹

The State of *Alabama*, }
Jefferson County. } To any Sheriff of the State of *Alabama*:
 To *John Doe*, *Samuel Short* and *William West*, Apportioners for Precinct No. 2.

Take notice that you were appointed on the *tenth* day of *February*, 1899, by the *Commissioners'* Court of said county, apportioners of public roads of Precinct No. 2.

The law requires you to appoint an overseer for each road precinct in your precinct, which you will find below, between the ages of *21* and *50* years; but you must not commission them. It requires you to return a list of such overseers appointed by you to the undersigned, *Probate Judge*, within *thirty* days from your appointment. To aid you in your duties, you are herewith furnished with blanks, and all you have to do is to insert the person's name you appoint. Keep a copy and return this to the undersigned.

On the (*naming road*) road from (*stating point of beginning*) to (*stating point of ending*), *Francis Fern* is hereby appointed overseer.

On the (*naming road*) road from (*continuing as above until all the appointees have been named*).

For your other duties as apportioners, I refer you to section 2468, page 732, of the Code of Alabama of 1896, and page 6, Pamphlet of Road Laws of this county.

By order of the *Commissioners'* Court.

Witness my hand this *fifteenth* day of *February*, 1899.

John Marshall, Judge of *Probate*.

The apportioners will each sign the following certificate and date the same:

The State of *Alabama*, }
Jefferson County. }

We, the undersigned, apportioners for Precinct No. 2, do hereby certify that we appointed the persons whose names appear above as overseers of the different foregoing road precincts, on the roads hereinbefore mentioned.

Given under our hands this *twentieth* day of *February*, 1899.

John Doe,
Samuel Short, } Apportioners.
William West, }

Form No. 19176.¹

Appointment of Road Overseer.

State of Arkansas, } In Pulaski County Court,
County of Pulaski. } ss. March Term, 1899.

Road District No. 2, Little Rock Township.

It is ordered by the court that *John Doe* be appointed overseer of road district No. 2, of *Little Rock* township, until the *first* day of *January*, 1901, on the road leading from (*stating place*) to (*stating place*), beginning (*specify the section of the road allotted to the overseer*), and that he call on *Abraham Kent*, Esq., appointing justice, for a list of his hands.

A true copy from the record.

Attest: *Calvin Clark*, Clerk.*Daniel Church*, D. C.

11. Notice to Overseer of Appointment.

Form No. 19177.²

The State of Alabama, }
Jefferson County. } Probate Court.

To any Sheriff of said State Greeting:

You are hereby commanded to notify *John Doe* that on the *first* day of *December*, 1902, he was appointed overseer of the (*stating name of road*) road, from (*stating point of beginning*) to (*stating point of ending*), by *Richard Roe*, *Samuel Short* and *William West*, apportioners for precinct No. 2, and these are therefore to commission the said *John Doe* as such overseer of said road.

Road is the *first* grade.Witness my hand this *tenth* day of *December*, 1902.*John Marshall*, Judge of Probate.

12. Oath of Road Overseer.

Form No. 19178.

State of Colorado, }
County of Ouray. } ss.

I, *John Doe*, do solemnly swear, by the ever living God, that I will support the constitution of the United States, and of the state of *Colorado*, and faithfully perform the duties of the office of road overseer upon which I am about to enter.

John Doe.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1899.

Abraham Kent, Justice of the Peace.

13. Bond of Road Overseer.

Form No. 19179.³

Know all men by these presents, that we, *John Doe*, as principal, and *Samuel Short* and *William West*, as securities, all of *Ouray*, in the

1. *Arkansas*. — Sand. & H. Dig. (1894). §§ 6748, 6750. 3. *Colorado*. — Mills' Anno. Stat. (1891), § 3952.

2. *Alabama*. — Civ. Code (1896), § 2454.

county of *Ouray*, and state of *Colorado*, are held and firmly bound unto the people of the state of *Colorado*, for the use of said *Ouray* county, in the penal sum of *ten thousand* dollars, current money of the United States, for the payment of which, well and truly to be made, we do bind ourselves and each of us, our heirs, executors and administrators, and each of them, jointly, severally and firmly by these presents.

Signed with our hands, and sealed with our seals, this *tenth* day of *May*, A. D. 1899.

The condition of this obligation is such, that whereas, the above bounden *John Doe* was, on the *first* day of *May*, 1899, duly elected road overseer for road district No. 2, in the county of *Ouray* aforesaid; now, therefore, if the said *John Doe* shall faithfully discharge the duties of his office as such road overseer, and shall honestly and faithfully account for and pay over all moneys that may come to his hands by virtue thereof, and render a just and true account of the same when thereupon required, and if he shall well and truly perform all and every act and duty enjoined on him by virtue of said office, according to the laws of the state of *Colorado*, to the best of his skill and ability, then this obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered }

in presence of

Francis Fern. }

John Doe. (SEAL)

Samuel Short. (SEAL)

William West. (SEAL)

Approved by the board of county commissioners this *tenth* day of *May*, A. D. 1899.

John Adams,

Charles Church,

Henry Blake,

} County Commissioners.

(Justification of sureties.)

14. Appointment of Apportioning Justice.

Form No. 19180.¹

Appointment of Apportioning Justice.

The State of *Arkansas*, } ss.
County of *Pulaski*.

To *Abraham Kent*, Esq.:

You are hereby notified that on the *first* day of *February*, A. D. 1899, you were appointed by the County Court of *Pulaski* county to apportion hands of *Little Rock* township to the several road overseers in said township.

Given under my hand, as clerk of said court, this *first* day of *February*, A. D. 1899.

Calvin Clark, Clerk.

By *Daniel Church*, Deputy Clerk.

1. *Arkansas*. — Sand. & H. Dig. (1894), § 6792.

15. Notice by Overseer to Work on Road.

Form No. 19181.¹

Overseer's Warning Order.

State of *Arkansas*, }
 County of *Pulaski*. }
 To *Richard Roe*:

You are hereby warned to work the county road, in road district No. 2, *Little Rock* township, on the *first*, *second* and *third* days of *March*, 1899. Report for duty at the (*stating place*), at 7 o'clock A. M., and bring with you (*specify tools required*).

Dated this *twenty-third* day of *February*, 1899.

John Doe, Overseer.

N. B. — You must appear on the day and at the place above mentioned. I will not call to collect.

Form No. 19182.²

State of *Colorado*, }
Ouray County. } ss.

Ouray County Road District No. 2, to *Richard Roe*:

You are hereby notified to be and appear at (*stating place*), on the county road, at *seven* o'clock A. M., on the *tenth* day of *June*, 1899, with the following tools, to wit: (*specifying tools*), to work upon said county road in accordance with the statute.

Witness my hand this *fifth* day of *June*, 1899.

John Doe, Road Overseer.

Form No. 19183.³

The State of *Texas*, }
 County of *Freestone*. }

To Mr. *Samuel Short*, greeting:

You are hereby notified to appear at (*stating place*), on the (*designating road*) road, in road precinct No. 2 in said county, on the *tenth* day of *May*, A. D. 1899, then and there to perform 3 days' work upon the following road, viz: (*describing road*).

Witness my hand on this the *first* day of *May*, A. D. 1899.

John Doe, Road Overseer.

Road Precinct No. 2.

16. Complaint of Failure to Work on Road.

Form No. 19184.⁴

(Commencement as in Form No. 6717.)

On this day personally appeared before the undersigned authority *John Doe*, who, after being by me duly sworn, deposes and says that heretofore, on the *tenth* day of *June*, in the year of our Lord one

1. *Arkansas*. — Sand. & H. Dig. (1894), §§ 6770, 6771.

2. *Colorado*. — Mills' Anno. Stat. (1891), § 3955.

3. *Texas*. — Rev. Stat. (1895), art. 4740.

4. *Texas*. — Pen. Code (1895), art. 491.

thousand eight hundred and *ninety-nine*, in the said county of *Freestone* and state of *Texas*, one *Richard Roe*, late of said county and state, was then and there liable under the law to work upon the public roads, and to work upon that part of the (*designating road*) public road leading from (*stating point*) to (*stating point*), in road precinct No. 2 (*designating road*), in said county of *Freestone*, and was legally summoned by *John Doe*, the road overseer of said road precinct, to attend at (*stating place*), on said road, on the *tenth* day of *June*, A. D. 1899, to work on said road; and the said *Richard Roe* did then and there wilfully refuse to attend at such time and place, either in person or by substitute; and did wilfully fail, on or before said day for which he was so summoned to attend and work said road, to pay to said overseer the sum of *one* dollar per day for each day he had been notified to work on said road, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state.

John Doe.

Sworn to and subscribed before me this *first* day of *July*, A. D. 1899.

Abraham Kent, J. P.

Precinct No. 2, *Freestone* Co., *Texas*.

17. Warrant for Arrest for Failure to Work on Road.

Form No. 19185.¹

The State of *Alabama*, }
Jefferson County. } *Justice's Court*, Precinct No. 2.

To any Constable of said County:

You are hereby commanded to arrest *Richard Roe* and bring him before me, to answer the State of *Alabama* for failing or refusing, after legal notice, to work the public road, either in person or by substitute, without a sufficient excuse therefor, in this county, on the following days: (*specifying days*), he being liable to road duty.

Witness my hand this *tenth* day of *August*, 1899.

Abraham Kent, Justice of the Peace.

Form No. 19186.²

State of *Florida*, }
Dade County. } In the name of the State of *Florida*.

To any lawful Officer of said County:

Whereas *John Doe*, road supervisor of district No. 2, in said county, has this day made oath before me, in writing, that *Richard Roe* has been duly notified to work on the public roads of said county and has failed or refused to work on said roads: Now, therefore, you are hereby commanded to arrest said *Richard Roe* and bring him before me, to show cause, if any he has, why he failed or refused to work on said roads.

Given under my hand and seal this *tenth* day of *April*, A. D. 1899.

Abraham Kent, Justice of the Peace. (SEAL)

1. *Alabama*. — Crim. Code (1896), § 5392. 2. *Florida*. — Rev. Stat. (1892), § 633.

18. Citation to Road Overseer to File Report.

Form No. 19187.¹

The State of *Texas*, } In *County Commissioners'* Court,
County of *Freestone*. } *Freestone County, June Term, 1899.*
To the Sheriff of *Freestone County*, Greeting:

You are hereby commanded that you summon *John Doe* to appear before the honorable *County Commissioners'* Court, in and for the county of *Freestone*, at the court-house thereof, in *Fairfield*, on the *tenth* day of *June, 1899*, then and there to file report and make settlement with said court as road overseer of precinct No. 2, and show cause why said report has not been made as required by law.

Herein fail not, but of this writ make due return, showing how you have executed the same.

Witness my official signature, at office, this *first* day of *June, 1899*.

Calvin Clark, Clerk,
County Court, Freestone Co., Texas.

19. Petition by Taxpayer for Permission to Make and Repair Highways in Its Township.

Form No. 19188.²

(Precedent in *Lehigh Valley Coal Co.'s Appeal*, 164 Pa. St. 44.)³

[To the Honorable Justices of the Court of *Quarter Sessions* for *Luzerne County*:

The petition of the *Lehigh Valley Coal Company*, a corporation organized and existing under the laws of the state of *Pennsylvania*, respectfully represents to the court:]⁴

That it is the owner of property assessed and taxed for road purposes in the township of *Plains*. That the approximate number of miles of public road in said township are *twenty*, and your petitioner is desirous and is able to lay out, make, open, amend and repair the public highways and bridges of said township or road district wholly at its own expense for the ensuing township fiscal year beginning *March 5, 1894*, and to pay the other expenses of said township or road district as provided for under the provisions of the act of *June 12, 1893*, entitled "An act enabling the taxpayers of townships and road districts to contract for making, at their own expense, the roads and paying the salaries of township or road district officers and thereby preventing the levy and collection of road taxes therein," without any right against or claim upon said township or road district for or by reason of the materials, labor or moneys so furnished.

Your petitioner therefore prays the court for an order or decree to the supervisors of said *Plains* township, on behalf of such township, to enter into a contract with the said *Lehigh Valley Coal Company*, whereby your petitioner will bind itself:

1. *Texas*.—Rev. Stat. (1895), art. 4752.

2. *Pennsylvania*.—Laws (1893), No.

3. This petition was held sufficient.

4. The matter enclosed by [] will not be found in the reported case.

1. To open, make, amend and repair the public highways and bridges of said township for the fiscal year beginning *March 5, 1894*, in a lawful and workmanlike manner, wholly at the expense of your said petitioner and without creating thereby any claim upon or right against said township for or by reason of the materials, labor or money for such purpose employed.

2. To indemnify and save harmless the said township from all claim for damage, cost or expense of whatever kind for or by reason of any act or omission of said petitioner whereby any claim, suit or other demand may be set up or recovered against the said township.

3. To pay within *sixty* days from said *March 5, 1894*, to the township clerk of said township, the sum of *fifty* dollars, to the auditors of said township each the sum of *twenty-five* dollars, to an attorney to be selected by the supervisors of said township as counsel for said township, the sum of *fifty* dollars, and to the supervisors of said township each the sum of *two hundred and fifty* dollars. In consideration of which obligations to be assumed and performed by said petitioner, the said supervisors, on behalf of such township, will stipulate that the said township will not assess, levy or collect any taxes for road purposes during the fiscal year beginning *March 5, 1894*.

[(Signature of petitioner.)]¹

III. INJURIES TO THE PERSON OR PROPERTY CAUSED BY DEFECTS OR OBSTRUCTIONS IN HIGHWAYS.

1. Action Against Municipal Corporation.

a. Notice of Claim for Damages.

Form No. 19189.

(Precedent in *Breen v. Cornwall*, 73 Conn. 311.)²

Cornwall Bridge, Conn., June 24, 1897.

To the Selectmen of Town of *Cornwall*, Gentlemen:

I hereby notify you that myself and a friend, Miss *Mary McCormick*, of *Bridgeport*, while driving on the road between the *Warren Turnpike* and *Richard Brophy's* house, I think the road is familiarly called the "*Cook Road*," near the ruin of an old house, we were thrown out of our wagon on that ledge of rocks in the road. Our wagon was broken and ourselves very much injured. As it is beyond dispute that the condition of the road was the cause of the accident, I shall hold the town of *Cornwall* responsible for the injuries done myself and wagon. That whole road is in a terrible condition. I should judge there has not been a spoonful of dirt put on it in more than a year. The bushes and grass hide holes, rocks and other dangers, so that a driver cannot see danger until he meets it.

We were several times nearly thrown out before we came to those rocks, so were driving very slowly and carefully when the accident occurred, otherwise we should have been killed. I was thrown out headlong and struck on the rocks, hurting my right shoulder, neck

1. The matter to be supplied within [] will not be found in the reported case. 2. This notice was held sufficient.

and back. Miss *McCormick* hurt her hip and wrenched her ankle, which at present is swollen to twice its usual size. In fact, we can neither of us tell exactly yet the extent of our injuries, as the accident occurred yesterday, *June 23, 1897.*

Very respectfully,
Julia C. Breen.

Form No. 19190.

(Precedent in *McNerney v. East Livermore*, 83 Me. 450.)¹

To the Municipal Officers of *East Livermore*, in the County of *Androscoggin*:

You are hereby notified that I claim damages for bodily injuries received by me by reason of a defective sidewalk or crossing on *Depot street*, in *Livermore Falls* village, in the evening of the *6th* day of *September*, A. D. 1889. The nature of the injury which I received was a bruise upon my right leg and knee, a wrench of the same, and an injury to my back.

The nature and location of the defect was a settling and displacement of the sidewalk over the causeway, or near the end of the causeway opposite the *Ezra Hilton* block, and in passing over the same, without previous notice of the defective condition, I stepped between the end of the crossing and the sidewalk, and received the injuries above described.

Amount of damages claimed, \$2,000.

Dated this *14th* day of *September*, A. D. 1889, at *Livermore Falls*.

Mrs. Lizzie McNerney.

Form No. 19191.

(Precedent in *Chapman v. Nobleboro*, 76 Me. 423.)¹

Damariscotta, May 15, 1883.

To the selectmen of *Nobleboro*, gentlemen:

You are hereby notified that on the *second* day of *May*, 1883, I met with an injury caused by a defect in the road leading from *Genthner's* corner, in *Nobleboro*, to *Jefferson*, at a point in *Nobleboro* about *sixty* or *eighty* rods northerly of the residence of *Cyrus Winslow* and *Judson Genthner*. The defect consisted of a hole in the traveled part of said road, which had been worn or gullied out *ten* inches below the surface of a long root over which the travel passed, into which the wheel of the carriage in which I was riding dropped, and between the spokes of which the projecting end of the root was thrust, causing the carriage to suddenly stop. The carriage was broken, and I was thrown violently out of the carriage upon the ground, striking my face and chest, wrenching my neck and shoulders, so that the same were severely strained and sprained, and also severely injuring my spine, and jarring and injuring my whole person; by reason of which I have been and still am suffering great pain and distress.

For these injuries I claim from the town of *Nobleboro* the sum of *two thousand* dollars as damages.

Laura E. Chapman.

A. P. Gould, for the Plaintiff.

1. This notice was held sufficient.

Form No. 19192.

(Precedent in *Wadleigh v. Mount Vernon*, 75 Me. 80.)¹

To the town officers of the town of *Mount Vernon*, in the county of *Kennebec*, and state of *Maine*:

You are hereby notified that *Alton M. Wadleigh*, of *Belgrade*, on the *thirtieth* day of *September*, A. D. 1879, at about the hour of *six and one-half* o'clock in the *afternoon* of that day, was thrown violently from his carriage, to wit: wagon, and seriously injured in the thigh, and internally injured in his right lung, and otherwise injured, by being violently shaken up and jarred in his fall to the ground, caused by his horse stepping into a defect, to wit: a hole in the highway at the small water course which crosses the bog road at a point about *seventy-five* rods easterly from the *Ingraham* brook in said *Mount Vernon*; said defect being a hole in the middle of said bog road at said water course, about *four* feet long, *two to three* feet deep, and *four to eight* inches wide; his horse was also at same time violently thrown to the ground, and received serious injury in the right fore leg, and foot and shoulder, for which injury to himself and horse the said *Alton M. Wadleigh* claims the sum of *five thousand* dollars (\$5,000) damages therefor. And you are hereby notified to settle and make payment of the same forthwith, *October 6*, 1879.

Alton M. Wadleigh,

By *E. W. Whitehouse*, his Attorney.

Form No. 19193.

(Precedent in *Connors v. Lowell*, 158 Mass. 336.)¹

Lowell, Mass., Feb. 2nd, 1891.

To the City of *Lowell*, in the County of *Middlesex* and Commonwealth of *Massachusetts*, a municipal corporation:

You are hereby notified that on the *tenth* day of *January*, 1891, at *ten* o'clock in the *evening* of said day, when I was walking, in the exercise of due care, on the sidewalk on the westerly side of *Central* street in said city, and nearly opposite premises on the corner of *Central* and *Centre* streets occupied by *William B. Spalding* and numbered (1) *one* on said *Centre* street, I fell and sustained severe bodily injuries, and the fall was occasioned by the rough, uneven, hubby, and ridgy condition of said sidewalk where I fell, by reason of an accumulation of ice and snow thereon. This notice is given for the purpose of fixing the liabilities of said city, as I claim compensation for injuries sustained by me as aforesaid.

Mary Connors,

By *John J. Pickman*, her Atty.

Form No. 19194.

(Precedent in *Spellman v. Chicopee*, 131 Mass. 443.)¹

[To the Selectmen of the Town of *Chicopee, Massachusetts*:]²

Respectfully represents *Catherine E. Spellman*, wife of *Melden W. Spellman*, both of said *Chicopee*, residing in a tenement, No. 36 *Per-*

1. This notice was held sufficient.

2. The matter enclosed by [] will not be found in the reported case.

kins street, that on the 24th day of *November*, A. D. 1880, about five o'clock in the *afternoon*, while she was walking on the sidewalk on the southerly side of *Exchange* street, near the store occupied by *H. Coggs* as a stove store, she was injured; that the causes of her injury and the circumstances are as follows: She had just left the said store and stepping on the sidewalk, that the walk was out of repair, and was coated with ice in front of the store, and was very slippery and unsafe, by reason of which she fell; that the injuries consist of a sprained and bruised foot, ankle and leg, and internal injuries, and injuries to her head; wherefore she claims of the said inhabitants compensation in damages.

Catherine E. Spellman,
By *H. W. Ely*, her Attorney.

Form No. 19195.

(Precedent in *Griswold v. Ludington*, 116 Mich. 404.)¹

The Common Council of the City of *Ludington, Mich.*:

Gentlemen: You are hereby notified that on the 19th day of *October*, 1896, at about the hour of 7 o'clock in the *evening*, I was seriously and permanently injured and disabled by falling into and through a hole or opening in the sidewalk on the south side of *Foster* street, near the intersection of *Charles* street, in the city of *Ludington*, at a point in front of the building owned by *August Tiedemann* and *William C. Ungers*, and about 43 feet west of the point where the south line of *Foster* street intersects with the west line of *Charles* street; that said injury and disability were caused by a defect in the sidewalk on said street, at the point designated, produced by a broken plank; that the manner of said injury was as follows: I was passing along said street, upon said sidewalk, with all due care and caution, and without any negligence on my part, the night being very dark and stormy, and I being almost a stranger in the city, and, without any fault on my part, I unavoidably stepped with my right foot into said opening or hole in the sidewalk, and fell heavily upon and along the said sidewalk; and, the sidewalk at the point aforesaid being raised considerably above the natural surface of the ground, my foot went down the entire length of my right leg, and, the sidewalk being wet and slippery, my left foot slipped and slid upon the sidewalk, so that I fell with my whole weight upon the parts of my body between the legs, very greatly bruising and injuring the testicles, scrotum, spermatic cord, and the parts adjacent to the rectum, and also greatly bruising, straining, and contusing the hips and the lower parts of the spine. The injury to the genital and urinary organs was such that I have been subject to great pain and distress ever since, and have been unable to stand upon my feet without supporting the said parts by means of a suspensory bandage;

1. It was held that in order to hold the city liable the claim should have been verified by the claimant or should have been certified by an officer of the

city as required by section 20, chapter 8, of the Acts of 1895. No objection was made to the form of the notice.

and the muscles, nerves, and ligaments of the rectum were so bruised, strained, and injured that it has been difficult, and at times impossible, to control the action of the bowels; and the hips and spine have been so strained, shocked, bruised, and contused that, in consequence of the said various injuries, I was confined to my bed, and under the charge and care of physicians, for a period of *three* weeks, and am still able to walk only with difficulty and much pain, and by the aid of crutches.

There were no other witnesses present at the time of said injuries.

By reason of said injuries so received through the said defective sidewalk I have been put to great cost and expense for doctor's bills, for nurses and attendance, for medicine and suspensory bandages, crutches, and other appliances, and for other large outlays; and have been disabled from performing my professional work as a minister of the gospel at the village of *Custer*, where I reside; and have been caused to suffer very great pain and distress of body, and also great pain, anxiety, and distress of mind, and have been permanently and seriously injured and disabled thereby; on account of all which injuries, bruises, wounds, and disabilities, costs, expenses, charges, loss of time and services, pains, sufferings, and permanent injuries, I claim damage from the said city of *Ludington* to the amount of \$5,000.

You are further notified that I have appointed Messrs. *Cutcheon & Sworthout*, 831 Michigan Trust Company Building, Grand Rapids, Mich., to represent me and to act for me as my attorneys in all matters pertaining to this claim.

Very respectfully,

A. Linley Griswold.

Dated December 17, 1896.

Form No. 19196.

(Precedent in *Tinkham v. Stockbridge*, 64 Vt. 481.)¹

To *O. G. Richardson*, *Wm. H. Edmunds* and *Charles Cobb*, selectmen of the town of *Stockbridge*:

You are hereby notified that on the *21st* day of *March*, A. D. 1890, at said *Stockbridge*, one *Wells Blanchard*, of said *Stockbridge*, was driving a span of horses, belonging to us, down the hill in said *Stockbridge*, between the so-called *Stony Brook* bridge and the dwelling-house of *Emmans Knowlton*, in said *Stockbridge*, that said horses then and there on said hill became frightened and unmanageable and ran away and got away from said *Blanchard* and ran towards said *Stony Brook* bridge and on to the abutment thereof, and for want of proper and sufficient muniment or guard on said abutment, one of the horses went off said abutment and fell a distance of from *ten* to *fifteen* feet, thereby killing said horse. Said horse fell from the *first* abutment of said bridge, on the right-hand side, as one would go from *Rochester* to *Bethel*, about *five* feet from the end of the bridge, nearest the junction of the *Stony Brook* road with the so-called river stage road.

1. This notice was held sufficient.

And you are hereby notified that we shall claim satisfaction of the town of *Stockbridge* for the injury and damage occasioned to us as aforesaid.

Wm. Tinkham & Son.

b. Complaint, Declaration or Petition.¹

1. Requisites of Complaint, Declaration or Petition, Generally.—For the formal parts of a complaint, declaration or petition in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244; PETITIONS, vol. 13, p. 887.

The plaintiff must allege facts showing defects or obstructions existing in the highway through the fault of the defendant, whereby the plaintiff has suffered injury. *Perry v. Barnett*, 65 Ind. 522; *Goshen v. Alford*, 154 Ind. 58.

Duty of Defendant to Repair—Generally.—A general allegation that it was the duty of the defendant to repair the highway is, as a general rule, sufficient. *Montgomery v. Wright*, 72 Ala. 411; *Griswold v. Gallup*, 22 Conn. 208; *Stedman v. Southbridge*, 17 Pick. (Mass.) 162.

Where, however, the liability imposed upon the municipality for injuries resulting from defective highways is special, facts which show the existence of this special liability must be set forth. *Barbour County v. Horn*, 48 Ala. 649; *Smith v. Wright*, 27 Barb. (N. Y.) 621.

At Time of Accident.—It must be averred that it was the duty of the defendant to keep the highway in repair at the time when the accident happened. *Mechanicsburg v. Meredith*, 54 Ill. 84; *Corey v. Bath*, 35 N. H. 530.

At Place of Accident.—That it was the duty of the defendant to keep the highway in repair at the place where the accident happened must be stated. *Kellogg v. Northampton*, 4 Gray (Mass.) 65.

Negligence of Defendant—Generally.—Negligence on the part of the municipal corporation must be charged. *Rushville v. Poe*, 85 Ind. 83; *Groveport v. Bradfield*, 2 Ohio Cir. Ct. 145, 1 Ohio Cir. Dec. 411; *McCoull v. Manchester*, (Va. 1888) 4 S. E. Rep. 848. And an averment of negligence on the part of the officers of the corporation, where it is not shown that the corporation is liable for the negligence of such officers, is not sufficient. *Abbett v.*

Johnson County, 114 Ind. 61; *Ederly v. Concord*, 59 N. H. 341.

See, generally, the article NEGLIGENCE, vol. 13, p. 1.

At Time of Accident.—That the defendant was guilty of negligence at the time the accident occurred must be stated. *Cotter v. Lindgren*, 106 Cal. 602; *Bluffton v. Mathews*, 92 Ind. 213.

Plaintiff's Contributory Negligence.—To the effect that the plaintiff need not negative contributory negligence on his part, see as follows: *Orlando v. Heard*, 29 Fla. 581; *Reading Tp. v. Telfer*, 57 Kan. 798; *Corey v. Bath*, 35 N. H. 530; *Waggner v. Point Pleasant*, 42 W. Va. 798; *Sheff v. Huntington*, 16 W. Va. 307.

But see *contra* *Mount Vernon v. Dusouchett*, 2 Ind. 586; *Riest v. Goshen*, 42 Ind. 339; *Fernbach v. Waterloo*, 76 Iowa 598.

See also the title CONTRIBUTORY NEGLIGENCE, vol. 5, p. 458.

Cause of Injury.—The cause of injury must be specifically set forth. *Williamsport v. Smith*, 2 Ind. App. 360; *Plummer v. Milan*, 70 Mo. App. 598; *Bodah v. Deer Creek*, 99 Wis. 509.

Description of Defect.—As a general rule, a general description of the defect in a highway is sufficient. *Bartlett v. Hookset*, 48 N. H. 18; *Corey v. Bath*, 35 N. H. 530; *Stone v. Pendleton*, 21 R. I. 332; *Barney v. Hartford*, 73 Wis. 95.

Time When the Accident Happened must be Stated.—*Tripp v. Lyman*, 37 Me. 250; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114.

Place where the accident happened should be pointed out with certainty. *Orlando v. Heard*, 29 Fla. 581; *Bryan v. Macon*, 91 Ga. 530; *Springfield v. Doyle*, 76 Ill. 202; *Columbus v. Strassner*, 124 Ind. 482; *Snow v. Adams*, 1 Cush. (Mass.) 443; *Whoram v. Argentine Tp.*, 112 Mich. 20; *Corey v. Bath*, 35 N. H. 530.

Defendant's Notice of Defect.—Where the defect resulted from the wrongful act of a third person, it must be shown that the defendant had notice of the

defect. *Montgomery v. Wright*, 72 Ala. 411; *Orlando v. Heard*, 29 Fla. 481; *Spiceland v. Alier*, 98 Ind. 467; *Turner v. Indianapolis*, 96 Ind. 51; *Elkhart v. Ritter*, 66 Ind. 136; *Higert v. Greencastle*, 43 Ind. 574; *Noble v. Richmond*, 31 Gratt. (Va.) 271; *Cuthbert v. Appleton*, 22 Wis. 642. Unless the municipality is by statute liable regardless of notice. *Vaughan v. Buffalo, etc.*, R. Co., 72 Hun (N. Y.) 471; *Chapman v. Milton*, 31 W. Va. 384. But where the defect has resulted from acts of the municipality an averment of notice of the defect is unnecessary. *Allen County v. Bacon*, 96 Ind. 31; *Madison County v. Brown*, 89 Ind. 48; *Indianapolis v. Scott*, 72 Ind. 196; *Austin v. Ritz*, 72 Tex. 391.

Notice of Injury.—In some states, it is provided by statute that a municipal corporation shall not be liable for injuries caused by a defect in a bridge or highway, unless notice of the plaintiff's claim for damages is served on the corporation or its officers within a stated time. In these jurisdictions, the general rule is that service of such notice must be alleged in the complaint. *Schroeder v. Colbert County*, 66 Ala. 137; *Low v. Windham*, 75 Me. 113; *Reining v. Buffalo*, 102 N. Y. 308; *Eron v. Steven's Point*, 85 Wis. 379; *Watson v. Appleton*, 62 Wis. 267; *Darsey v. Racine*, 60 Wis. 292; *Benware v. Pine Valley*, 53 Wis. 527.

In *Vermont*, it is held that service of notice need not be alleged, as the notice is not part of the cause of action. *Matthie v. Barton*, 40 Vt. 286; *Kent v. Lincoln*, 32 Vt. 591.

Setting Out Notice.—The notice given need not be set out in the complaint. *Cairncross v. Pewaukee*, 78 Wis. 66.

Precedents.—In *Albritton v. Huntsville*, 60 Ala. 486, the complaint was as follows:

"The plaintiff claims of the defendant, a municipal corporation under the laws of said state, *twelve thousand* dollars, as damages, because the defendant failed to do its duty, and erect and put up a barrier, railing, or guard, along the north side of *Spring* street, a public highway in said city, and south of, and opposite the '*Huntsville Hotel*,' to prevent travelers and pedestrians from falling from the street or sidewalk, over a precipice, declivity, there being and situated, about the distance of *eight* feet, to the basement or foundation of said hotel; whereby

the plaintiff, who did not know of the existence of said precipice, in consequence of the said negligence of the defendant, on the night of the *15th* of *November*, 1876, necessarily and unavoidably fell from said street, over said precipice or declivity, without fault of the plaintiff, and broke his leg, so that it had to be, and was, on the *16th* of *November*, 1876, cut off above the knee.

2. Plaintiff claims of defendant *twelve thousand* dollars damages, because it was, and is, the duty of the defendant to keep the streets of said city in repair, and to put up guards or railings, and, at night, to keep lights burning, opposite and near to any precipice, or dangerous declivity, in and contiguous to the streets and sidewalks of said city. On the north side of, and contiguous to *Spring* street, which was, at the time of the grievances herein alleged, and now is, a public street and highway of said city, for all persons to pass and repass, go and return upon, there was, and has been for several years, and now is a dangerous precipice or declivity, opposite to which the defendant had, knowing the existence and situation of said precipice or declivity, wrongfully and negligently failed and refused to put any guard or railing, and near to which the defendant had failed to have any or sufficient lights to show and expose said precipice or declivity. The plaintiff, who did not know of the existence of said precipice, on the night of the *15th* of *November*, 1876, while passing along said *Spring* street, on foot, in consequence of the said negligence of the defendant in failing to place guards or railings between said precipice or declivity and said street, unavoidably and necessarily fell from said street to the bottom of said precipice, a distance of about *six* feet, and by such fall broke his leg, so that it had to be, and was, amputated above the knee on the following day; and he, the said plaintiff, became and was sick, sore, lame, diseased, and disordered, and remained and continued for a long space of time, to-wit: from thence, hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business, by him during that time to be performed and transacted; and was also, by means of the

premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend, a large sum, to-wit: the sum of *two thousand* dollars, in and about endeavoring to get healed and cured of the said wounds, sickness and disorder; and was also, by means of the premises, forced and obliged to pay and expend, and did pay and expend, a large sum, to-wit: *two thousand* dollars for board, lodging and attention while so confined by said injuries; and was also forced to expend, and did expend and pay out, a large sum of money, to-wit: *two thousand* dollars, in bringing a suit against said defendant for said injuries; and was also forced to pay out and expend a large sum of money, to-wit: *two thousand* dollars, to have the business and work of the plaintiff done, which plaintiff was by the premises rendered unable to do; and he, the plaintiff, was, also, put to great damage and loss, to-wit: the sum of *twelve thousand* dollars, by reason of the premises. Whereby the plaintiff, for all the time of his future life, was made less able to support and maintain and care for himself. Therefore plaintiff sues," etc.

"And the plaintiff claims of the defendant, a municipal corporation under the laws of *Alabama*, the further sum of *twelve thousand* dollars, because it was and is the duty of the defendant to keep the streets of said city in repair, and to remove, take away from and prevent obstructions being upon the same, and to put up guards, barriers and railing, and at night to keep lights opposite and near to any precipice or dangerous declivity in and contiguous to the streets and sidewalks of said city, unknown to the plaintiff. On the sidewalk on the north side of *Spring* street in said city, which street and sidewalk were at the time of the grievances herein alleged and now is a public street, sidewalk and highway of said city, for all persons to pass and repass, go and return upon, there was and has been for more than *one year* an obstruction or impediment, consisting of the end of a platform, which rests upon the sidewalk and street, which blocks up and makes said sidewalk impassable, and prevents travelers from walking on said sidewalk and forces them to walk in said street, on north side of which and contiguous to the same, there was and had been for *one year*, and now is, a dangerous precipice or

declivity, opposite to which the defendant had, knowing the existence and situation thereof, and knowing the situation of said platform or impediment on said sidewalk, wrongfully and negligently failed and refused to put any guard or railing, and near to which defendant failed to put any lights to show and expose said precipice and declivity; and the said defendant, knowing the existence and situation of said platform or impediment, refused to remove, and permitted the same to so remain, knowing that said platform or impediment would force travelers to walk near to and over said precipice. The plaintiff, on the night of the *15th of November, 1876*, while lawfully passing and walking along said *Spring* street, in consequence of said negligence of the defendant in failing to remove the end of said platform or impediment from said sidewalk, could not walk thereon, and was forced to walk in said street; and, in consequence of the said negligence of the defendant in failing to place guards, railings or barriers at and on the edge of said street, between said street and said precipice or declivity, he, the said plaintiff, necessarily and unavoidably fell from said street to the bottom of said precipice or declivity, a distance of about *six* feet, and by which fall broke his leg, so that it had to be and was amputated above the knee on the following day; and he, the said plaintiff, became and was sick, sore, lame, diseased and disordered, and remained and continued for a long space of time, to-wit: from thence hitherto, during all which time the said plaintiff thereby suffered and underwent great pain, and was prevented from attending to and transacting his necessary and lawful affairs and business by him during that time to be performed and transacted; and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend, a large sum, to-wit: the sum of *two thousand* dollars in and about endeavoring to get healed and cured of the said wounds, sickness and disorder; and was also, by means of the premises, forced and obliged to pay out and expend a large sum, to-wit: *two thousand* dollars, for board, lodging and attention, while so confined by said injuries; and was also forced to expend, and did expend and pay out, a large sum of money, to-wit:

two thousand dollars, in bringing suit against said defendants for said injuries; and was also forced to pay out and expend a large sum of money, to-wit: two thousand dollars, to have the business and work of the plaintiff done, which plaintiff was by the premises rendered unable to do; and he, the plaintiff, was also put to great damage and loss, to-wit: the sum of twelve thousand dollars, by reason of the premises, whereby the plaintiff for all the time of his future life was made less able to support and maintain and care for himself. Therefore plaintiff sues," etc.

A demurrer to this complaint was sustained in the trial court on the ground that the defendant was not liable. The ruling of the court was reversed on appeal, the appellate court holding that the defendant was liable as to the sufficiency of the complaint. The court said they would not scrutinize the counts of the complaint to see whether or not they could be made better by amendment.

In *Linsley v. Bushnell*, 15 Conn. 225, the declaration alleged in substance as follows:

In the first count, the plaintiff alleged that the defendant, on the 20th day of October, 1840, wrongfully and unjustly put and caused to be put and placed divers, to wit, ten large logs of wood, and a large ox-cart, in the public highway in Branford, and wrongfully and injuriously kept and continued, and negligently and wrongfully permitted the same to remain therein, and in the usually traveled path thereof, during the space of three days and three nights, to wit, from the 17th to the 20th of October, 1840, inclusive, without placing, during any part of the night, any light or signal at or near such logs and cart, to denote that the same were there; that in consequence of said negligence and improper conduct of the defendant, the plaintiff, in the night of the 20th day of October, 1840, at Branford, passing in a wagon in and through said highway, and in and through the usually traveled path thereof, was accidentally driven upon and against said logs and cart, and said wagon was thereby then and there overturned, and the plaintiff was thereby thrown, with great violence, out of said wagon upon said logs and cart, and upon the ground and stones of said highway; by means whereof

the plaintiff then and there was greatly hurt and wounded, and has so remained from that time to the present, his health and constitution being permanently and incurably injured; and that the plaintiff was thereby also put to great expense and charges, amounting to one hundred dollars, in endeavoring to be cured of his wounds, etc.

In the second count, the plaintiff alleged that the defendant, on the 17th day of October, 1840, at Branford, wrongfully and injuriously caused to be put and placed and left, for a long space of time, to wit, for more than one day, in and upon the public highway leading from near the Congregational meeting-house, in said Branford, westerly towards Branford Point, and passing the dwelling-house and homestead of the defendant, opposite said dwelling-house and homestead of the defendant, his, the defendant's, cart, loaded with logs, to wit: ten logs of the defendant's wood; said cart then and there having no team or animals attached to the same; and while said cart, so loaded, was so wrongfully and unjustly placed and left in and upon said public highway, to wit, on the 17th day of October, 1840, said cart and said logs loaded therein were, by the negligence and permission of the defendant, then and there wrongfully and unjustly caused to be overthrown in and upon the usually traveled path of said public highway; said cart and logs being then and there near to each other, in said usually traveled path, and greatly incumbering and obstructing the same: all of which was then and there well known to the defendant; but the defendant, though duly informed of the premises, and of the great danger thereby incurred, by all good citizens who might have occasion to travel upon said highway, then and there knowingly, wrongfully and injuriously kept and continued, and then and there negligently, knowingly and wrongfully permitted to be there kept and continued, and then and there negligently, wrongfully and injuriously left in and upon said usually traveled path, the said property of the defendant, to wit, said cart and logs so overthrown, for a long space of time, to wit, for the space of three days and three nights, from the 17th to the 20th day of October, 1840, inclusive; and particularly during the night time of the day last aforesaid, without placing,

during any part of that night, a signal at or near the said cart and logs, to denote the same were there: by means of all which negligence and improper conduct of the defendant, the plaintiff, on said 20th day of October, 1840, passing in a certain wagon upon said public highway, through and upon the usually traveled path thereof, was accidentally driven upon and against said logs and cart, and the plaintiff was thereby, with great violence and force, thrown out of said wagon upon said logs and cart of the defendant, and upon the ground and stones of said highway; by means whereof the plaintiff was greatly and dangerously hurt, wounded, etc., [as in the first count].

A verdict for the plaintiff was sustained.

In *Gleason v. Bremen*, 50 Me. 222, the declaration alleged:

"The plaintiff, on the said *twenty-fifth* day of *August*, A. D. 1858, was necessarily passing along and upon said highway, riding in a chaise, using due and proper care, and possessed of a suitable and safe horse, harness and carriage; and, when at said point in said highway (the defective place before described), said chaise, by means of the said defects in said highway, struck its right wheel against said rock, and upset the chaise, and threw the plaintiff out upon the ground with great violence, by the force of which blow she was greatly bruised and injured; and, in the upsetting of said chaise, the fastenings of the boot thereof, or some other part of said chaise to the plaintiff unknown, were forced into the lid and flesh surrounding the plaintiff's left eye, and by reason of the fall, as she was thrown upon the ground from the chaise, tore away the under eyelid and flesh surrounding said eye, and destroyed the lachrymal ducts thereof and the sac containing the lachrymal fluid of said eye, lacerated the ball of the eye, and greatly injured the sight of it, and destroyed or injured the muscles of the eye, so that the sight of it does not retain its natural location, whereby the eye is seriously and permanently injured; and cut, lacerated and bruised the plaintiff's head and face in various parts, by reason of which wounds and injuries the plaintiff, at the time, and ever since hitherto, has suffered great bodily pain, has been compelled to submit to surgical operations and medical treatment; has been deprived of the

use and benefit of the said eye, and is permanently disfigured, and permanently deprived of the use and benefit of said eye."

In *Circleville v. Sohn*, 59 Ohio St. 285, the petition was as follows:

"That the defendant, the *City of Circleville, Ohio*, is a municipal corporation of the *fourth* grade of the *second* class, duly organized under the laws of the state of *Ohio*. That there is a certain street in said city called *Court* street, with sidewalks on both sides of the same, which have been constructed and maintained upon grades established by said defendant for the use of public travel by pedestrians having occasion to travel thereon; that the said street is, and was at the date hereinafter mentioned, one of the most public streets in the said city, and that the said sidewalk, at the points hereinafter named, was a greatly frequented place and much traveled by the general public, being within *two* squares of the business center of said city; that on the west side of said street, between *Mound* and *Union* streets, there is an alley called *South Area* alley, extending from *Canal* street and intersecting said *Court* street at a point between the lots of *G. F. Wittich* and *Dorothea Turney*; that from a point near *St. Philip's Episcopal Church* to the said *Court* street said alley descends and slopes rapidly, and where the same crosses said sidewalk it has a slope of at least *two* feet in *sixteen* feet, thereby making said slope dangerous for persons traveling thereon, in times when the same is covered with ice and snow; that said sidewalk at said point, crossing said alley, is constructed in a dangerous and defective manner, by reason of said unusual and abrupt slope, and having rough and uneven stones thereon, and between which are large fissures; that the same is so constructed at said point as to have a depression or gutter in the middle, for the purpose of permitting and allowing drainage on and through said alley, from said *Episcopal* church, and from lots adjoining on said alley, and over said sidewalk, and emptying into a gutter running along the said *Court* street, between the said sidewalk and the street proper; that in times of rainfall there is a large flow of water over and through said alley at said point; and in times of freezing, the said sidewalk, at said point, becomes covered with ice from said drain-

Form No. 19197.

(Precedent in *Selma v. Perkins*, 68 Ala. 146.)¹

[(Title of court and cause as in Form No. 5907.)]

The plaintiff claims of the defendant, a municipal corporation, under the laws of the said state of *Alabama*, three thousand dollars as damages, and says that the defendant],² under and by virtue of its charter and by the law of the land, was bound to keep, and of right ought to have kept, the public streets and highways of said city in

age, and also from the drainage from lots adjoining on both sides of said alley, thereby making said sidewalk from all said causes aforesaid unusually dangerous to persons walking thereon; that said alley and said sidewalk have remained in said condition, as to the construction thereof, for a great many years, to-wit: for at least ten years, with the full knowledge of the defendant of all the conditions aforesaid; that accidents have frequently happened at said point to persons walking on said sidewalk, by said persons slipping and falling, when the same was covered with ice and snow; that the said *G. F. Wittich* and the said *Dorothea Turney* have, with the knowledge and consent of said defendant, for a long time prior to the injury hereinafter alleged, to-wit: for at least ten years prior thereto, and at the time the said injury occurred, used said alley way as a means of drainage for their slops and surplus water, coming from their said premises, and the same has been allowed and permitted by the defendant to flow over and across said sidewalk, and into said gutter, continuously, for the said period of time aforesaid; that on or about the *sixteenth* day of *March*, 1895, and for more than a month next preceding, said defendant, with full knowledge of all the facts heretofore stated, had carelessly and negligently suffered ice, frozen snow and sleet to accumulate on said sidewalk, at said point, and the same was, at said date, dangerous to persons passing along the same, by reason of its slippery condition, and the defective condition of said sidewalk, as hereinbefore stated; that at said date aforesaid, about *eight* o'clock in the evening, this plaintiff was passing along the sidewalk, in the usual way, using all due care, and ignorant of its defective and dangerous and slippery condition, and while so walking she fell and broke, fractured and sprained her right limb near the

ankle joint, and ruptured the ligaments, and otherwise injured her said limb. That by reason of the injury aforesaid, she was laid up and confined to her bed for the period of *five* days, and has suffered great bodily pain and mental anguish, and was prevented for the last *three* months from attending to her business, and incurred about \$125 expense for her medical attendance and nursing, in attempting to be cured of said injuries; and this plaintiff further avers that she is still lame and crippled from said injuries, and is only able to attend to her business by the use of her crutches; that the said injuries still exist, and that she will, as she verily believes, be and remain permanently lame, crippled and disabled from said injuries."

By an amendment the following allegations were added to the petition:

"That in consequence of the defective condition of the said alley, where the same crossed the said sidewalk, as it was at the time of her said injury, as described in her petition, and of the said unusual, abrupt and dangerous slope thereof at said point, and of the accumulation and flow of the water over and through said alley and across said sidewalk, from the sources and causes as averred and described in her petition, and the freezing of the said ice and snow thereon, in the defective condition of the said sidewalk at said point, at the time of said injury so caused and brought about by the negligence of said defendant, and by the negligence of the said defendant in permitting the same to be and remain in said condition, the said plaintiff became and was injured, as described in her petition."

Judgment for plaintiff was affirmed.

1. This complaint was held sufficient against demurrer.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

good repair and in a safe condition for the use of the public, and possessed ample means and had the power to employ them in keeping the said streets and highways in good repair and safe condition; that said defendant, not regarding its duty in this behalf, and contrary to the provisions of the charter of said defendant, neglected to keep the said streets and highways within the corporate limits of said city in good repair, and so mismanaged them that they were unsafe and dangerous, in that said defendant constructed a deep ditch along and through a public street of said city called *Lauderdale* street, extending across another public street called *Selma* street, at the point of intersection of said streets, and constructed a bridge over said ditch, and on a level with said *Selma* street, extending from the south side of said *Selma* street scarcely to the northern edge of said street, and just binding the eastern edge of the west sidewalk of *Lauderdale* street and the western bank or side of said ditch, so that foot-passengers, in crossing *Selma* street at its intersection with the west side of *Lauderdale* street, usually passed along and over said bridge the full length thereof to reach the northern sidewalk of *Selma* street and the western sidewalk of *Lauderdale* street; and the said defendant also constructed another deep ditch along the northern side of *Selma* street and across *Lauderdale* street, which ditch emptied into and connected with the above named ditch, underneath said bridge, where the northern sidewalk of *Selma* street extends over on and intersects *Lauderdale* street; and that the said bridge over said ditch, being a part of *Selma* street and within the corporate limits of said city, was, by reason of such mismanagement, neglect, and disregard of duty as aforesaid, unsafe and dangerous to foot-passengers crossing over and along the same; and that said defendant, not regarding its duty, negligently constructed the same without any barrier, railing or light to guard or prevent foot-passengers from falling from the eastern edge of said bridge, near the south end thereof, into said deep ditch last named; of which said defendant, then and there, and for a long time before that day, had positive notice: By means whereof plaintiff, while lawfully crossing said *Selma* street in the night-time, on said *4th December, 1877*, over and along said bridge, in the way usually traveled by foot-passengers, from the south to the north side of said street, without any fault or negligence on her part, fell from the eastern edge of said bridge, near the north end thereof, to the bottom of said deep ditch last named, [a distance of about *six* feet, and by which fall broke the left leg above the ankle, and she, the said plaintiff, became and was sick, sore, lame, diseased and disordered, and remained and continued for a long space of time, to wit, from thence hitherto, during all which time the defendant thereby suffered and underwent great pain and was prevented from attending to and transacting her necessary and lawful affairs and business by her during that time to be performed and transacted, and was also, by means of the premises, forced and obliged to pay, lay out and expend, and did pay, lay out and expend, a large sum, to wit, the sum of *five hundred* dollars, in and about endeavoring to get healed and cured of the said wounds, sickness and disorder, and was also, by means of the premises, forced to pay out and expend, and did pay

out and expend, a large sum, to wit, *five hundred* dollars, for board, lodging and attention while so confined by said injury, and was put to great damage and loss, to wit, the sum of *three thousand* dollars, by reason of the premises, and therefor she sues.

(*Signature of attorney as in Form No. 5907.*)]¹

Form No. 19198.

(Precedent in *McGill v. District of Columbia*, 4 Mackey (D. C.) 70.)²

[(*Title of court and cause as in Form No. 6987.*)]³

The plaintiff sues the defendant, a municipal corporation created by law, for that whereas the defendant, as such municipality, was, on the *20th* day of *December*, 1880, and for many years prior thereto, and has ever since been, and now is, charged by law, among other things, with the duty of keeping or causing the sidewalks of the city of *Washington* to be kept free from obstructions and from open vaults, basements, cellars and areas below the grade of said sidewalks, unless protected by sufficient railings or balustrade, so that all citizens of the said district, and all others having occasion thereto, might safely traverse and pass on upon said sidewalks on foot without the hazard of injury from falling into such unguarded openings in the sidewalks aforesaid; yet, notwithstanding the said duty and obligations on the part of the defendant, it wrongfully and negligently permitted an area of the length of *18 ft. 6 inches*, and of the depth of *4 ft. 9 inches*, and of the width from the building line of *6 ft. 10 inches*, to be made in the sidewalk in front of the basement of the building known as No. *607*, on the east side of *Seventh street N. W.*, and immediately opposite the Department of the Interior, the said *Seventh street N. W.* being one of the most frequented thoroughfares, both for vehicles and pedestrians, in the said city of *Washington*, and the locality aforesaid being one of the most thronged parts of said street, and on the *20th* day of *December*, 1880, and for a long time prior thereto, the said area was, and has been, by the carelessness and negligence of the defendant, permitted to be and remain without any railing or guard of any kind whatever, to the great hazard of persons passing thereby on foot; of which the defendant had notice; and on the day and year last aforesaid the plaintiff, while passing along said sidewalk, in front of said area, and being partially blinded by the snow that was then falling, and without carelessness and negligence on his part, slipped upon the pavement and with great violence fell headforemost into said area, striking his head against the iron jamb or cheek of the door to the basement of said building No. *607*, and thereby causing a wound upon the top of his head *four inches* in length; in consequence of which injury erysipelas supervened, and he was dangerously sick and was confined to his bed from the said *20th* day of *December*, 1880, until the *6th* day of *March*, 1881, and at times during his said illness his life was despaired of. During all of said time, and until the

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. The plaintiff recovered upon this declaration.

3. The matter to be supplied within

present time, he has suffered great bodily pain; and, as a further consequence of said injury, the nerves on the right side of his head are completely paralyzed, and the muscles and tissues on the right side and back of his head are destroyed. He has no sense of feeling on the right side and back of his head. By reason of said injuries his health and capacity to earn a livelihood are greatly and permanently injured, and he is constantly liable to renewed attacks of erysipelas and to neuralgia. He has already expended about \$800 for physicians, surgeons, medicines and attendance, and he will probably have a continuing necessity for similar expenditures so long as he lives.

He claims \$20,000 damages [(concluding as in Form No. 6937).]¹

Form No. 19199.

(Precedent in *Delphi v. Evans*, 36 Ind. 91.)²

[(Title of court and cause as in Form No. 5915.)]

John Evans, plaintiff, complains of the city of *Delphi*, defendant, and says that during all the times hereinafter mentioned the said defendant was and is now a municipal corporation organized and existing under the laws of the state of *Indiana*.]³

And the plaintiff further says, that he is the owner and holds possession of lots numbered 4 and 5, in *Wilson's* addition to the city of *Delphi*, and was such during the entire year of 1867; that said lots are bounded on the east by *Wilson* street, and on the south by *Frank* street; that *Frank* street terminates on the east at *Wilson* street; that some time in the year 1867, the mayor and common council of the city of *Delphi*, in the county aforesaid, contracted with *Joseph Polk* and *John Harrison*, to make a fill of earth upon *Washington* street in said city, and ordered and permitted them to take the earth for that purpose from the east end of *Frank* street; that at the time there was a regular descending grade from the south end of plaintiff's lots to about the middle of *Frank* street, south of which, in said *Frank* street, there was a level track into *Wilson* street; that the earth beneath said descent was firm and solid, and was not affected by washing, rains, freezing or thawing; that in accordance with the contract, said *Polk* and *Harrison* did, during the months of *September*, *October* and *November*, 1867, cut, dig and haul away a large quantity of earth therefrom, to-wit, the entire width of plaintiff's lots, *one hundred and twenty* feet; also the alley on the west, *twelve* feet wide, and west thereof more than *two hundred* feet, cutting away a part of the sidewalk of said plaintiff, leaving a perpendicular bank at the ends of plaintiff's lots *twelve* feet deep, and on *Wilson* street *five* feet deep; that there were no commissioners appointed by said common council and duly qualified, whose duty it was to value the land and other property thus appropriated; that no notice was given plaintiff by said common council,

[] will not be found in the reported case.

1. The matter to be supplied within [] will not be found in the reported case.

2. This was the second paragraph of the complaint and was held sufficient.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

or by any person for them, that they intended to appropriate said land, or to any person whatever; that no valuation of the same was made, nor injury or benefit assessed, and no report made of the same, as is required by the statute in such case made and provided; that the same was not done for the construction, repair, or benefit of *Frank and Wilson* streets, but was a great and material injury to the same, by reason of which, and on account of the condition of said banks, the earth, from rain, freezing and thawing, has crumbled and fallen until it has greatly destroyed plaintiff's sidewalk, wrecked his fence, rendered traveling upon said street more inconvenient, and done other and further damage to his said property, by means of which his said property has been reduced in value to a large amount, to-wit, to the sum of *five hundred* dollars. He therefore demands judgment for *one thousand* dollars, and other proper relief.

[[*Signature and verification as in Form No. 5915.*)]¹

Form No. 19200.

(Md. Pub. Gen. Laws (1888), art. 75, § 23, No. 37.)

(*Commencement as in Form No. 6941.*)

That the defendant is an incorporated city, and is bound to keep its streets in repair; that one of its streets, called *Main* street, was negligently suffered by the defendant to be out of repair, whereby the plaintiff, in traveling on said street, and using due care, was hurt, and the plaintiff claims therefor *two thousand* dollars.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 19201.

(Precedent in *Emery v. Lowell*, 109 Mass. 198.)²

[[*Commencement as in Form No. 6942.*)]¹

1. And the plaintiff says that he is the owner of a private drain, running from the cellar of his house on *Merrimack* street, in *Lowell*, under and across the street aforesaid, which he used for the purpose of draining the cellar under his said house; that the defendants entered a drain from the gutters of said street into the plaintiff's drain, and built the same in such an unskilful and careless manner that the sand and dirt were carried into the plaintiff's drain thereby, and choked the same up, and forced the water back through the plaintiff's drain into his cellar, and destroyed the property therein, and put him to great trouble and expense in getting the water out.

2. And the plaintiff further says that he is the owner of a drain leading from the *Merrimack House*, on *Merrimack* street, in *Lowell*, under and across said street, which he used for the purpose of draining his cellar under said house; and that the defendants entered a drain from *Merrimack* street into said drain, by which the filth, dirt and sand from *Merrimack* street were washed into said drain; and it was the duty of the defendants to keep the drain clear, and see that the same was not choked up, so that the water might flow through the same, and not flow back upon the plaintiff's premises; but that the defendants, utterly regardless of their duty in the premises, per-

1. The matter to be supplied within 2. Under this declaration the plaintiff
[] will not be found in the reported case. recovered.

mitted said drain to be choked up, so that the water would not flow through the same; that, through the negligence and carelessness of the defendants, said drain became choked up, and the water and filth flowed back into the plaintiff's cellar, and destroyed his property therein, and put him to great trouble and expense; and that the plaintiff notified the defendants that said drain was stopped up, and that by means thereof the water flowed back upon his cellar; but that the defendants, although notified thereof, refused to clean out said drain, so that the water would run through the same, and compelled the plaintiff, at great trouble and expense, to clean out the same.

[(Signature as in Form No. 6942.)]¹

Form No. 19202.

(Precedent in *Cushing v. Bedford*, 125 Mass. 526.)²

[(Title of court and cause as in Form No. 6942.)]¹

And the plaintiff says there is in the town of *Bedford* a public highway, leading from said town of *Bedford* to the town of *Lexington*, which said defendant is bound to keep in repair; that the same was negligently suffered by the defendant to be out of repair, whereby the plaintiff traveling thereon, and using due care, was hurt. And the plaintiff says he was traveling on said highway in his buggy with his wife, and was driving, in the exercise of due care, a quiet and safe horse; that at a certain place in said highway a water trough, painted of a brilliant color, had been placed, and placed in such a position that the road opposite said trough was made more narrow than it had been before said placing of said trough; that as the horse approached said brilliantly painted trough, he sheered; that said horse in sheering drew said buggy upon a defect in said public highway, which defect was on that side of said highway which was opposite to said water trough; that said buggy was overturned by reason of said defect, and said plaintiff was thrown out and greatly injured thereby.

(Signature as in Form No. 6942.)

Form No. 19203.³

In the Circuit Court for the County of *Washtenaw*.
County of *Washtenaw*: ss.

Virgie A. Comiskie, plaintiff in this suit, by her attorney, *George W. Smith*, comes into this court, according to the form of the statute

1. The matter to be supplied within [] will not be found in the reported case.

2. This was the first count of the declaration. A second count was held not to show a cause of action. The court said of this count that the jury "would be justified in finding that at the place where the injury was received, which may have been some distance from the red watering trough, the plaintiff, while passing on the highway, used due care and having at least partial control of his horse, was in-

jured by a defect in the highway which was the direct, sufficient and sole cause of his injury. It cannot be declared, as a matter of law, that the cause of the fright of the horse, producing the unexpected movement by which the carriage in the end went into the hole, was one of the direct and immediately contributing causes of the plaintiff's injury."

3. This is the declaration in *Comiskie v. Ypsilanti*, 116 Mich. 321, and is copied from the records. This declaration was held sufficient.

authorizing the commencement of suit by declaration, and complains of the *City of Ypsilanti*, defendant herein, in a plea of trespass upon the case, as follows:

Whereas, on or about the *tenth (10th)* day of *May*, A. D. 1896, the time of the happening of the wrong and loss hereinafter complained of and set forth, and for a long time prior thereto, the said defendant, being a municipal corporation duly chartered under the statutes and laws of the State of *Michigan*, had had the care, regulation, supervision and control of all public improvements of a general nature, and of the public streets, sidewalks, culverts, sluices and bridges, water-courses, drains and culverts, within the limits of the city of *Ypsilanti, Michigan*, and of the streets known as *Ballard* and *Emmett* streets in said city, and of the intersection of *Ballard* and *Emmett* streets, which streets are within the corporate limits of said city. And many days prior to the date above mentioned, the defendant, through its proper officers, had been engaged in making repairs in and about a gutter and underground water-duct and ditch at the southeast corner of the intersection of said *Ballard* and *Emmett* streets, which streets had, for more than *ten (10)* years prior to *May 10th*, 1896, been public streets and under the care and control of said defendant, during which time the defendant made improvements thereon for pedestrians, horses and vehicles at and near where said excavation and repair was being made.

Plaintiff further avers that the defendant, through its agents and servants, while in the repair of the street, water-course, ditch and gutter, at the place aforesaid, where it had been for a period of *ten (10)* years and from time immemorial the custom of pedestrians to cross said *Emmett* street, made an excavation, long before the accident hereinafter set forth, in said street and crossing; and the defendant knew of this excavation and had knowledge thereof sufficiently long before the accident about to be set forth, to have made said place a reasonably safe one for public travel or to have guarded against danger; and it was the duty of the defendant to keep said streets, crossing and passage-way in a reasonably safe condition for public travel; and it was the duty of the defendant to provide proper guards, lights or barriers to guard or warn the passers-by of the danger and to use reasonable means to prevent accidents; and it was the duty of the defendant to keep fit and proper men in its employ. But the said defendant, not regarding these duties, carelessly, negligently and knowingly permitted the aforesaid excavation, ditch and gutter, and other dangerous places near, to be and remain unfit and unsafe for public travel; and to be and remain wholly unguarded for a long and unreasonable time prior to the accident and at the time thereof; and the defendant, knowing of this defect aforesaid, put neither guards, lights nor barriers, nor protection nor danger signals of any sort to warn and protect the passers-by at this dangerous place; and knowingly and negligently kept unfit men in its employ. And so said plaintiff, who was passing carefully upon and along said *Ballard* street, at about the hour of *nine (9)* o'clock in the *evening*, on about the *tenth (10th)* of *May*, 1896, as she had a right to do, on the east side thereof, using due and

reasonable care, and without knowledge of the existence of danger ahead, and wholly without negligence on her part, fell into the said unguarded excavation, ditch and gutter, of which defect the defendant had at all times due notice, and said plaintiff was injured in and about her person permanently, and has suffered and still suffers great and permanent injuries, as by the "prolapsus of the womb," or, "falling of the womb," and received other injuries to the female organs, and to her spine, back and hips and nerves, and was bruised in and about her limbs and person, resulting in loss of health, and underwent and still undergoes both bodily and mental pain and suffering, and has been at a great expense in treating and caring for her health and injuries, and for a greater portion of the time has been unable to work. Now, therefore, owing to the above mentioned duties and the neglect thereof by the defendant, and the resulting losses and injuries to the plaintiff, she prays damages to the amount of *ten thousand* (\$10,000.00) dollars, and therefore she brings this suit, by

Geo. W. Smith, Attorney for Plaintiff.

Form No. 19204.

(Precedent in *Southwell v. Detroit*, 74 Mich. 451.)¹

[*(Commencement as in Form No. 6943.)*]²

For that whereas, the city of *Detroit* is, and for many years last past has been, a municipal corporation and body politic under and by virtue of the laws of the state of *Michigan*, and had become, and is thereby, charged with the duty of keeping the streets within its borders in a safe and suitable condition for travel by the public, and, in case of paving or repairing said streets, to take all proper precautions to warn the public thereof by barriers and lights; that, to wit, on *August 27*, A. D. 1886, the said city of *Detroit* was paving and repairing *Fourth* street near *Lysander* street, and the entire wrought or traveled part of the road-bed was torn up, and various holes were made in some parts of said wrought or traveled part of said street, and piles of sand, dirt and other material were exposed and lying upon other and contiguous places in the said wrought or traveled part of the said *Fourth* street as aforesaid; that, while said defendant was paving and repairing said street as aforesaid, it left the same carelessly, recklessly and negligently in the dangerous condition aforesaid, throughout the night, and placed no watchman, guard, barrier or light at or near the same to warn persons lawfully passing with teams, vehicles, horse, etc., in and along said *Fourth* street; that during the evening of said day, to wit, at *nine* o'clock, and while it was dark, so as to conceal the condition of said road-bed, plaintiff was riding along said *Fourth* street in a buggy drawn by a horse, driven by the husband of the said plaintiff, and the said horse, without any negligence or want of care on the part of said plaintiff, or of her said husband, became, and was then and there, precipitated and hurled down into the holes and among the debris scattered here and

1. This declaration was held sufficient.

2. The matter to be supplied within [] will not be found in the reported case.

there in the wrought and traveled part of said *Fourth* street, at and about *Lysander* street aforesaid [by means whereof said plaintiff then and there became and was greatly hurt, bruised, cut and wounded and thereby then and there (*stating specifically the nature of the injury*) and became and was sick, sore, lame and disordered and so remained and continued for a great space of time, to wit, the space of *six* months, and during all that time was and still is wholly hindered and disabled from following and performing her business and cares, and has been obliged to expend, and has expended, a large sum of money, to wit, the sum of *five hundred* dollars, in and about the care of said injury (*specifying it*), and in endeavoring to be cured of the said wounds, sickness, lameness and disorder before mentioned, and hath been and is otherwise greatly injured and damaged, to wit, at the city of *Detroit*, in the county of *Wayne* aforesaid, to the damage of the plaintiff *three thousand* dollars, and therefore she brings suit.

Jeremiah Mason, Plaintiff's Attorney,
*316 Main street, Detroit, Michigan.*¹

Form No. 19205.

(Precedent in *Kossman v. St. Louis*, 153 Mo. 295.)²

[(*Title of court and cause as in Form No. 5921.*)]³

The plaintiff states that at the times herein mentioned the city of *St. Louis* was, and now is, a municipal corporation by virtue of the law of the state of *Missouri*. That at said time *Grand* avenue, at the places herein mentioned, was an open public street within the city of *St. Louis*, graded and paved as such. That on the *17th* day of *August*, 1896, the plaintiff was driving a wagon and team, northward upon *Grand* avenue, and when at a point in said street just south of *Grand* avenue bridge, his wagon and the wheels thereof came in contact with an obstruction in said street, to wit, a hole, ditch, an excavation worn into said street, whereby the plaintiff was caused to be thrown from said wagon to the street, and said wagon and the wheels thereof ran against and upon the plaintiff, whereby plaintiff was greatly and permanently injured upon his head and body, *two* of his ribs were broken, his chest was crushed, his head was greatly lacerated, and plaintiff was otherwise greatly injured and bruised. And plaintiff avers that said street at said place was, by reason of said obstruction, out of repair and in a dangerous and defective condition, as defendant, by its agents having charge of keeping said street in repair, well knew before plaintiff's said injuries, or would have known by the exercise of ordinary care in time to have repaired the same before plaintiff's said injuries, yet neglected to do so. That by reason of his injuries so sustained, the plaintiff has suffered and will suffer great pain of body and mind, has been disabled from labor and has lost and will lose the earnings thereof. His health and strength have been permanently impaired.

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. It was held that this petition stated the plaintiff's case very concisely.

3. The matter to be supplied within

He has incurred and will incur large expenses for medicines, medical attention and nursing, to his damage in the sum of \$10,000, for which sum he prays judgment.

[(Signature as in Form No. 5921.)]¹

Form No. 19206.

(Precedent in *Hollingsworth v. Saunders* County, 36 Neb. 142.)²

[(Commencement as in Form No. 5923.)]¹

First. That the defendant is a county duly organized under and by virtue of the laws of the state of *Nebraska*, and is not under township organization.

Second. That on and for some time prior to the 15th of August, 1889, a certain bridge on, and belonging to, and forming a part of the public road which lies and runs north and south between sections 32 and 33, in township 14, range 8, in *Wahoo* precinct, in said county of *Saunders*, and state of *Nebraska*, which road was a public road and highway, and was much traveled and used by the citizens of said county and by the public generally, was out of repair and dangerous to the public travel, and one of the main posts which supported the said bridge was gone from under it, and the approach to the bridge from the north side thereof had been washed away in such manner as to become and be in a dangerous condition, and that at the said time the said condition of the said approach was covered up by planks so as not to be observable to a person traveling in a wagon, and that the said bridge was at said time, and for some time prior thereto had been, dangerous to pass over with ordinary loads of travel, all of which the defendant had due notice.

Third. That on the 15th day of August, 1889, and for some time prior thereto, said bridge was allowed to be and remain exposed to public travel without guards or notice to prevent the public from passing or traveling over the same.

Fourth. That during the afternoon of the 15th day of August, 1889, this plaintiff, with his said team of horses attached to a lumber wagon, loaded with fifty bushels of oats therein, was passing along the said public road from the south going north, and the plaintiff drove his team upon the said bridge, intending to cross the same, but, while lawfully traveling on said road and bridge, and accidentally and without fault on his part, because of the said post being gone from under the said bridge and the condition of said bridge, this plaintiff, his team, harness, wagon, and oats were precipitated from the said bridge to the ground and water under the said bridge.

Fifth. That by reason of the premises the plaintiff was damaged in the sum of \$400 to his horses, wagon, harness and oats.

Sixth. That this plaintiff was not familiar with said road, he not having passed over it for many months preceding the time of the injury complained of herein.

[] will not be found in the reported case.

[] will not be found in the reported case.

1. The matter to be supplied within

2. This petition was held sufficient.

Seventh. That the defendant had the means of knowledge of the condition of said bridge at the said time, and had failed to repair the same, after having had a reasonable time to do so, and that the damages of plaintiff's property was caused by the said bridge not being in sufficient repair, the said bridge being one which the said defendant was liable to keep in repair.

Wherefore, the plaintiff prays judgment for \$400 and costs.

[(*Signature and verification as in Form No. 5923.*)]¹

Form No. 19207.

(Precedent in *Hardy v. Keene*, 52 N. H. 371.)²

[(*Commencement as in Form No. 6945*) for that whereas (*setting out the first count*).]³

And in a further plea of trespass on the case, for that on *July 1*, A. D. 1870, at said *Keene*, there was, and for a long time had been and still is, another certain public and common highway leading from *Washington* street, so called, in said *Keene*, to and past *Woodland* cemetery, so called, in said *Keene*, and said highway being known by the name of *Beaver* street; and the said plaintiff avers that the said town of *Keene*, during all the said time, was and still is bound by law to maintain and keep in good and sufficient repair, so that all persons having occasion to pass, might pass and repass safely to themselves, their horses and carriages; and the said plaintiff further avers that the said defendants, at said *Keene*, on said *July 1*, A. D. 1870, last aforesaid, the said highway was in good and sufficient repair, and that the defendants, well knowing the premises at *Keene* aforesaid in this—that the servants of the said defendants had carelessly and negligently placed in and near said highway a derrick, to be used in the repair of said highway, and the said derrick was permitted to there remain and be used by the servants of the said defendants in an unsafe, insecure, and careless condition—unsafe and dangerous to pass; and the said plaintiff further avers that on *July 1*, A. D. 1870, at said *Keene*, while he, the said plaintiff, was driving and traveling in a careful and prudent manner over and upon said highway, with a horse and wagon of the said plaintiff's, the plaintiff being in said wagon, and being drawn by said horse, the whole weight of said wagon being less than *three* tons, and by reason of the carelessness and negligence of the servants of the said town of *Keene* in permitting and suffering said derrick to be there placed and used while in said unsafe and dangerous condition, and while the said servants were then and there in the act of raising a stone with the said derrick, by reason of the insufficiency of said derrick, and careless and heedless position in which it was placed, used and fastened, the said derrick broke, gave way, and fell to the ground, striking the said plaintiff upon the head and body with great force, knocking him down and rendering him senseless, producing an injury to the brain

1. The matter to be supplied within [] will not be found in the reported case.
 2. This was the second count of the declaration and was held sufficient.
 3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

and spinal marrow, thereby producing insanity and great bodily pain, and has greatly impaired the health of him, the said plaintiff — all of which was, by reason of the premises aforesaid, and without the fault or negligence of the said plaintiff, to wit, at said *Keene*, [to the damage (*concluding as in Form No. 6945*).]¹

Form No. 19208.

(Precedent in *Bartlett v. Hooksett*, 48 N. H. 18.)²

[[*Commencement as in Form No. 6945*] for that whereas]¹ at said *Hooksett*, on the 28th day of *October*, A. D. 1866, there was, and for a long time had been, and still is, a certain common and public highway leading from *Concord*, in said county, through the said town of *Hooksett* to the town of *Chester*, in our county of *Rockingham*, known as the "*old Chester road*," of which said common and public highway, so much as lies in the town of *Hooksett*, the said town of *Hooksett*, during all said time, was and is bound by law to keep in good and sufficient repair, free from defect or obstruction, and suitable for the travel passing thereon, so that all persons having occasion therefor might and may pass and repass safely thereon, by and with themselves, their horses and carriages. And the plaintiffs aver that, on said 28th day of *October*, a portion of said highway leading from and lying easterly of the dwelling-houses of *E. Johnson* and *C. C. Johnson* was not in good and sufficient repair, and was narrow and obstructed and encumbered with a certain pig-sty and pig-yard projecting into and located upon the limits of said highway, greatly diminishing the necessary width of said highway, and rendering the same unsafe and dangerous, and that the said town of *Hooksett*, well knowing the premises, on the 28th day of *October*, did suffer and permit the said obstructions to exist, and to be and remain located upon and projecting into the limits of said highway, and did knowingly suffer and permit the pig-sty and pig-yard to be occupied with and by certain swine. And the plaintiffs aver that on the said 28th day of *October*, the said *Margaret Bartlett* was lawfully traveling over and upon the said highway, riding in a certain wagon, drawn by a horse, and driven in a prudent and proper manner by one *Andrew J. Langley*, the whole weight of the load upon said wagon being less than three tons, to wit, of the weight of four hundred pounds, and no more. And the plaintiffs say that the said *Langley* was riding and driving the said horse and wagon, the said *Margaret* being in said wagon, the said horse and wagon came along in said highway to a point nearly opposite the said pig-sty and pig-yard; and that there were in the said pig-sty and pig-yard, by the sufferance, permission and negligence of the said town of *Hooksett*, and occupying the same, divers, to wit, five swine; and the said swine then and there started and ran in and about said pig-sty and pig-yard, and by starting and running about, as aforesaid, and by certain loud noises which the said swine then and there uttered, so frightened the said horse,

1. The matter enclosed by and to be supplied within [] will not be found in the reported case. 2. This declaration was held sufficient.

driven by the said *Langley*, as aforesaid, as to cause him to jump and sheer suddenly and violently, thereby tipping up the said wagon so that the said *Margaret* was thrown violently out upon the ground, and was greatly bruised, lamed and injured in her head, arms, back, shoulders, legs and sides, and her right arm broken, and her said right arm dislocated, at or near the shoulder joint; by means of all which the said *Margaret* has been made sick and disabled, and has suffered and still suffers great pain and distress, and is unable to perform any labor, and is likely to continue lame and disabled during her natural life; all of which is by reason of the negligence of the defendants, and the obstruction and defect in said highway, as aforesaid, and without the fault of the plaintiffs, or either of them, or of the said *Langley*, [to the damage (*concluding as in Form No. 6945*).]¹

Form No. 19209.

(Precedent in *Davis v. Hill*, 41 N. H. 330.)²

[(*Commencement as in Form No. 6945*).]³

In a plea of trespass on the case, for that at *Hill* aforesaid, *January 13*, 1858, there was, and for a long time had been, a public and common highway leading from a point near *Wells'* saw-mill, so called, to the intersection of said highway with another highway leading from *Franklin*, in said county of *Merrimack*, to *Bristol*, in said county of *Grafton*, near the dwelling-house of *Carr Huse*, in said *Hill*; and the plaintiff avers that the said town of *Hill*, during all the said time, was and still is bound and liable by law to maintain and keep in good and sufficient repair the said first mentioned highway, suitable for the travel passing thereon, so that all persons might and may pass and repass safely thereon, by and with themselves, their horses and carriages; and the plaintiff further avers, that at said *Hill*, on said *January 13*, the said first mentioned highway was not in good and sufficient repair, and that the said town of *Hill*, well knowing the premises, at *Hill* aforesaid, on said last mentioned day, suffered and permitted said first mentioned highway to be and the same was then and there narrow, sloping, rounding, sidling, rocky, uneven, and incumbered with ice, unsafe, and dangerous to pass; and the plaintiff avers that on said *January 13*, at said *Hill*, the servant of the plaintiff was driving and traveling in a lawful, careful, and prudent manner, over and upon said highway first mentioned, with the plaintiff's horse and sleigh, and the plaintiff's said servant being in said sleigh and being drawn by said horse, the whole weight of the load upon said sleigh, exclusive of said sleigh, being less than *three* tons, to wit, of the weight of *three hundred* pounds, and no more; and by reason of the narrow, sloping, rounding, sidling, rocky, uneven, icy, unsafe and dangerous condition of said highway, first aforesaid, the said sleigh was overturned and the said horse escaped from the control of the said

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. This was the amended declaration and was held sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

servant of the plaintiff, without the fault or negligence of the plaintiff or his said servant, and ran with the said sleigh to and upon the track of the *Northern Railroad*, and was precipitated through a certain cattle-pass and opening existing upon the track of said railroad, in said town of *Hill*, a great distance, to wit, *ten* feet, upon the ground beneath the said track of the said railroad; and the said horse was then and there killed; and the said sleigh, and the harness of the plaintiff attached to the said horse and sleigh, were broken and greatly damaged; all which was by reason of the insufficiency and want of repair of said first mentioned highway, and without the fault or negligence of the plaintiff or his said servant. To the damage of the plaintiff, as he says, *five hundred* dollars.

Amendment.

Also, for that at *Hill* aforesaid, *January 13*, 1858, there was, and for a long time had been, a certain other public and common highway, leading from a point near *Wells'* saw-mill, so called, to the intersection of said highway with another highway, leading from *Franklin*, in said county of *Merrimack*, to *Bristol*, in said county of *Grafton*, near the dwelling-house of *Carr Huse*, in said *Hill*; and the plaintiff avers that the said town of *Hill*, during all the said time, was and still is bound and liable by law to maintain and keep in good and sufficient repair the said first mentioned highway, suitable for the travel passing thereon, so that all persons might and may pass and repass safely thereon, by and with themselves, their horses and carriages; and the plaintiff further avers, that at said *Hill*, on said *January 13*, said first mentioned highway was not in good and sufficient repair, the said town of *Hill* well knowing the premises, in this: that there were, upon land adjoining the same highway, a large number, to wit, *twenty* rocks of large size, to wit, of the height of *two* feet and of the width of *two* feet, which said rocks were situated and projected near said highway; and that upon the side of said highway was a high bank, to wit, of the height of *two* feet; and that the said town of *Hill*, during all the time aforesaid, was and still is bound and liable to keep and maintain, upon the side of said highway near said bank and rocks, a good and sufficient railing, barrier, and protection, to prevent travelers passing thereon from collision with said rocks and banks, and from injury therefrom, and that said town of *Hill*, during all the time aforesaid, neglected and refused to furnish and provide said railing and protection; and the plaintiff avers that, on said *January 13*, at said *Hill*, the servant of the plaintiff was driving and traveling, in a lawful, careful, and prudent manner, over and upon said highway first mentioned, with the plaintiff's horse and sleigh, the said plaintiff's said servant being in said sleigh and being drawn by said horse, the whole weight of the load upon said sleigh, exclusive of said sleigh, being less than *three* tons, to wit, of the weight of *three hundred* pounds, and no more; and by reason of the existence, location, and projection of said rocks and of the bank aforesaid, and the want of such sufficient and necessary railing, barrier, and protection, the said sleigh was thrown upon said rocks, and came into violent collision therewith, and was overturned, and the said horse escaped

from the control of the plaintiff's said servant, without the fault or negligence of the plaintiff or his said servant, and ran with the said sleigh to and upon the track of the *Northern Railroad*, and was precipitated through a certain cattle-pass and opening, then being upon the track of said railroad, in said town of *Hill*, a great distance, to wit, *ten feet*, upon the ground beneath the said track of the said railroad; and the said horse was then and there killed, and the said sleigh, and the harness of the plaintiff attached to the said horse and sleigh, were broken and greatly damaged; all which was by reason of the premises aforesaid, and without the fault or negligence of the plaintiff or of his said servant, [to the damage of the plaintiff, as he says, (*concluding as in Form No. 6945.*)]¹

Form No. 19210.

(Precedent in *Smith v. Piermont*, 31 N. H. 343.)²

[(*Commencement as in Form No. 6945.*)]³

In a plea of the case for that whereas on the *29th* day of *March*, A. D. 1852, at *Piermont*, in said county of *Grafton*, there was and for more than *twenty* years then *past* had been a certain public highway leading from *Piermont Village*, in a southerly direction to *Wentworth* and the old *Coos* turnpike, called the *Brook* road, running through the *Chandler* district, so called, in said *Piermont*, which said highway had then and there been publicly used, and for more than *twenty* years, as a public highway, and which said town of *Piermont* was then and there bound by law to keep and maintain in good repair; and whereas the wife of said plaintiff, at said *Piermont*, on said *twenty-ninth* day of *March*, now last past, was passing on said road in a *one-horse* wagon, drawn by *one* horse, without any load, in company with a driver, who was a relative of the plaintiff, which said driver was carefully and prudently driving said horse and wagon in the traveled path of said road; and whereas, by reason of the defect, insufficiency and want of repair in and of said road, the wife, horse and wagon of said plaintiff were thrown down a steep bank, on the lower side of said road, by which the horse and wagon of said plaintiff were greatly injured and broken. All of which happened without any fault or negligence of said plaintiff, or of his said wife, or of the driver aforesaid, but through the insufficiency of said road and the negligence of said town. All of which is to the damage of said plaintiff (as he says) the sum of *three hundred* dollars.

Also for that the road leading from *Piermont Village*, in said *Piermont*, in a southerly direction to *Wentworth* and the old *Coos* turnpike, called the *Brook* road, running through the *Chandler* district, so called, in said *Piermont*, was on the *20th* day of *March*, 1852, and ever since hath been and now is a public highway within said town of *Piermont*, for the maintenance and support and repair of which said town of *Piermont* is by law liable, and that from said *20th* day

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. It was held that this declaration stated a good cause of action for injury

to the horse and wagon. The joining of a cause of action for injury to the plaintiff's wife was held improper.

3. The matter to be supplied within [] will not be found in the reported case.

of *March* to the *20th* day of *April* then *next*, said highway was out of repair and insufficient, and in a state dangerous and wholly unfit to be traveled by citizens of the state and the public, and that the wife of the plaintiff, in company with a driver, on the *29th* day of *March*, 1852, undertook to pass said highway with a single wagon, drawn by a single horse, both the property of the plaintiff, on lawful business, which said driver was carefully and prudently driving said horse and wagon at said time in the traveled path of said road, with said plaintiff's wife, and that in said passing the wife and horse and wagon of said plaintiff were thrown down a steep bank on the lower side of said road, by which the said horse and wagon were greatly injured and broken, all by reason of the unfit and dangerous condition and want of repair of said highway, and the insufficiency thereof, and not through any fault or negligence of said plaintiff, or of his said wife or said driver; to the damage of said plaintiff, as he says, [(concluding as in Form No. 6945).]¹

Form No. 19211.

(Precedent in *Pearson v. Spartanburg County*, 51 S. Car. 480.)²

[(*Title of court and cause as in Form No. 5932.*)

The complaint of the above named plaintiff respectfully shows to this court:]³

1. That at the times hereinafter mentioned, the plaintiffs were, and are now, partners in the business of operating a saw-mill, under the firm name of *J. M. & G. W. Pearson*.

2. That at the time hereinafter mentioned, the defendant was, and is now, a body politic and corporate, under and by virtue of the laws of this state, and as such was, and is, entitled to sue and be sued.

3. That, among other things, at and during the said times, it was the duty of the said county to construct, out of suitable, strong and sound material, and to keep in good repair its highways and causeways, bridges and abutments thereto, so that the citizens of said county and the public generally could at all times travel over and along and across said highways, causeways and bridges without danger to their persons and property.

4. That the said defendant, disregarding its duty in the premises, failed to properly construct and keep in proper repair a certain bridge and the abutments thereto, within the boundaries of said county, to wit: the bridge known as *Tanner Bridge*, across *Middle Tyger* river, near the residence of *W. J. Means*; but, on the contrary, the said bridge and approaches were not properly constructed, in that the timbers thereof were entirely too light — the said timbers being mortised or cut out in such a way as to diminish their strength and make them utterly unfit, both by reason of said cutting and size and the lightness thereof, to be used in said bridge. And by reason

1. The matter to be supplied within [] will not be found in the reported case.

2. In this case the plaintiff recovered for injuries to his engine and also for loss of time by his employees. It was

held that the loss of time was consequential and direct damage should not have been allowed.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

of said defective material and the defective construction of said bridge, and by reason, further, of the utter want and failure of the defendant to replace said defective timbers with better, stronger and newer timbers, and to keep the said bridge in good repair, the said bridge was, on the 5th day of September, 1895, in a very unsafe and defective condition.

5. That on the said 5th day of September, 1895, while the plaintiffs were driving a traction or road engine belonging to them over the said bridge, the said bridge gave way and fell in, throwing the property of the plaintiffs a considerable distance, and greatly injuring and damaging it to such an extent as almost to destroy its value. And by reason of the said negligent conduct of the said defendant, the said property of plaintiffs was greatly injured and damaged, making extensive repairs necessary, and preventing the use of said engine, teams and employees of the plaintiffs, and utterly destroying their said business and the revenue they would have received in the use of their said engine, teams and employees for a considerable time—all of which was to their damage in the sum of \$1,000.

6. That the said damage done to plaintiffs was through and on account of defects in and on account of the negligent want of repair of the bridge hereinbefore referred to, and such damage was not in any way brought about by their own acts, by overloading or otherwise, and they in no way negligently contributed thereto. That such defects were occasioned by the neglect and mismanagement of the defendant.

7. That there is now due and owing from the defendant to the plaintiffs the said sum of \$1,000 damages, done to them through and by reason of the negligent acts of the defendant hereinbefore set out.

Wherefore, plaintiffs demand judgment against the defendant for the sum of \$1,000, together with the costs and disbursements of this action.

[(Signature of attorney, and verification as in Form No. 5932.)]¹

Form No. 19212.

(Aiken's Prac. F. (Supp.), p. 54, No. 77.)⁹

(Commencement as in Form No. 10663.)

In a plea of the case for that on the first day of June, A. D. 1900, there was within the said town of Chelsea an open public highway leading from (stating point) to (stating point) in said town, which said highway then was and for a long time before had been the duty by law of the said town of Chelsea to maintain and keep in good and sufficient repair for the safe passing of travelers with their carriages and teams thereon, but which said highway was on the day and year last aforesaid out of good repair, insufficient and unsafe, and the plaintiff avers that on the day and year last aforesaid, at Chelsea aforesaid, he was passing along, upon and over the said highway in

1. The matter to be supplied within [] will not be found in the reported case.

2. In Vermont, municipalities are not now liable for injury occasioned by reason of the insufficiency of a high-

way, except in so far as bridges and culverts are held to be parts of a highway. This form will, however, serve as a guide in preparing a pleading in a jurisdiction where such liability exists.

his carriage, drawn by *one* horse, and then and there, by reason of the insufficiency and want of repair of said highway as aforesaid, the said carriage with the said plaintiff therein was overturned and the plaintiff was thereby greatly injured (*set forth particularly the injuries to the person and to the carriage, if any*), and the said plaintiff has been obliged to expend and has expended a large sum of money, to wit, the sum of *two hundred* dollars, in and about the healing the bruises and injuries of the plaintiff as aforesaid and in and about the repair of the plaintiff's said carriage, to the damage (*concluding as in Form No. 10663*).

Form No. 19213.

(Precedent in *Cook v. Barton*, 63 Vt. 566.)¹

[(*Commencement as in Form No. 10663.*) In a plea of the case for that (*Here was set out the first and second counts of the declaration.*)]²

Also in a further plea of the case, for that on the *second* day of *September*, A. D. 1890, there was within the said town of *Barton* a certain other open highway leading from the dwelling-house then and now occupied by *Asahel Buswell* to and past the dwelling-house then and now occupied by *Edgar R. Cook*, in said *Barton*, and being the highway in said *Barton* which runs past the dwelling-house of said *Asahel Buswell*, in said *Barton*, to *Irasburg*, in said county, which said last named highway it then was, and for a long time before had been, the duty by law of the said town of *Barton* to maintain and keep in good and sufficient repair for the safe passing of travelers with their carriages and teams thereon, but which said last named highway was, on the day and year last aforesaid, at *Barton* aforesaid, and for a long time theretofore had been, out of good repair, insufficient and unsafe; and the plaintiff avers that on the day and year last aforesaid, at *Barton* aforesaid, she was passing along, upon and over the said last named highway in a carriage drawn by *one* horse, and that then and there, without fault on her part, and by reason of the insufficiency and want of repair of the said last named highway, the said plaintiff was thrown from said carriage in which she was then and there riding over and upon said last named highway, and thereby she, the said plaintiff, was greatly injured, [to the damage (*concluding as in Form No. 10663*).]²

Form No. 19214.

(Precedent in *Powell v. Wytheville*, 95 Va. 74.)³

[(*Commencement as in Form No. 6951.*)]⁴

For whereas the plaintiff on the *1st* day of *December*, 1892, was and is now the owner in fee, possessed of a certain house and lot of ground on the southwest intersection of *Church* and *Union* streets,

1. It was held on demurrer that this declaration was sufficient; but while, in order to recover, the plaintiff must show that the want of repair was in a bridge, sluice or culvert, those localities are, under the statute, portions of the highway, and the place of the accident need not be particularly described in the declaration.

2. The matter enclosed by and to be supplied within [] will not be found in the reported case.

3. This declaration was held sufficient.

4. The matter to be supplied within [] will not be found in the reported case.

and running back between parallel lines on *Union* street about 190 feet, in the town of *Wytheville*, in *Wythe* county aforesaid; the said lot of ground being then and now enclosed by plank fences and palings, and used by the plaintiff as a residence, and garden and stable. And the plaintiff avers that up to the time of the act or acts of the defendant, its officers and agents herein complained of, there was a ditch or depression or gutter running along *Union* street near the line of and running parallel with plaintiff's lot which emptied into, first, a sink and depression into said street, and then into a flume or funnel leading into a culvert running under said *Union* street, a few feet beyond the line of said plaintiff's lot; which said ditch, depression or gutter conveyed all the water that flowed from said street and plaintiff's lot aforesaid to said flume or funnel aforesaid, where it passed into its proper channel and was carried off. And the plaintiff further avers that the defendant, its officers and agents, on the day and year aforesaid, unlawfully, wrongfully, negligently, carelessly, unskilfully and injuriously filled up the ditch, depression or gutter, and in the place thereof unlawfully, negligently, carelessly, unskilfully and injuriously erected thereon an embankment of dirt and stone from *four* to *six* feet above the level and grade of *Union* street, and raised the grade of the flume or funnel which carried off the water under *Union* street aforesaid, without cutting a ditch or constructing a drain whereby the water flowing from plaintiff's lot and the streets aforesaid could escape as it hitherto had done, whereby a large portion flowing from *Church* street and *Union* street and plaintiff's lot is held and retained on plaintiff's lot aforesaid by reason of and in consequence thereof.

And plaintiff further avers that by reason of the unlawful, wrongful, careless, negligent and unskilful construction of said embankment as aforesaid, the earth thereon was rolled and thrown against and through the plaintiff's enclosure, and in and upon her said lot, greatly injuring the same. And the plaintiff further avers that by reason of the erection and construction as aforesaid of said embankment she has been cut off and prevented having access to her stables and other buildings and to her said lot, with horses, carriages, wagons and other vehicles. And the plaintiff further avers that said embankment so unlawfully, wrongfully, carelessly and negligently made and maintained by the defendant is a nuisance, greatly injurious and damaging to the plaintiff, and that by reason of the maintenance thereof she is greatly hindered and impeded, in fact, almost entirely debarred access to her stables and outbuildings, [to the plaintiff's damage (*concluding as in Form No. 6951*).]¹

Form No. 19215.

(Precedent in *Sheff v. Huntington*, 16 W. Va. 309.)²

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. A demurrer to this declaration was overruled. One of the questions decided under such demurrer was that

it was not necessary that the declaration should contain an allegation that the defendant or any of its corporate officers had any notice that the road or place complained of was out of repair or in bad condition. The court

[(*Venue and title of court as in Form No. 6952.*)]¹

George Sheff and Margaret Sheff, his wife, complain of the city of *Huntington*, a corporation organized, existing and doing business under the laws of the State of *West Virginia*, which has been duly summoned, etc., of a plea of trespass on the case: For this, that whereas, before and at the committing of the grievances, wrongs and injuries hereinafter mentioned, there was a common and public highway or road running along the bank of *Guyandotte* river on the lower or west side of said river, through a part of said city of *Huntington*, and within the corporate limits thereof, in said county of *Cabell*, intersecting *Thirty-first* street of said city, over, on and upon which said common and public road the citizens of this State and all others had the right to travel, pass and repass without hinderance or obstruction, and it was the duty of the said defendant to put and keep that part of the said common and public road that was within the corporate limits of the said city of *Huntington* in good repair; yet the said defendant, well knowing the premises, heretofore, to wit, on the *1st* day of *October*, *1876*, and for a long time previous thereto, at the county and city aforesaid, wrongfully and injuriously allowed and permitted that part of the said common or public road situated in its corporate limits to become and remain in bad condition, order and repair, in this: That the said defendant allowed the said road to become sidling, and permitted a large rut to be worn in, along and across said public road at or near a sugar-tree, standing in or on the side of said road a short distance above the place the *Chesapeake and Ohio* railroad crosses said public road, in the city and county aforesaid, and within the corporate limits aforesaid, and by means whereof afterward, to wit, on the day and year aforesaid, at the city and county aforesaid, the said plaintiff, *Margaret S. Sheff*, wife of the plaintiff, *George Sheff*, then lawfully residing, going and passing in, upon and along the said common and public road in and with a buggy to which *one* horse was attached and hitched, and on the sidling place aforesaid, the said buggy slipped and slid, and the wheels on one side thereof fell into the said rut, whereby she, the said *Margaret S. Sheff*, was then and there violently thrown out of said buggy, and then and there was greatly injured, bruised, wounded and crippled, and her life put in great danger and peril, to wit, at the city and county aforesaid. Wherefore, and by means of the premises and the wrongs and injuries mentioned, the said plaintiffs have been greatly injured and have sustained damages to the amount of *\$5,000.00*, and therefore they sue.

[(*Signature as in Form No. 6952.*)]¹

said: "The statute gives an action for any injury to any person by reason of a public road or bridge being out of repair. The statute does not limit the liability of the corporation, whose duty it is to keep a public road or bridge in good repair, to cases in which they have had notice of any defect in the road. It is the duty of the corporation to know that the road is in good repair, and see to it that citizens may have

full protection from injury by reason of the roads being in an unsafe condition. If a person is injured by reason of a public road being out of repair, the corporation, whose legal duty it is to keep the road in good repair, is liable to him for damages, whether it had notice of such defect or not."

1. The matter to be supplied within [] will not be found in the reported case.

c. Answer.

Form No. 19216.

(Precedent in *Independent Tp. v. Guldner*, 7 Kan. App. 701.)¹

[(*Title of court and cause as in Form No. 6352.*)]

The defendant, for answer to the plaintiff's petition, says: (*Here follow the first, second and third answers.*)²

For its fourth and further answer to the said petition defendant says that at the time of the injury complained of in said petition the said *Gustav Kroff*, deceased, was, and for a long period of time prior thereto had been, fully acquainted with and aware of the condition of the said bridge, as described in the said petition, and knew all about the condition of the approaches thereto at the place where it is alleged that the said injury occurred; that he had passed over the said bridge and its approaches for several months almost daily, in transporting wheat and other grain by wagon to the town of *Claflin*, in said county, and for the transaction of his other business and affairs; and that plaintiff herein is not entitled to recover from this defendant any damages whatever for the reasons following, that is to say: That at the time of the injury complained of in plaintiff's petition he, the said *Gustav Kroff*, deceased, was not exercising ordinary care and prudence, and that any injury that may have befallen him at said point was due solely to his own contributory negligence and want of ordinary care and caution in this, that at the time of the injury complained of he was driving a wild and fractious team of horses, which at all times were very difficult of management; that he was running the said team upon the road which approaches the said bridge described in plaintiff's petition, and that by his own negligence, at the time he approached the bridge, his team and wagon were not traveling in the beaten track of the road, and at the time of going upon the bridge he was driving at a distance of several inches from the regular approaches to the bridge, and when his wagon struck the bridge he was driving at a high rate of speed, and struck the bridge at a point near to one side or end thereof, and at a point on said bridge where he knew it was dangerous and unsafe, and that any injury which was received by him on that occasion was and is due wholly and solely to his own default.

[(*Signature and verification as in Form No. 6952.*)]³

2. Against Third Person.

a. Complaint, Declaration or Petition.

Form No. 19217.

(2 Humph. Prec. (1845), p. 762, § 29.)

(*Commencement of declaration as in usual form*) in a plea of the case for that whereas the said *Richard Roe*, before and at the time of the

1. It was held that under this answer the burden was on the defendant to prove the contributory negligence alleged.

2. The matter enclosed by and to be

supplied within [] will not be found in the reported case.

3. The matter to be supplied within [] will not be found in the reported case.

committing of the grievance hereinafter mentioned, was possessed of a certain messuage, with the appurtenances, situate and being in a certain street, called *King street*, in the city of *Dover*, in the county of *Kent*, which said street, at the time of the committing of such grievance, and from thence hitherto hath been, and still is, a common public street and highway for all persons to go, return, pass and repass, in, by, and with coaches, chariots and other carriages, at their free will and pleasure, to wit, at *Dover* aforesaid, in the county aforesaid, yet the said *Richard Roe*, well knowing the premises, whilst he was so possessed of the said messuage, with the appurtenances aforesaid, to wit, on the *tenth* day of *June*, A. D. 1895, at *Dover* aforesaid, in the county aforesaid, wrongfully and unjustly put and placed divers large quantities of dirt and rubbish in the said street, near to the said messuage, and wrongfully and injuriously kept and continued the same therein, and during the *night*-time of that day, without fixing or placing, or causing to be fixed or placed, any light or signal at or near such dirt and rubbish, to denote or show that the same were so there as aforesaid; by means and in consequence of which said negligence and improper conduct of the said *Richard Roe* in that respect, afterwards, to wit, in the *night*-time of the said *tenth* day of *June*, in the year aforesaid, to wit, at said *Dover*, in the county aforesaid, a certain chariot and carriage of the said *John Doe*, of great value, to wit, of the value of *two hundred* dollars, with the said *John Doe* therein, then and there going and passing in and through the said street, was accidentally and without any fault or negligence on the part of the plaintiff who was the driver thereof, driven upon and against the said dirt and rubbish, and was thereby then and there overturned, by means whereof the said *John Doe* became and was greatly hurt, bruised, cut, and wounded, and thereby then and there broke his right leg above the ankle, and then and there became and was sick, sore, lame and disordered, and so remained and continued for a great space of time, to wit, for the space of *six* months, and during all that time was and still is wholly hindered and disabled from following his profession and business, and hath been put to great expense, and hath laid out a large sum of money, to wit, the sum of *five hundred* dollars, in and about the care of his said leg and in and about endeavoring to be cured of the said wounds, sickness, soreness, lameness and disorder, so as aforesaid occasioned, and hath been and is permanently crippled and disabled by said breaking of his right leg, and hath been and is otherwise greatly injured and damnified (*If the plaintiff's carriage was injured, state such damage and the expense of repair*), to wit, at the city of *Dover*, in the county of *Kent* aforesaid.

And whereas also before and at the time of the committing of the grievance by the said *Richard Roe* as hereinafter mentioned, there was, and from thence hitherto hath been, and still is, a certain other common highway in the city aforesaid for all the citizens of this state to go, pass, and repass at all times of the year, at their free will and pleasure, yet the said *Richard Roe*, well knowing the premises, heretofore, to wit, on the day and year aforesaid, to wit, at the city of *Dover*, in the county aforesaid, wrongfully and unjustly

caused to be put and placed divers large quantities of dirt and rubbish in the said last mentioned common and public highway, whereby the said *John Doe*, lawfully passing in and along the said last-mentioned highway in a certain carriage, was then and there, with great force and violence and without any fault or negligence on his part, overturned in the said last mentioned carriage, by means whereof the said *John Doe* became and was greatly hurt, bruised, cut and wounded, and thereby then and there broke his right leg above the ankle, and then and there became and was sick, sore, lame and disordered, and so remained and continued for a great space of time, to wit, for the space of *six months*, and during all that time was and still is wholly hindered and disabled from following his profession and business, and hath been put to great expense, and hath laid out a large sum of money, to wit, the sum of *five hundred* dollars, in and about the care of his said leg and in and about endeavoring to be cured of the said wounds, sickness, soreness, lameness and disorder, so as aforesaid occasioned, and hath been permanently crippled and disabled by the said breaking of his right leg, and hath been and is otherwise greatly injured and damnified (*If the plaintiff's carriage was injured, state such damage and the expense of repair*), to wit, at the city of *Dover*, in the county of *Kent* aforesaid, to the damage of the said plaintiff *ten thousand* dollars, and therefore he brings suit, etc.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19218.

(*Title of court and cause as in Form No. 5926.*)

The complaint of the above named plaintiff respectfully shows to this court:

1. That at the times hereinafter mentioned the defendant had taken upon himself (or had agreed to the trustees of the village of *Northport*, hereinafter mentioned) to lay down pipes in and under the highway known as *Main street*, in the village of *Northport*, in said county of *Suffolk*, for the purpose of lighting the said highway with gas, and to make the proper trenches for that purpose, and when said pipes were laid down, to fill up properly the said trenches, and to put and to leave the said highway clear and in a reasonable and secure condition.

2. That the defendant and his servants on the *first* day of *June*, *1903*, accordingly took up part of the said highway and made trenches and holes therein and laid down said pipes, and displaced the earth and material of the said highway, and so carelessly and negligently filled the said trenches, and left the said highway in so dangerous and improper state, that a horse of the plaintiff, of the value of *two hundred* dollars, which he was then and there lawfully driving along the said highway, sunk and fell therein, without fault or negligence on the part of plaintiff, and was wounded, lamed and rendered of little or no value, to the plaintiff's damage *three hundred* dollars.

Wherefore, (*concluding as in Form No. 11457*).

Form No. 19219.

(Precedent in *Clark v. Fry*, 8 Ohio St. 360.)¹[[*Title of court and cause as in Form No. 5929.*]]²

George Fry, plaintiff, says that *John B. Clark*, defendant, before and on the 16th day of *March*, 1854, was the possessor and occupier of a certain messuage and premises, situate in the city of *Toledo*, in the said county of *Lucas*, and near to and abutting upon *Summit* street; and which said street, at the time aforesaid, and from thence hitherto has been, and still is, a common public street and highway in said city for all persons to go, pass and repass upon, and that before the day of the year aforesaid, and while the said street was a public highway as aforesaid, the said *John B. Clark* and *Milton G. Freeman*, defendants, had caused to be dug into said street, and into and across the sidewalk on the side thereof, a certain hole opening into a certain cellar of and belonging to the said messuage and premises, and permitted the said hole to continue up to and after the day and year aforesaid without any proper or sufficient covering or guard over and around it to protect passengers along said street and sidewalk from falling into the said hole; and the same was then and there so badly and insufficiently covered, guarded and protected that the plaintiff, who was then and there passing along the said street and sidewalk, unavoidably, and without fault or negligence on his part, stepped and fell into said hole, and thereby the right shoulder and arm of the plaintiff were fractured, dislocated and otherwise injured, and the plaintiff thereby became and was sick, disabled, disordered and diseased, and has so remained and continued up to this time, during all which time the plaintiff has suffered and endured great pain and suffering, and has been prevented from attending to and transacting his usual and necessary business, and has been obliged to pay and lay out large sums of money in and about attempting to be cured of his said injuries, which are yet uncured, and are of such a nature as to render his right arm crippled for the remainder of his life.

[Wherefore, (*concluding as in Form No. 5929.*)]³

b. Answer.

Form No. 19220.

(Precedent in *Wood v. Mears*, 12 Ind. 517.)⁴[[*Commencement as in Form No. 12779.*]](*The first paragraph of the answer was a general denial*)(*The second paragraph of the answer was held subject to demurrer.*)²

3. That the defendant was about to, and engaged in building, as in the second paragraph is alleged, and for that purpose did deposit

1. From the facts of the case it was held that the defendant was not liable.

2. The matter to be supplied within [] will not be found in the reported case.

3. The matter enclosed by and to be

supplied within [] will not be found in the reported case.

4. The third and fourth paragraphs of the answer set forth in the text were held good against demurrer.

for a reasonable time, and not longer, sand in said street for said building, which is the same pile complained of (but he denies that it was wrongfully, carelessly or negligently done), and says that at *Indianapolis* aforesaid, there was an ordinance of the city of *Indianapolis*, passed April 20, 1852, and afterwards continued in force, whereby "Persons engaged in building or making pavement, may deposit materials for such building or pavement, in any of the streets or alleys, for a reasonable time; but no person shall be authorized to fill up any gutter or channel for the passage of water, or so obstruct the said street or alley as to prevent the passing of carriages, nor occupy more than one-third of said street or alley." And the defendant says that, by such deposit, he did not fill up any gutter or channel for the passage of water; nor did he so obstruct said street as to prevent the passing of carriages; nor did he occupy thereby more than *one-third* of said street, and left open, unoccupied and unobstructed a large space of and upon said street, around said pile, to wit, *sixty* feet, along and through which the plaintiff might have safely driven his mare and buggy. Wherefore defendant demands judgment.

4. That the defendant deposited the sand, as alleged in the second and third paragraphs, and for the purpose therein named, which is the same pile complained of, as he had a right to do; that the same had not remained there an unreasonable length of time, and the plaintiff, well knowing that said materials were there in said street, carelessly drove his mare and buggy upon said sand, and the mare, being old and clumsy, fell and slightly injured the shafts of the buggy, doing no damage to the harness. Wherefore, [(concluding as in Form No. 12696).]¹

IV. OBSTRUCTION OF STREET OR HIGHWAY.

1. Petition to Municipal Authorities to Have Obstruction Removed.

Form No. 19221.

(Precedent in *Norfolk v. Chamberlaine*, 29 Gratt. (Va.) 536.)²

[To the Select and Common Councils of the City of *Norfolk*.]³

We, the undersigned, owners and occupants of the stores known as "*Atlantic Block*," respectfully represent to your honorable bodies that we find the projection of the steps of the "*Marine and Citizens Bank*" is a serious detriment and nuisance to us; our stores, at certain times, being almost unapproachable by parties coming from the eastern portion of the city.

We believe that this trespass upon the public sidewalk, in any business section of the place, is a nuisance to all our citizens, a drawback to business, and ought to be removed.

1. The matter to be supplied within [] will not be found in the reported case.

2. An order directing the removal of the obstruction was granted.

3. The matter enclosed by [] will not be found in the reported case.

We, therefore, request that you will instruct the city inspector of streets to have the above mentioned steps removed from the pavement within *thirty* days after granting of this petition.

[(Signatures of petitioners.)]¹

2. Notice to Remove Obstruction.

Form No. 19222.

(Precedent in *Samuell v. Sherman*, 170 Ill. 266.)

[(Address as in Form No. 19223.)]¹

You are hereby notified that there are obstructions in the public road across the land of which you are the owner, at the south-east corner of the angle where the road coming from the north at the residence of *George W. Athey*, near the south-west corner of the town of *Easton, Illinois*, turns west, immediately in front of said residence, and extending from said angle north-west toward the *Illinois Central* railroad. You are hereby notified that said road is *sixty-six* feet wide, and runs in a straight line from said railroad squarely up to the yard fence of the said residence of *George W. Athey*. And you are hereby notified to remove from the said road all obstructions, and especially those near said residence, and consisting of buildings, fences, wagons, vehicles, farm implements and machinery, header barges, hay frames and rubbish, trash, etc., and unless you remove such obstructions from said road within *ten* days from the date of service of this notice, you will be proceeded against according to law.

[(Signature as in Form No. 19223.)]¹

Form No. 19223.

(Precedent in *Ferris v. Ward*, 9 Ill. 499.)²

Mr. *George W. Ferris*: Sir, you are hereby ordered to remove *two* certain rail fences, built by you across and which are now an obstruction to a certain public road, known as the road from the south-west corner of section *19*, in township numbered *11* north, of range numbered *one* east of the *fourth* principal meridian, thence east on the section line, till it intersects *Galesburgh* and *Knoxville* road, which said fences are the one erected from the north-east the other from the north-west corner of the north-east quarter of section *30*, and running to the one to the south-east quarter of section *19*, in said township.

John L. Clay, Supervisor
of road district No. *34*, in *Knox* county, *Ill.*

3. Civil Action for Obstructing Highway.

a. By Municipality.³

1. The matter to be supplied within [] will not be found in the reported case.

2. This notice was held sufficient.

3. Precedent. — In *Pittsburgh v. Scott*, 1 Pa. St. 309, the following declaration was sufficient:

The first count alleged in substance,

that "there then was, and from thence hitherto has been, and still ought to be, a certain common and public street or highway, in the city of *Pittsburgh*, called and known as '*Duquesne Way*,' in and through said city, then and there situate and being in the county aforesaid, for all persons to go, return, pass and repass, on foot and with horses, drays, carts, wagons, etc., at all times of the year, of their free will and pleasure, to wit, in the city aforesaid, in the county aforesaid.

And whereas, before and at the time of the committing of the grievances hereinafter and before mentioned, the said plaintiff had employed, engaged, hired and permitted divers persons, with horses and carts and other vehicles, laden with stones, dirt, clay and gravel, and just before, and at the time of, the continuance of said grievances, the said plaintiffs, by their servants, in that behalf were driving and conducting their said horses and carts and other vehicles so laden as aforesaid, in, through, over and along the common and public street or highway aforesaid, to wit, in the city aforesaid, in the county aforesaid, for the purpose of filling up, grading, making and repairing the public wharf along the *Allegheny* river, between said street and said river, in the county aforesaid: Yet the said defendant, well knowing the premises, etc., wrongfully and injuriously built, erected, put and placed certain piles of boards or lumber in, upon and across the said public street aforesaid, for a long space of time from the — day of —, A. D. —, up to the time of bringing this suit, and thereby, during all the time aforesaid, obstructed the said common and public street or highway, and thereby prevented the said plaintiffs from driving and conducting their said horses and carts and other vehicles, so laden as aforesaid, in, through, over and along the said common and public street or highway, by reason of all which the aforesaid premises the said plaintiffs were obliged to drive and conduct their said horses and carts and other vehicles, so laden as aforesaid, back again, and by a very circuitous road, and for a much greater distance, than the said plaintiffs otherwise would, and, of right, ought to have done, to wit, in *Pittsburgh*, in the county aforesaid, whereby," etc.

The second count charged that there was, "and still ought to be, a certain

public street, called '*Duquesne Way*,' in and through said city, for all persons to go, return, pass and repass on foot, with horses and wagons, drays, carts, etc., at all times of the year, of their free will and pleasure; and also there then was, and still is, and from thence hitherto has been, a public wharf or landing extending along said street, and from said street to the *Allegheny* river, for all persons to use as a landing or wharf for their boats, rafts, etc.; and for the use of said landing the said 'mayor, aldermen and citizens of *Pittsburgh*' receive certain pay, moneys and wharfage, to wit, in *Pittsburgh*, in the county aforesaid; and that the said street was greatly used by divers persons for the purpose of passing and repassing; and hauling their lumber, iron, stone, coal, etc., from the said wharf or landing to divers places in said city, and also divers manufactured and other articles from the said city to said wharf, and was of great use, convenience, and benefit to all persons who used said wharf, and from whom the said plaintiffs derived and received large sums of money for wharfage, as aforesaid; yet the said defendant, well knowing the premises, etc., placed, built, and piled in, upon, and across said public street piles of lumber, dirt, boards, etc., and kept and continued the same in, upon, and across said street for a long space of time, to wit, from the day and year aforesaid to the time of bringing this suit, and thereby prevented the persons, so as aforesaid trading and doing business at said wharf, from passing and repassing, and hauling lumber, etc., in, through, over and along the said public street, as they were wont to do before the committing of the aforesaid grievances: by reason of all which the aforesaid premises, the business at the said wharf was greatly injured, and the revenue received by the plaintiffs therefrom, for wharfage, was greatly diminished."

The third count alleged, "that the said plaintiffs, before and at the time of the committing of the grievances hereinafter in this count mentioned, were, and thence hitherto have been, and still are entitled to the possession, custody and use of a certain wharf in the city of *Pittsburgh*, lying and being on the line of the northward side of *Duquesne Way* to the river *Allegheny*, to have, hold, and use the same as a public landing, for the purposes of trade, commerce,

Form No. 19224.

(Precedent in *Augusta v. Moulton*, 75 Me. 551.)¹[[*(Commencement as in Form No. 6940.)*]]²

In a plea of the case for that on the *twenty-fifth* day of *September*, A. D. 1866, there was and ever since that time has been and now is, a certain highway in said city, known as the *South Belfast* road, leading from said *Augusta* to *Belfast*, which said road was legally established, and said city bound to keep the same in repair, so that it shall at all times be safe and convenient for travelers with their horses, teams and carriages; that said city on said day, and from thence hitherto were and now are the lawful occupants of said road for all purposes of making and repairing the same, and no other person or persons (except the owners of the fee in said road) had or have any right or authority to enter upon (except for the purposes of travel), occupy or interfere with said road. That said city, ever since said day, have been and now are bound by law to keep the same safe and convenient for travelers with their horses, teams and carriages.

That on the said *twenty-fifth* day of *September*, A. D. 1866, the defendant, not being the owner of the fee in said road and without right or color of right, unlawfully and wilfully erected, raised, and from that date to the date hereof, has maintained and now maintains *two* dams, one upon a certain stream called *Worromontogus* stream, and one upon what is called back run stream, east of the dam upon the *Worromontogus*, which said dams so erected, raised and maintained, raised the water in said streams to such a height that it overflowed said road and made the same unsafe and inconvenient for travel by reason of the water thereon, and has greatly damaged the same by washing out the gravel and dirt from said road, and rendering the same soft and muddy, by throwing up driftwood and rubbish on said road, and other damages to said road, which rendered the same at times impassable, wholly on account of said obstructions. That said city has been put to great expense in the repairing of said road, to wit, the sum of *two hundred* dollars, yearly, since said *twenty-fifth* day of *September*, A. D. 1866, which said repairs were wholly on account of the flowing and damage caused by the defendant's said dams. That said city has been obliged to raise and have raised said

etc., and to receive and collect certain tolls or wharfages for the use and occupation of the same: nevertheless, the said defendant, well knowing the premises, etc., on the *1st* day of *August*, A. D. 1834, and on divers other days between that day and the day of commencing this suit, injuriously and unlawfully, and against the will of the said plaintiffs, used the said wharf for landing, carrying, etc., certain rafts of pine lumber, the property of said defendant, and collected and received for the use of said wharf, from divers persons trading in the city of *Pittsburgh*, wharf-

age for lumber, etc., landed at said wharf, against the will of said plaintiffs, and notified, prevented and hindered the wharf-master, lawfully appointed by the plaintiffs, from collecting and receiving wharfage, which, by law, he was authorized and entitled to collect and receive from the said plaintiffs."

1. No objection was made to this complaint. The defendant filed a plea *puis darrein continuance*, which was held bad and a repleader ordered.

2. The matter to be supplied within [] will not be found in the reported case.

road to protect it from said flowing and damage, and have been put to great expense in so doing, to wit, the sum of *one thousand* dollars. [To the damage (*concluding as in Form No. 6940*).]¹

b. By Person Injured Thereby.

(1) COMPLAINT, DECLARATION OR PETITION.²

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. **Precedents.**—In *Fossion v. Landry*, 123 Ind. 136, the first paragraph of the complaint alleged substantially:

That the plaintiff, Ellen Landry, who is the wife of her co-plaintiff, is the owner of certain unplatted lots, describing them, in Clymer's Station, in Cass county, Indiana; that one Andrew M. Brown, being the owner of a forty-acre tract of land, of which plaintiffs' lots constituted a part, laid out said lots, and at the same time laid out a certain described ten-foot alley, and expressly dedicated said alley forever to the public, by then and there freely giving said alley to the public; that one of plaintiff's lots is situate on the south side of said alley, and the other on the north side thereof; that the dwelling-house occupied by plaintiffs as well as the wood-house and cow-house, are situate on the lot south of said alley; that the grocery and dry goods store and post-office, run and operated by plaintiffs, and also the barn, are situated on the lot on the north side of said alley; that plaintiffs have used said alley as a way of ingress and egress to and from the said wood-house, cow-house, stable and barn, for twenty years past up to the year 1883, when the defendant, without right and against the repeated protests of the plaintiff and others, unlawfully and forcibly obstructed the same by fencing the same on the sides and at the east end, the entrance from the public highway, with a barbed wire fence, and has ever since, with menaces and threats, forcibly and unlawfully obstructed said alley, and, during said time prevented the public, and especially plaintiffs, from using said alley in any way for any purpose; that the public, and especially the plaintiffs, used and traveled said alley for more than twenty years continuously and uninterruptedly, prior to the time the same was so obstructed by the defendant;

that on account of said obstruction, plaintiffs have been deprived of the way to the wood-house, cow-stable and barn situate on said alley, and in consequence of said obstruction have suffered and sustained the following expenses and damages; setting out an itemized account of special damages, among which is loss of rent of \$2.50 per month of dwelling since May, 1883, to date, \$100.

This was held sufficient.

In *Zanesville v. Fannan*, 53 Ohio St. 605, the petition alleged that the defendant is a municipal corporation of this state, and since the year 1880 has been a city of the third grade of the second class; that Zane street, and some other streets connecting with it, are, and since the year named have been, public streets of the defendant, and Rish-tine alley is and has been a public alley within the city; which streets and alley the defendant had improved by gutters, drains, and by widening, and otherwise, prior to the occurrences complained of; that the plaintiff, since the year mentioned, has been and still is the owner of a lot fronting on Zane street, and bounded by Rish-tine alley in the rear, and that, relying on his right to the free and unobstructed use of the street and alley for all lawful purposes, he improved his lot by erecting thereon a dwelling-house, which he occupies as a home, and made other convenient improvements thereon, to the enjoyment of which the use of the street and alley and their connecting streets is necessary.

The petition then alleged that:

"On the 30th of November, A. D. 1887, the defendant, by its city council by ordinance, which went into effect, consented and authorized certain railroad companies, to wit: Two corporations, one entitled '*The Zanesville, Newcomerstown and Cleveland Railroad Company*,' and the other '*The Zanesville, Mount Vernon and Marion Railway Company*,' to take possession of and use the westerly end of Zane

Form No. 19225.

(Precedent in *Goggans v. Myrick*, 131 Ala. 287.)¹[(Title of court and cause as in Form No. 5907.)]²

The plaintiff claims of the defendant *five thousand* dollars damages, for that, heretofore, to-wit, on or about *April*, 1898, defendant wrongfully obstructed a certain public road which ran through section 29, township 15, range 4 west, and as a proximate consequence thereof, plaintiff, whose homestead abutted upon said road and who

street, from the north line of said street near the southwest corner of lot 13 in said addition, to and across said *Rishtine* alley, and thence to said *Fifth* and *Howard* streets, and also that much of said alley, for the purpose of constructing, maintaining and operating railroads thereon. The said *The Zanesville, Newcomerstown and Cleveland Railroad Company*—having no line of its own—afterwards transferred the rights granted it as above stated to the *Baltimore & Ohio Railroad Company*; and thereupon said last named company—a corporation—which then possessed all necessary main tracks required by it along its line—and the said *Zanesville, Mount Vernon and Marion Railway Company*, took possession of the whole of said *Zane* street and of said part of *Rishtine* alley, and of said way leading to *Fifth* and *Howard* streets, and laid tracks thereon, raising embankments where said tracks crossed the city gutters and drains in said street and alley, and putting down cross ties and laying and fastening iron rails thereon and using and operating the same for railway purposes, transporting to and fro cars and engines, and entirely blocked and obstructed said part of said street and said part of said *Rishtine* alley, completely destroying the western entrance and approach to said alley, and wholly obstructed and prevented passage through said street and alley and the use thereof; and ever since on or about the *twenty-eighth* (28) day of *November*, A. D. 1899, the said parts of said street and alley, by reason of the premises, have been and are now wholly obstructed and rendered useless for the purposes for which they were laid out and appropriated, and the plaintiff and his family have been, and are, deprived of access by wagons and teams to the rear of said lot by said alley, and have no other access thereto; and said railway companies, by the laying of such track, have encroached and

advanced upon the real estate of the plaintiff above described—with the consent and permission of the defendant and its officials. Moreover, the said embankments and track of said railways have, during said time, so obstructed, and do now so obstruct, the passage of water along the aforesaid public gutters and drains in said street and alley from the higher ground east of plaintiff's said lot, that said water in each heavy rain, because of said embankment and track, has overflowed said gutters and drains and come upon plaintiff's lot and into his cellar; by reason of all said acts, said overflow of said waters, and difficulty of ingress and egress, the occupancy of plaintiff's said dwelling and lot has become uncomfortable and undesirable, and the value of his said dwelling, lot and appurtenances has been greatly diminished; all without compensation or damages paid, tendered or offered to the plaintiff therefor by any person or corporation whatever. On and after the *9th* day of *December*, A. D. 1899, the defendant, by its city council, was duly and fully notified of the aforesaid obstructions of said street and alley, and of the matters hereinbefore alleged, and prayed for the restoration of said street and alley and the removal of said obstructions from each of them and from said drains, but the defendant and its officials wilfully failed, refused and neglected to remove or cause to be removed said obstructions from said street and alley, and said obstructions now continue contrary to law, and without any fault, permission or negligence of the plaintiff, whereby he has been damaged in the sum of *one thousand* dollars in the particulars and in the manner aforesaid."

A judgment for plaintiff was affirmed.

1. This is the amended complaint, which was held sufficient on demurrer.

2. The matter to be supplied within [] will not be found in the reported case.

owned and operated a saw mill, grist mill, cotton gin and wheat thresher upon land abutting upon said public road, was put to great inconvenience and expense in getting to and from his said homestead and said enterprises, and in moving freight, live stock, machinery, grain and other things to and from his said homestead and to and from his said saw mill, grist mill, cotton gin and wheat thresher, and access to which was rendered greatly more difficult and lengthy, and plaintiff lost a great amount of custom for his said saw mill, grist mill, cotton gin and wheat thresher, and failed to make a great amount of money, which he would otherwise have made doing work for the public at said saw mill, grist mill, cotton gin and wheat thresher, and plaintiff's said homestead, and his said saw mill, grist mill, cotton gin and wheat thresher were rendered greatly less valuable, and plaintiff was greatly harassed and worried, and suffered great mental pain, and was put to great inconvenience and expense. The said road was a part of the road formerly known as the *Elyton* and *Jasper* road, of the *Warrior Trace*, and at the time of said obstruction was known as the *Birmingham* and *Jasper* road, or *Old Birmingham* and *Jasper* road.

(*The second count of the complaint was identical with the first, with the exception that it was alleged therein that the obstruction was placed across the public road by the defendant on the 13th day of November, 1899.*)

Plaintiff claims of defendant the further sum of five thousand dollars damages, for that heretofore, to-wit, on the 13th day of November, 1899, defendant wrongfully obstructed a road, to which and through which plaintiff had the right of access for himself, his family, and those desiring to transact business with plaintiff, to whom the use of said road was necessary or convenient, which said road ran through section 29, township 15, range 4 west, in *Jefferson* county, *Alabama*, and as a proximate consequence thereof, plaintiff, whose homestead abutted upon said road, and who owned and operated a saw mill, grist mill, cotton gin and wheat thresher, at which he sought the patronage of the public, suffered the injuries and damages set out in the first count of this complaint. The said road was a part of the road formerly known as the *Elyton* and *Jasper* road, of the *Warrior Trace*, and at the time of said obstruction was known as the *Birmingham* and *Jasper* road, or *Old Birmingham* and *Jasper* road.

[(*Signature of attorney as in Form No. 5907.*)]¹

Form No. 19226.

(Precedent in *Smith v. Smith*, 34 Kan. 293.)²

[(*Title of court and cause as in Form No. 5917.*)]¹

Plaintiff, for a cause of action against defendant, says that he resides upon, is in possession, cultivates and is the owner of the fol-

1. The matter to be supplied within [] will not be found in the reported case.

2. It was held that a demurrer to this petition was properly overruled. It was held further that if the defendant

desired the situs or place of the alleged way set forth in the petition fixed with greater certainty, the court, upon his motion, might have required the pleading to be made more definite in that regard.

lowing lands and tenements in *Linn county, Kansas*, to wit: The west half of the northeast quarter of section 14 and the west half of the southeast quarter of section 11, all in township 22, range 23; that he occupies and cultivates said land as a farm, and it is the homestead of himself and family; that he has so occupied and owned said land for a number of years last past; that running through said land east and west is a public highway, which public highway commences two or three miles west of said land, and runs in an easterly direction through other lands west of said land and enters said land about thirty rods south of the northwest corner of the northwest quarter of said northeast quarter of section 14, and thence runs east nearly parallel with the north line of said section, through said west half of the northeast quarter of section 14, and then in the same direction east through the east half of said northeast quarter of section 14, and through, in the same direction, the northwest quarter of section 13, in said township and range, and thence in an easterly direction to *Mound City*, in *Linn county, Kansas*.

Plaintiff further says that said highway has been used by the public and by defendant in passing and repassing thereon, as a public highway continuously from 1859 until it was obstructed in *March, 1881*, by said defendant as hereinafter more fully set forth; that in 1859 a road was viewed by the supervisors of *Mound City* township, in said county, across said lands near to and over the same road, which survey was duly recorded in the township records of said township, and that ever since said survey said road has been used by the people of *Linn county, Kansas*, as a public highway, with the consent and assent of defendant; that defendant has resided upon a farm of which the said east half of the northeast quarter, section 14, is a part, and the other part being the east half of the southeast quarter, section 11, township 22, range 23, ever since said survey was made, and has recognized and used said road as a public highway ever since; that he has built a fence on both sides of said road where the same crosses the said east half of the northeast quarter of said section 14, and has, as overseer of the public highways in the road district in which said road is located, repaired said road, built culverts and bridges thereon, and kept the same in repair as a public highway.

Plaintiff further says that he has used said road as a public highway in passing to and from *Mound City*, the county seat of said county, the trading-point, milling-place and post-office of plaintiff, from his said farm, continuously for the last 24 years; that during that time he has used no other road than the said road across the defendant's said land in going to and returning from *Mound City* from his said farm; that across his own land he has built fences on each side of said road, and has built his dwelling-house, stables, out-houses, pens and fields with reference to said road, and adjacent and handy to the same; that in going to the railroad station he has passed over said road continuously, and has no other eastern outlet from his house and farm than over said road.

Plaintiff further says that said defendant has built his houses, out-houses, planted his orchard, constructed his fields on his farm —

being the said E. 1-2 of S. E. 1-4, section 11, and the E. 1-2 of N. E. 1-4 of said section 14, town 22, range 23 — adjacent to and convenient to said road.

Plaintiff further says that on or about the 20th day of March, 1881, said defendant did wilfully obstruct said road by placing posts firmly in the ground on said road, and attaching three strands of barbed wire firmly to said posts across said road, and by placing brush and timbers in said road; that said obstructions are and were placed on and across said road by defendant on the said day, and at the point on said road where it enters upon the said east half of the northeast quarter of said section 14, and like obstructions where said road crosses the east line of said land; that defendant has been frequently requested by plaintiff, and others who use said road, to remove said obstructions, but that he refuses to remove the same, or any part thereof, and still maintains the same, and has kept the same in and across said road since the 20th day of March, 1881; and that by reason thereof plaintiff has been wholly deprived of the use of said road since said date, to his damage in the sum of five hundred dollars; that he has been compelled to go three miles around because of said obstructions in going to and returning from Mound City, and in going to and returning from the railroad station, and that his family, and each member thereof, has been compelled to go a like distance in making the same travel; and that said obstructions greatly inconvenience and damage plaintiff in the use and enjoyment of his said farm and homestead to his damage as aforesaid.

Wherefore, plaintiff demands judgment against defendant for the sum of five hundred dollars; that said highway be adjudged a legal highway, and that the same may be opened to the public for public travel, for other relief, and costs.

[(Signature and verification as in Form No. 5917.)]¹

Form No. 19227.

(Precedent in *Stewart v. Ohio River R. Co.*, 38 W. Va. 440.)²

[(Commencement as in Form No. 6952.)]¹

The amended declaration of *C. V. Stewart* against the *Ohio River Railroad Company*: *C. V. Stewart*, by way of amendment to his former declaration filed herein, complains of the *Ohio River Railroad Company*, a corporation under the laws of the state of *West Virginia*, which does business in said state, and has its principal office in the city of *Parkersburg*, in said state, and which has been duly summoned to answer a plea of trespass on the case, for this, to wit, that the said plaintiff now is, and long has been, the owner in fee simple and occupier of a certain lot or parcel of land situate in the town of *West Columbia*, in the county and state aforesaid, and bounded on the west by *Coal street*, and on the north by the public road or street leading from the *Ohio river* to and intersecting with the *Ripley* and *West*

1. The matter to be supplied within [] will not be found in the reported case. against demurrer, although it was held that the paragraph relating to the plaintiff's nervous system should have been omitted.

2. This declaration was held good omitted.

Columbia pike, so that said lot is a corner lot, and very valuable, and upon which lot or parcel of land belonging to this plaintiff is situated a frame dwelling-house, storehouse, stable and other buildings necessary and proper for the free use and enjoyment of the same, and which lot, with the buildings thereon, the said plaintiff now is, and long hath been using, occupying and enjoying as a home and residence and place of business; and the plaintiff says that he used, occupied and enjoyed said premises as aforesaid, free from all obstructions, obstacles, incumbrances, interferences, or hindrances, as of a right he ought and should have done, until the happenings of the matters and things, and the acts and doings, hereinafter specified and complained of, namely, that during the time said premises were occupied, used and enjoyed by this plaintiff in the manner herein-after set forth, the said defendant, through and by its agents and employees, took possession and appropriated to its own use and benefit, to wit, on the ——— day of ———, 1886, in the county aforesaid, that part of said *Coal* street which forms the western boundary of plaintiff's said premises, and defendant made deep and dangerous excavations in said street, and along the same, and immediately in front of plaintiff's property, and built thereon its railroad bed and laid its railroad track on the same, and ever since the day and year last aforesaid the said defendant has been, and still is, using the same as a railroad right of way and railroad track, and the said defendant, ever since the day and year last aforesaid, has run its cars, locomotives, trucks, hand-cars, engines, and all other rolling stock over the said *Coal* street, in the operation and carrying on of its business as a common carrier of freight and passengers, to the great and irreparable injury and damage to the said plaintiff in the use and the enjoyment of his said premises, and without compensating him therefor.

And the plaintiff further says that the deep and dangerous excavations and cuts made in and along said *Coal* street immediately in front of his premises by said defendant, as aforesaid, have entirely destroyed the use of said *Coal* street by this plaintiff, so that this plaintiff cannot now have access to and from his said premises on the western side thereof, as he had theretofore done; that his said premises front upon said *Coal* street, and that he can no longer approach his said premises by means of said *Coal* street with wagons or other vehicles; and that said street was in constant use, in going to and from plaintiff's said premises, until it was destroyed by the said defendant, as aforesaid.

Plaintiff further avers that said excavations and cuts made in said street by said defendant are deep and dangerous, and that in some places the said excavations in front of plaintiff's said premises are as much as *four* feet in depth, and leave a narrow strip between said cut and plaintiff's said houses and buildings not exceeding *six* or *eight* feet in width.

Plaintiff further avers that his only means of access to and from his said stable situate on said premises was over and along said *Coal* street, and that he cannot now reach said stable with a wagon or other vehicle, and that his said stable is rendered almost practically useless to this plaintiff by reason of the destruction of said street by

said defendant as aforesaid; that the said railroad passes so near to the said stable that it is unsafe and dangerous to keep hay, oats or other feed therein, or to confine or shelter stock therein, because of the great danger from fire originating from sparks issuing from the locomotives constantly passing along said street immediately in front of said stable; and the ground upon which said stable is located can no longer be appropriated to any valuable or practicable use or purpose, by reason of the loss of the use of said *Coal* street and its near proximity to said railroad track; and so plaintiff says that he has had to abandon the use of said stable, and the use and enjoyment of the ground upon which it stands. Plaintiff further says that the other buildings on his said lot are so close to said railroad track, by reason of the location of the said road on said *Coal* street, that there is great danger of being lost and wholly destroyed by fire issuing from the locomotives of the defendant aforesaid, and this dangerous exposure to fire of plaintiff's said buildings has greatly enhanced the cost of procuring insurance thereon, and thus rendered it almost impossible for plaintiff to procure insurance against loss by fire upon his buildings aforesaid; and plaintiff says that the trains of the defendant which pass along and over said road immediately in front of his said buildings and property are very heavy, and frequently run very rapidly, whereby plaintiff's said buildings are greatly jarred and shaken and much injured and damaged.

Plaintiff further avers that the locomotives and trains of said defendant pass over said road in front of plaintiff's premises, as aforesaid, both in the night-time and in the day-time, and shake and jar plaintiff's buildings, part of which is occupied by the plaintiff as a residence; and plaintiff is a person of highly sensitive nervous organization, and the shaking and jarring of plaintiff's said residence has greatly annoyed and disturbed him and caused him great loss of sleep, whereby plaintiff's health has been much impaired.

Plaintiff further avers that by reason of the facts and allegations hereinbefore specified, touching the injury to his said buildings and premises, that they have been depreciated in value more than *two-thirds*, and their value prior to the injuries herein complained of was at least the sum of *twelve hundred* dollars. And by reason of which matters and things hereinbefore set forth and complained of, an action hath accrued to this plaintiff to demand and have of and from the said defendant the sum of *one thousand* dollars, the damages sustained by this plaintiff, as aforesaid; wherefore the plaintiff brings suit.

Hogg & Beller, P. Q.

(2) ANSWER.

Form No. 19228.

(Precedent in *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 263.)¹

[(*Title of court and cause as in Form No. 12445.*)]²

Now comes the *Kinnear Manufacturing Company*, one of the defend-

1. It was held that a demurrer to these answers was properly overruled. 2. The matter to be supplied within [] will not be found in the reported case.

ants herein, and says that it is a corporation organized and existing under the laws of the state of *West Virginia*.

Further answering said defendant admits that *William A. Neil*, now deceased, in his lifetime platted and laid out the subdivision of real estate, as alleged in the petition and according to the plat, a copy of which is attached to said petition.

Further answering this defendant admits that the said *William A. Neil*, during his lifetime, and after his death the trustees, as herein-after set forth, sold and conveyed various lots in said addition to various parties, and among the same conveyed to the plaintiff lot 63 in said addition, and that said plaintiff is in possession of said lot 63 and has erected buildings thereon.

Further answering this defendant admits that it has taken possession of the east 109.80 feet of what was formerly *Cedar* alley, as appears on said plat, running west from *Fourth* street said distance, and is now excavating for the foundations of a building and intends to erect thereon a building.

Further answering this defendant denies each and every fact and allegation in the petition contained, not herein admitted.

Further answering this defendant says that the sewer in the east 109.80 feet of *Cedar* alley is a private sewer, beginning at *Fourth* street and drains west toward *Hamlet* street. Defendant further says that the erection of a building upon said portion of said alley will in no wise interfere in the use by plaintiff of said sewer or any part thereof.

This defendant, further answering, says, that on or about the *third* day of *January*, 1897, *William A. Neil* died testate, and that on the *sixth* day of *January*, 1897, his will was duly admitted to probate in the probate court of *Franklin* county, *Ohio*, and that by said will he appointed as his trustees the defendants, *Walter N. P. Darrow*, *Theodore M. Livesay* and *Charles S. Hamilton*, which trustees on the *eighth* day of *January*, 1897, were duly qualified and appointed as such trustees.

By the terms of said will the said *William A. Neil* devised all of his real estate, including all of the land, a plat of which is attached to the petition, to said trustees in fee simple, with full power to contract with, convey the same and subdivide the same.

Among the property devised by the said *William A. Neil*, deceased, to said trustees were lots 64, 65, 66, 73, 74, 75 and 76 of the property so platted.

That on or about the *twentieth* day of *November*, 1899, the defendant trustees, being the owners in fee simple of the last named lots, filed with the city council of the city of *Columbus*, *Ohio*, a petition praying for the vacation of that portion of *Cedar* alley, extending through said premises and bounded on the north and south by said lots for a distance of 110 feet west from the west line of *Fourth* street.

That notice of the pendency and prayer of said petition was published for six consecutive weeks prior to the *nineteenth* day of *February*, 1900, in the "*Ohio State Journal*," the "*Columbus Citizen*" and the "*Columbus Express*," three newspapers published in and of general circulation in the city of *Columbus*, *Ohio*, and of which the "*Columbus Express*" is a newspaper published in the *German* language.

That on the *nineteenth* day of *February*, 1900, the board of public works of the city of *Columbus* recommended to the city council of said city an ordinance vacating said portion of *Cedar* alley, as prayed for in said petition, which ordinance was, on the *nineteenth* day of *February*, 1900, duly passed by said city council, which ordinance, being number 16,524, provided that besides vacating said portion of said alley that the said city reserved the right to use and maintain the sewer located therein.

That thereafter said ordinance was, on the *first* day of *March*, 1900, duly approved by the mayor of said city, and was filed and recorded in the office of the clerk of said city.

That thereafter publication was had of said ordinance in said *three* newspapers for the time and in accordance with the statute in such cases made and provided.

In said ordinance said city council found that it was satisfied that there was good cause for such vacation, and that the same would not be detrimental to the general interest, a copy of which ordinance is hereto attached, marked Exhibit "A," and made a part hereof.

Thereafter said trustees made a subdivision of said lots 64, 65, 66, 67, 73, 74, 75 and 76, including in such subdivision the vacated portion of *Cedar* alley, as aforesaid, which plat was duly signed and acknowledged by said trustees, was duly approved by the chief engineer of the city of *Columbus, Ohio*, and an ordinance accepting the same was duly recommended by the board of public works of said city and duly passed by the city council, and thereafter signed by the mayor of said city and publication made thereof in said *three* newspapers according to law. That the plat of said subdivision has been recorded with the recorder of *Franklin* county, *Ohio*, a copy of which plat is hereto annexed, marked Exhibit "B," and made a part hereof.

By said last plat said trustees dedicated for street purposes an alley *fifteen* feet in width and running from *Warren* to *Lincoln* streets on a line 109.80 feet west from *Fourth* street and parallel with the west line of *Fourth* street, a copy of which plat, marked Exhibit "B," is hereto attached and made a part hereof. Said alley runs from *Lincoln* street to *Cedar* alley and on the east line of said lot 63 to *Warren* street.

This answering defendant further says that the lot, as aforesaid, owned by the plaintiff, is bounded on the south by *Cedar* alley and on the north by *Warren* street, on the east by said *fifteen-foot* alley, on the west by lot No. 62 on the plat of said *William A. Neil*, deceased.

Further answering, this defendant says that the plaintiff has egress and ingress to and from her said property on *Warren* street on the north and *Cedar* alley on the south; said *fifteen-foot* alley on the east, and that egress and ingress to and from *Cedar* alley on the south by the lot owned by plaintiff may be had by the said *fifteen-foot* alley dedicated by said trustees, both to and from the east portion of said *Cedar* alley, north to *Warren* street and south to *Lincoln* street, and on the entire east line of said lot 63 by said *fifteen-foot* alley.

This answering defendant says that the plaintiff does not own any lots abutting upon or adjoining to the portion of said *Cedar* alley so

vacated, and that said plaintiff has no rights or interest in and to the portion of *Cedar* alley so vacated.

This answering defendant further says that by reason of the bounding of the plaintiff's lot by said *Lincoln* and *Hamlet* streets and *Cedar* alley and by the dedication of said *fifteen-foot* alley on the east line of lot 63, as aforesaid, said plaintiff has reasonable means of egress and ingress to and from her said premises in all directions.

This answering defendant further says that on the *fifth* day of *February*, 1900, said trustees agreed to convey by warranty deed all that real estate in the city of *Columbus, Ohio*, beginning at the north-west corner of *Fourth* and *Lincoln* streets in the city of *Columbus, Ohio*; thence west on the north line of *Lincoln* street 109.80 feet to a point; thence north on a line parallel with the west line of *Fourth* street to a point in the south line of *Warren* street; thence easterly on said line to the northeast corner of *Warren* and *Fourth* streets; thence southerly upon the west line of *Fourth* street to the place of beginning, containing said vacated portion of said alley and lots 65, 66, 67, 74, 75 and 76, and parts of lots 64 and 73 of said *William A. Neil's* addition.

Said property was purchased by said defendant for the purpose of erecting buildings thereon and was agreed to be conveyed by said trustees to said defendant for that purpose.

Thereafter this answering defendant took possession of said premises so agreed to be conveyed by said trustees and proceeded to make the excavations and prepare for the erection of buildings thereon as heretofore stated.

Further answering, this defendant says that it has made a contract for the erection of the buildings upon said premises so agreed to be conveyed; that materials for said building have been ordered, and that great and irreparable injury will result to it if any restraining order or injunction is granted as prayed for by the plaintiff; that said contract for such building amounts in the aggregate to about the sum of *twelve thousand* dollars.

Wherefore, this answering defendant prays that it may go hence and recover its costs.

[(*Signature and verification as in Form No. 12445.*)]¹

4. Criminal Proceeding for Obstructing Highway.

a. Criminal Complaint.

(1) ERECTING DAM SO THAT WATER FROM RIVER OVERFLOWED HIGHWAY.

Form No. 19229.

(Precedent in *State v. Raypholtz*, 32 Kan. 450.)²

[*State of Kansas*, } ss.]³
Sumner County.

Geo. W. Peters, of lawful age, being first sworn in due form of

1. The matter to be supplied within [] will not be found in the reported case.

2. It was held that this complaint was sufficient.

3. The matter enclosed by [] will not be found in the reported case.

law, on his oath says, that on the *25th* day of *October*, 1883, in the county of *Sumner* and state of *Kansas*, *William Raypholtz* and *Scott Raypholtz*, then and there being, did then and there unlawfully and wilfully obstruct a certain public road leading from the southeast corner of section *thirty-six*, in township *thirty-four* south, of range *two* west of the *6th* principal meridian, and the northeast corner of section *one*, in township *thirty-five* south, of range *two* west of the *6th* principal meridian, along the section line between sections *thirty-five* and *thirty-six*, in township *thirty-four* south, of range *two* west of the *6th* principal meridian, and sections *one* and *two*, in township *thirty-five* south, of range *two* west of the *6th* principal meridian, in said county, to the southwest corner of section *thirty-five*, in township *thirty-four* south, of range *two* west of the *6th* principal meridian, and the northwest corner of section *two*, in township *thirty-five* south, of range *two* west of the *6th* principal meridian, in said *Sumner* county, where said road crosses *Chikaskia* river in said county, by placing a certain dam in the said river below the place where the said road crosses the said river, and maintaining said dam and thereby causing the water in said river to flow back and rise in said river upon and over the place where said road crosses said river, to such a depth as to render and cause the said road to be impassable at and upon the aforesaid crossing of the said river; contrary to the statute in such case made and provided, and against the peace and dignity of the state of *Kansas*.

George W. Peters.

[[*Jurat as in Form No. 6676.*]]¹

(2) ERECTING FENCE ACROSS HIGHWAY.

Form No. 19230.

(Precedent in *Ard v. State*, 114 Ind. 543.)²

[[*Venue as in Form No. 6674.*]]

Richard Roe swears]³ that, at and in the county of *Montgomery*, and state of *Indiana*, on the *19th* day of *May*, 1887, *Oscar Ard* and *five* other persons, whose names are to affiant unknown, did then and there unlawfully and wrongfully obstruct a certain highway running north and south upon and over the section line dividing sections *17* and *18*, in township *20* north, of range *4* west, in said county, by then and there unlawfully and wrongfully putting, building and erecting a fence and fence-posts upon and across said highway, contrary to the statute [in such case made and provided, and against the peace and dignity of the state of *Indiana*.

(*Signature and jurat as in Form No. 6674.*)]¹

(3) PERMITTING VEHICLE TO REMAIN IN HIGHWAY.

Form No. 19231.

(Precedent in *Com. v. Lagorio*, 141 Mass. 81.)²

[[*Commencement as in Form No. 6681.*]]

- | | |
|---|---------------------------------------|
| 1. The matter to be supplied within | 3. The matter enclosed by and to be |
| [] will not be found in the reported case. | supplied within [] will not be found |
| 2. This complaint was held sufficient. | in the reported case. |

Richard Roe, of *Boston*, in the county of *Suffolk*, on behalf of the Commonwealth of *Massachusetts*, on oath complains that *Joseph Lagorio*, of *Boston*, in the county of *Suffolk*, on the *twenty-fifth* day of *April*, in the year of our Lord one thousand eight hundred and *eighty-five*, at *Boston*, aforesaid, and within the judicial district of said court,]¹ was the person then and there having the care and ordering of a certain vehicle, to wit, a wagon, and did then and there, without having any license, authority or appointment, according to law, so to do, suffer said vehicle to stop in a certain public street situate within said city and district, and called *Haymarket Square*, for a longer time than *twenty* minutes, against the peace of said Commonwealth, the form of the statute of said Commonwealth, and the revised standing regulations of the board of aldermen of said city, in such case made and provided.

[(*Signature and verification as in Form No. 6681.*)]²

b. Indictment or Information.

(1) IN GENERAL.

Form No. 19232.

(Precedent in *State v. Chesapeake, etc., R. Co.*, 24 W. Va. 809.)³

The State of *West Virginia*, *Cabell* County, ss.:

In the *Circuit* Court of said County.

The grand jurors of the state of *West Virginia* in and for the body of the county of *Cabell*, and now attending the said court, upon their oaths present that the *Chesapeake and Ohio Railway Company*, a corporation, on the *1st* day of *January*, 1883, in the county aforesaid, unlawfully, and without lawful authority, did knowingly and wilfully obstruct, injure and destroy the public road called and known as *Hull's* road, at and near where the said road intersects the *James* river and *Kanawha* turnpike, below the city of *Huntington*, in said county, against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10726.*)]²

(2) CUTTING DITCH ALONG SIDE OF AND MAKING EMBANKMENTS ALONG SIDE OF AND ACROSS HIGHWAY.

Form No. 19233.

(Precedent in *State v. Day*, 52 Ind. 484.)⁴

[(*Commencement as in Form No. 10692.*)]²

That, at the said county of *Putnam*, on the *7th* day of *May*, 1875, one *Vincent Day* did, then and there, unlawfully obstruct a certain highway, then and there situate, running through section No. 31, town 15, range 3, and leading from the *Greencastle* and *New Mays-*

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. The matter to be supplied within [] will not be found in the reported case.

3. It was held that it was sufficient

to allege that the act was done unlawfully and without lawful authority and that the words "knowingly and wilfully" were surplusage.

4. This indictment was held sufficient.

vile road, in said county, by then and there unlawfully cutting a ditch alongside of, and making an embankment alongside of and across said highway, thereby causing the water to flow in said road; contrary [concluding as in Form No. 10692).]¹

(3) DIGGING TRENCH ACROSS HIGHWAY.

Form No. 19234.

(Precedent in *State v. Fisher*, 117 N. Car. 734.)²

[[*Commencement as in Form No. 10711.*]]¹

The jurors for the state upon their oath present that on the *first* day of *August*, in the year of our Lord one thousand eight hundred and *ninety-five*, there was and theretofore had been and still is in the county of *Guilford* a certain public road and street and common highway leading from the court-house in *Greensboro*, in said county, in a northerly direction, towards, unto and beyond the corporate limits of said city of *Greensboro*, in said county, called *North Elm* street, for all good people of said State to go, return and pass on foot or horseback, and with their coaches, carts and carriages, at their free will and pleasure, in which said county of *Guilford*, on said *first* day of *August*, A. D. 1895, *B. J. Fisher*, late of said county, with force and arms, at a certain place within the corporate limits of said city of *Greensboro*, unlawfully, wilfully and injuriously, upon and across the said public road, street and common highway, a certain trench and ditch of the depth of *three* feet and of the width of *four* feet, then and there did dig, cut, open and make, by which the said public road, street and common highway last aforesaid was so obstructed, altered and changed that the good people of the State aforesaid, in, by, through and over and along the said public road, street and common highway, could not go, return and pass on foot, on horseback, with their coaches, carts and carriages, so freely as they ought and were wont to do, to the great damage and common nuisance of all the good citizens of the State going, returning, passing and repassing, in, along and through the last mentioned public road, street and common highway, to the evil example of all others in like cases offending, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

[[*Signature and indorsements as in Form No. 10711.*]]¹

(4) ERECTING FENCE ACROSS HIGHWAY.

Form No. 19235.³

(Ala. Crim. Code (1896), § 4923, No. 66.)

(*Commencing as in Form No. 10680, and continuing down to *.*)

John Doe did obstruct a certain public road, known as the "*Chickasabogue*" road, by a fence (or *bar*, or other impediment may

1. The matter to be supplied within [] will not be found in the reported case.

2. From the facts in the case the defendant was held not guilty.

3. *Alabama*.—Crim. Code (1896), § 5388.

be alleged in the alternative, but must be specified), without leave of the court of county commissioners first had and obtained, against. (*concluding as in Form No. 10680*).

Form No. 19236.

(Precedent in *U. S. v. Tucker*, 1 Hayw. & H. (D. C.) 269.)¹

[[*Commencement as in Form No. 10687.*]]²

The jurors of the *United States* for *Washington* county aforesaid, on their oaths do present that *Enoch Tucker*, late of the county aforesaid, merchant, on the 14th day of *December*, 1846, with force and arms, at the county aforesaid, a certain road being a common highway leading from *Bladensburg*, *Piscataway* and the *Alexandria Ferry* to *Bladensburg*, known as the *old Bladensburg Road*, used for all the good citizens of the *United States*, and their horses, coaches, carts, wagons and carriages, to go, return, pass, repass, ride and labor in, on and along the same at their free will and pleasure, unlawfully and injuriously did obstruct and stop up by pulling and placing a certain wooden fence on and across the said common highway, etc., to the great damage and common nuisance of all the citizens going and returning, passing, repassing, riding and laboring in and along the said common highway, to the evil example of all others in the like case offending and against the peace and Government of the *United States*.

P. B. Key, United States Attorney.

Form No. 19237.

(Precedent in *State v. Lucas*, 124 N. Car. 804.)³

[[*Commencement as in Form No. 10711.*]]²

The jurors for the State upon their oath present that *J. H. Lucas*, late of the county of *Sampson*, on the 20th day of *May*, 1898, with force and arms, at and in said county, a certain road leading to and from *Bethel Church*, in *Little Coharie Township*, *Sampson* county, known as the "*Old Church Road*" leading from the *Wilmington* and *Raleigh* road, known as the "*Negro Head road*" to said church, did wilfully and unlawfully obstruct by putting his fence in the said road, against the form of the statute in such case made and provided and against the peace and dignity of the State.

[[*Signature and indorsements as in Form No. 10711.*]]²

(5) ERECTING GATE ACROSS HIGHWAY.

Form No. 19238.

(Whart. Prec. Ind. & Pl. (1857), No. 675.)

Middlesex. The jurors of our lord the king upon their oath present that at the time of committing the nuisance hereinafter mentioned there was and yet is a certain ancient common highway

1. This indictment was dismissed because the plaintiff failed to show the legality of the highway.

2. The matter to be supplied within [] will not be found in the reported case.

3. This indictment was held sufficient.

in the parish of *Blank*, in the county of *Middlesex*, leading from (*stating place*) into, through and over a certain public highway, called the *great north road*, and from thence to (*stating place*), in the parish of *Blank*, in the said county, for all the good people of said state to go, return and pass on foot and on horseback, at their free will and pleasure,* and that on (*stating time*), *John Doe*, late of (*stating place*), with force and arms, at a certain place there in the parish of *Blank* aforesaid, contiguous to and on the east side of the *great north road* aforesaid, unlawfully and injuriously did erect and cause to be erected a certain wooden gate, of the length of *fifteen* feet and of the height of *four* feet, upon and across the said highway, leading from the place called (*naming place*) to the *great north road* aforesaid; and that the said *John Doe* the said wooden gate so as aforesaid erected and made from the said (*stating time*) until the day of the taking this inquisition, with force and arms, at (*stating place*) aforesaid, unlawfully and injuriously did continue locked and fastened with an iron chain, and yet doth continue, by which the common highway last aforesaid, during all the time aforesaid, was so obstructed and stopped up that the good people of said state in, by and through the same highway could not nor yet can go, return† and pass on foot and on horseback so freely as they ought and were wont to do; to the great damage and common nuisance of all the good citizens of the said state going, returning, passing and repassing in, along and through the said last mentioned highway, in contempt of our said lord the king and his laws, to the evil example of all others and against (*concluding as in Form No. 10678*).

Form No. 19239.

(Precedent in *Wroe v. State*, 8 Md. 417.)¹

[(*Commencing as in Form No. 10698, and continuing down to **) in a certain road leading from (*stating place*) to (*stating place*) and known as the (*stating name*) road, being a common highway for all good citizens of the state of *Maryland* and their horses, coaches, carts, wagons and carriages to go, return, pass, repass, ride and labor in, on and along the same at their free will and pleasure]⁶ unlawfully and injuriously did build and erect gates and unlawfully and injuriously did cause to be built and erected gates and other obstructions, and did then and there and on divers other days and times between that day and the time of taking this inquisition, unlawfully and injuriously continue to allow to remain the said gates and divers other obstructions so as aforesaid unlawfully built and erected, and caused to be built and erected, by reason whereof the citizens of this state, during the time aforesaid, could not go, return, ride, pass and repass [and labor in or along the said road, to the great damage and common nuisance of all the citizens of said state going, returning, passing, repassing, riding and laboring in and along the said road, contrary (*concluding as in Form No. 10698*)].²

1. This indictment was held sufficient. supplied within [] will not be found in the reported case.

2. The matter enclosed by and to be

(6) ERECTING AND CONTINUING A HOUSE, PART OF WHICH IS ON A HIGHWAY.**Form No. 19240.**

(Whart. Prec. Ind. & Pl. (1857), No. 676.)

(Commencing as in Form No. 19238, and continuing down to*) and that on (stating time), *John Doe*, late of (stating place), with force and arms, at (stating place), unlawfully did erect and build, and cause and procure to be erected and built, a certain brick messuage and tenement, containing in length *twelve* feet and *six* inches, and in depth at the east end thereof *five* feet and *six* inches, and in depth at the west end thereof *two* feet *nine* inches, and that the same was erected and built, and caused and procured to be erected and built, by him, the said *John Doe*, in and upon the said ancient and common highway at the parish aforesaid, in the county aforesaid, to wit, opposite a certain dwelling-house of one *Richard Roe* there situate, and the said part of the said messuage and tenements so erected and built, and caused and procured to be erected and built, by him, the said *John Doe* as aforesaid, in and upon the said ancient and common highway, at the parish aforesaid in the county aforesaid, he, the said *John Doe*, from the said *tenth* day of *June*, in the year aforesaid, until the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did continue and yet doth continue; by reason and means whereof the said ancient and common public highway was, during the time aforesaid, at the parish aforesaid, in the county aforesaid, encroached upon, narrowed and straitened, so that the good people of the said state, by and through the said highway could not, nor yet can go, return, (concluding as in Form No. 19238, from †).

(7) ERECTING STEPS IN HIGHWAY.**Form No. 19241.**(Precedent in *People v. Carpenter*, 1 Mich. 273.)¹

Wayne county, ss:— The grand jurors of the people of the state of *Michigan*, inquiring in and for the body of the county of *Wayne* aforesaid, upon their oaths present, that on the *first* day of *January*, in the year one thousand eight hundred and *twenty-three*, was, and from thence hitherto there hath been, and still is, a certain common and public highway, commonly called *Woodward* avenue, leading from a certain place in the city of *Detroit*, in the county of *Wayne* aforesaid, commonly called the *Grand Circus*, to a stream of water in the city of *Detroit* aforesaid, called the *Detroit* river, for all the citizens and inhabitants of the state of *Michigan* aforesaid to go, return, pass and repass, ride and labor, on foot and on horseback, and with their horses, coaches, carts and carriages, in and along the same, at

1. A special verdict was rendered by the jury in this case, but it was held that it was not such as would warrant a judgment being rendered against the defendant and a new trial was ordered.

their free will and pleasure, without any obstruction, hindrance or impediments.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that *William N. Carpenter*, late of the county aforesaid, afterwards, to wit, on the *first* day of *January*, one thousand eight hundred and *forty-four*, with force and arms, at *Detroit*, in the county of *Wayne* aforesaid, and within the jurisdiction of this court, in and upon the aforesaid common and public highway, unlawfully and injuriously made, placed, built and erected, and caused to be made, placed, built and erected, divers steps made of stone, iron and other materials, of great height and width, to wit, the height of *fifteen* feet, and the width of *four* feet, and also a certain erection composed of stone, iron and other materials, of the same height and width aforesaid, and by the same steps and erection encroached upon, stopped up and obstructed a certain part of the aforesaid common and public highway, for a large space thereof, to wit, for the space of *four* feet in length and *four* feet in width; and the same part of the common and public highway aforesaid so encroached upon, stopped up and obstructed, he, the said *William N. Carpenter*, upon and from the said *first* day of *January* aforesaid, until the day of the taking of this inquisition, with force and arms, at *Detroit* aforesaid, and within the jurisdiction of this court, unlawfully and unjustly hath continued and still doth continue, whereby the citizens and inhabitants of the state of *Michigan*, during all the time last aforesaid, could not, nor can they now, go, return, pass and repass, through, over and along the aforesaid common and public highway, on foot and on horseback, and with their horses, coaches, carts and carriages, as they were used and accustomed to do, and ought to have done and to do; but during all the time aforesaid have been and are greatly obstructed and hindered in the use and enjoyment of the said common and public highway, to the great damage and nuisance of all the citizens and inhabitants of the state aforesaid, against the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of *Michigan*.

[(*Signature and indorsements as in Form No. 10700.*)]¹

(8) FILLING UP DITCHES IN HIGHWAY.

Form No. 19242.

(Precedent in *Alexander v. State*, 117 Ala. 220.)²

[(*Commencement as in Form No. 10680.*)]¹

The grand jury of said county charge that before the finding of this indictment *Newton Alexander* did obstruct a certain public road, known as the *Columbia* and *Franklin* road, in said county, by filling up the ditches on said road without leave of Court of *County Commissioners* first had and obtained, against the peace and dignity of the State of *Alabama*.

[(*Signature and indorsement as in Form No. 10680.*)]¹

1. The matter to be supplied within 2. This complaint was held sufficient.
[] will not be found in the reported case.

(9) LEAVING OPEN AREA ON FOOT-PAVEMENT.

Form No. 19243.

(Whart. Prec. Ind. & Pl. (1857), No. 685.)

(Commencing as in Form No. 19238, and continuing down to *) and that *John Doe*, late of (*stating place*), on (*stating time*), with force and arms at (*stating place*), in a certain part of the said common highway and public street, there, to wit, in the foot pavement of said street, before the dwelling-house of him, the said *John Doe*, unlawfully and injuriously did leave open a certain area of the length of *twenty* feet, and of the breadth of *ten* feet, belonging to him, the said *John Doe*, without putting or placing, or causing to be put and placed, any rails or other fence to inclose the same; and he, the said *John Doe*, from (*stating time*), until (*stating time*), at (*stating place*) aforesaid, the said area so as aforesaid being in the said foot pavement of the said common highway and public street, unlawfully and injuriously did cause, permit and suffer to be, remain and continue open, by reason and means whereof the good people of the said state, during the time aforesaid, could not, nor yet can go, return and pass on foot in, by and through the said common highway and public street, and as they were used and accustomed, and were wont and ought to do, without great peril and danger of their lives; to the great damage and common nuisance of all the citizens of this state in, by and through the said common highway and public street, going, returning and passing on foot, in contempt (*concluding as in Form No. 10678*).

(10) LETTING WAGONS STAND IN HIGHWAY.

Form No. 19244.

(Whart. Prec. Ind. & Pl. (1857), No. 683.)

(Commencement as in Form No. 10678.)

That *John Doe*, late of (*stating place*), yeoman, before and at the times hereinafter mentioned, was and still is a proprietor of divers wagons for the conveyance for hire of goods and merchandise to and from (*stating place*), and being such proprietor, he, the said *John Doe*, on (*stating time*), and on divers other days and times between that day and the *tenth* day of *June*, in the year aforesaid, in the parish of *Blank*, in the county aforesaid, without just cause or excuse, but wrongfully and unjustly did cause and permit divers, to wit, *twenty* wagons to stand and remain for a long time, to wit, *ten* hours on each day, before his warehouse, situate in a public street and highway called (*stating name*), in the parish aforesaid, in the county aforesaid, and divers cumbrous and other parcels which had been conveyed or were intended to be conveyed in such wagons, to lie during such time scattered about such public street; to the common nuisance, great hindrance, impediment and annoyance of all the good people of the said state, passing and repassing such streets, in contempt of our said lord the king and his laws, to the evil example of all others, and against (*concluding as in Form No. 10678*).

(11) PILING LUMBER ON HIGHWAY.

Form No. 19245.

(Precedent in *State v. Mathis*, 21 Ind. 277.)¹[(*Title of court and cause as in Form No. 10824.*)

Jeptha D. New, prosecuting attorney for the county of *Bartholomew*,² informs the court that the defendants, on or about the 1st of September, 1862, owned a saw-mill on *Jackson* street, in the town of *Columbus*, *Bartholomew* county, *Indiana*, which obstructed and hindered, and ever since hath continued to obstruct and hinder, the free passage of a public street of known notoriety, to wit: *Jackson* street aforesaid, in the town, county and state aforesaid, in front of said saw-mill, by piling lumber from said mill on said street in front of said mill, to great annoyance and injury of the citizens of the town, county and state aforesaid, [contrary (*concluding as in Form No. 10824.*)]²

(12) PLACING CASKS IN HIGHWAY.

Form No. 19246.

(Whart. Prec. Ind. & Pl. (1857), No. 684.)

(*Commencement as in Form No. 10678.*)

That *John Doe*, late of (*stating place*), yeoman, on (*stating time*), at (*stating place*), with force and arms, at the said parish of *St. Paul*, *Covent Garden*, in said county of *Middlesex*, in and upon a certain road and highway called (*stating name*), in the parish and county aforesaid, the said road then being a common road and highway for all the citizens of this commonwealth to go, pass and travel at their will, with their horses, carts and carriages, *ten* wooden casks unlawfully and injuriously did put, place, and cause to be put and placed, and that the said *ten* wooden casks, by the said *John Doe* in the common road and highway put and placed, and caused to be put and placed, from the *tenth* day of *June*, in the year aforesaid, to the *twentieth* day of *June*, in the year aforesaid, in the county aforesaid, the said *John Doe* did voluntarily permit to be and remain.

By reason whereof the common road and highway aforesaid, for all the time aforesaid, at the county aforesaid, was so obstructed that the good citizens of this commonwealth, in and along the said road and highway, about their necessary business, with their horses, carts and carriages, could not go, pass and travel so freely as of right they ought, to the great damage and common nuisance and hinderance of all the citizens of this commonwealth in and along the said road going, returning, passing and repassing, in contempt of our said lord the king and his laws, to the evil example of all others, and against (*concluding as in Form No. 10678.*)

1. This information was held sufficient. supplied within [] will not be found in the reported case.

2. The matter enclosed by and to be

(13) PLACING DRAYS IN HIGHWAY

Form No. 19247.

(Whart. Prec. Ind. & Pl. (1857), No. 677.)

(Commencing as in Form No. 10678, and continuing down to *) in a certain street, there called *Leman* street, being a common highway used for all the good people of the said state, with their horses, coaches, carts and carriages to go, return, pass, repass, ride and labor at their free will and pleasure, unlawfully and injuriously did put and place *three* empty drays, and did then and on the said other days and times there, unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the common highway aforesaid, for the space of several hours, to wit, for the space of *five* hours, on each of the said days; whereby the common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid, on each of the said days respectively, was obstructed and straitened, so that the good people of the said state could not then and on the said other days and times, go, return, pass, repass, ride and labor with their horses, coaches, carts and other carriages, in, through and along the common highway aforesaid, as they ought and were wont and accustomed to do; to the great damage and common nuisance of all the people of the said state going, returning, passing, repassing, riding and laboring in, through and along the common highway aforesaid, in contempt of our said lord the king and his laws, to the evil example of all others, and against (concluding as in Form No. 10678).

c. Plea.

Form No. 19248.

(Precedent in *Allen v. Jersey City*, 53 N. J. L. 523.)¹[(Title of court and cause as in Form No. 15225.)]²

The defendant, *Paul Allen*, comes and says that it is true that he did commit the acts charged against him in said complaint, but that he is not guilty of violating any ordinance, because he says that at the time, etc., charged he was a workman employed by the *New York, Lake Erie and Western Railroad Company*, who is the lawful lessee of the railroad and franchises of the *Long Dock Company*, a corporation authorized to build a railroad extending from the eastern mouth of the *Bergen Erie* tunnel to the *Hudson* river, *sixty-six* feet wide, with the right to widen the same to *one hundred* feet; said railroad with such right of way has existed since and before the year eighteen hundred and *fifty*, and said *New York, Lake Erie and Western Railroad Company*, and its predecessors, whose rights it has lawfully acquired, has operated, and it does now operate, the same; said *Long Dock Company* owns, and its lessee has the right to occupy, and does occupy, lands on each side of every street which said railroad

1. It was held that this plea set up a complete justification.

2. The matter to be supplied within [] will not be found in the reported case.

crosses to the width of over *two hundred* feet; said railroad in its progress to said river crosses several streets, and among them *Jersey* avenue, at grade, being so originally laid out and built; and said *New York, Lake Erie and Western Railroad Company* having determined to lay down an additional track within its right of way, the said *Long Dock Company* consenting thereto, crossing said streets, and among them said *Jersey* avenue, employed this defendant to aid in so doing, and the acts charged against him were done in the reasonable discharge of said employment; said railroad crosses said streets, including *Jersey* avenue, at grade, which grade said defendant was instructed not to interfere with nor so to lay down said track as to prevent or unnecessarily obstruct public travel, nor did he, or would he, have done so; and defendant saith that the law does not require the permission of the board of aldermen of *Jersey City* before laying down the additional track within the right of way as aforesaid, and he admits that no such permission has been obtained, and he prays to be hence discharged, with costs.

[(Signature of attorney as in Form No. 15225.)]¹

V. CRIMINAL PROCEEDINGS AGAINST MUNICIPALITIES AND OFFICERS FOR FAILURE TO LAY OUT OR REPAIR ROAD.

1. Against Municipality.

a. For Failure to Lay Out Highway

Form No. 19249.

(Precedent in *State v. Newfane*, 12 Vt. 422.)²

[(Commencement as in Form No. 10723.)]¹

That, at the county court begun and holden at *Newfane*, within and for the county of *Windham*, on the *second Tuesday* of *April*, in the year one thousand eight hundred and *thirty-six*, the report of a committee theretofore appointed by said court to lay out a road or highway, from the county road passing through *Williamsville* in *Newfane*, near where the said road is intersected by *Baker's* brook, thence to the mouth of *pond* brook, thence up *pond* brook to the mouth of *Kimball's* brook, and thence to the old road, thence to the county road in *Wardsboro*, was returned to and accepted by said court, in and by which report said committee laid out and established a public road or highway from the center of the county road, passing through *Williamsville*, *five* rods easterly from the center of the east abutment of the bridge across *Baker's* brook, on a course east *thirty* degrees north; thence in various directions through the town of *Newfane*, in said county of *Windham*, to the center of the county road leading from *Fayetteville* to *Wardsboro*, and it was then and there ordered by said court that said road, as laid out by said committee, be made and completed within *one* year from the *twenty-first* day of *April*, in the

1. The matter to be supplied within 2. This indictment was held sufficient.
[] will not be found in the reported case.

year one thousand eight hundred and *thirty-six*; that the said town of *Newfane*, not regarding its duty in this behalf, although *one* year from the *twenty-first* day of *April*, in the year one thousand eight hundred and *thirty-six*, has long since elapsed, and although said town of *Newfane* were bound, by law, to make and open so much of said road as lies in said town of *Newfane*, within *one* year from the said *twenty-first* day of *April*, in the year one thousand eight hundred and *thirty-six*, yet, said town of *Newfane* have wilfully refused and neglected to make or open so much of said road as lies in said town of *Newfane*, [contrary (*concluding as in Form No. 10723*).]¹

b. For Failure to Repair Highway.

Form No. 19250.

(Whart. Prec. Ind. & Pl. (1857), No. 783.)

(*Commencement as in Form No. 10678.*)

That on (*stating time*), there was and yet is a certain common and ancient highway leading from (*stating place*), towards and unto (*stating place*), used for all the state's citizens, with their horses, coaches, carts and carriages to go, return, pass and repass, at their will and pleasure; and that a certain part of the same common highway situate, lying and being in the parish of *Blank*, in the same county, containing in length *one thousand* feet and in breadth *thirty* feet, on (*stating time*), and continually afterwards until the present day, was and yet is very ruinous, deep, broken and in great decay for want of due reparation and amendments, so that the citizens of the state, through the same way, with their horses, coaches, carts and carriages, could not, during the time aforesaid, nor yet can go, return, pass or repass, as they ought and were wont to do. And that the inhabitants of the parish of *Blank* aforesaid, in the county aforesaid, the said common highway (so in decay) ought to have repaired and amended, and still of right ought to repair and amend, when and as often as it should, shall or may be necessary; to the great damage and common nuisance of all the people of the state through the same highway going, returning or passing, and against (*concluding as in Form No. 10678*).

Form No. 19251.

(Whart. Prec. Ind. & Pl. (1857), No. 781.)

(*Commencement as in Form No. 10678.*)

That on (*stating time*), there was and still is a certain common and public highway leading from (*stating place*) to (*stating place*), used for all the good citizens of the said state, with their horses, coaches, carts and carriages, to go, return, pass, ride and labor, at their free will and pleasure, and that a certain part of the said highway situate, lying and being in the township of *Blank*, containing in length *one thousand* feet and in breadth *thirty* feet, on (*stating time*), and from

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

thence continually afterwards until the day of the taking of this inquisition, at the township aforesaid, in the county aforesaid, was and yet is very ruinous, miry, deep, broken and in great decay for want of due reparation and amendment of the same, so that the queen's subjects through the same way, with their horses, coaches, carts and wagons, could not during the time aforesaid, nor yet can go, return, pass, ride and labor, with great damage of their lives and loss of their goods. And that the inhabitants of the said township of *Blank*, in the county aforesaid, have used and been accustomed to repair and to amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, the said highway, so being in decay as aforesaid, when and so often as it hath been and shall be necessary; to the great damage and common nuisance of all citizens of the state through the same way going, returning, passing, riding and laboring, and against (*concluding as in Form No. 10678*).

Form No. 19252.

(Precedent in *State v. Northumberland*, 46 N. H. 156.)¹

State of *New Hampshire* — *Coos*, ss.

At the trial term of the *Supreme Judicial Court* holden at *Lancaster*, within and for the county of *Coos* aforesaid, on the *first Tuesday of November*, in the year of our Lord one thousand eight hundred and *sixty-two*:

The grand jurors for the state of *New Hampshire*, upon their oath present, that for a long time previous to the *first day of May*, in the year of our Lord one thousand eight hundred and *forty-five*, there was, and ever since then there has been, a common highway in the town of *Northumberland*, in said county of *Coos*, which said highway all the good citizens of this state might and of right should use to pass and repass through and over the same, on foot and with their horses and carriages and teams, at their will and pleasure; said highway commencing at the guide-board about *twenty* rods easterly from the dwelling-house of *James Richey*, in *Northumberland* aforesaid, upon the road leading from *Lancaster*, in said county, through said *Northumberland* to the railroad depot in said *Northumberland*; and from said guide-board running in a northerly direction down a sand hill, and from thence across the meadow of said *James Richey*, and across the *Ammonoosuc* river, and to the dwelling-house of *Edward Bucknam*, all in said *Northumberland*; and that said *Ammonoosuc* river, across which the said highway passes, and at the place where it crosses the same, is a wide and deep river, with high and steep banks, and entirely impassable either on foot or with horses, carriages or teams, except by a bridge; and that said town of *Northumberland*, at the time aforesaid, suffered a bridge, which then existed across said river at the place where said highway crosses the same, to be taken down and carried away and to fall down, so that said good citizens of this state, for want of a bridge across said river at the place

1. It was held that the termini of the highway must be alleged in the indictment and must be proved as alleged. The proof varied from the allegation in the indictment and the variance was held to be fatal.

aforesaid, could not, from the *first* day of *May*, in the year of our Lord one thousand eight hundred and *forty-five*, to the day of making this presentment, go, pass or repass over the same, either on foot or with their horses, carriages or teams, without great danger to themselves, their said horses, carriages and teams, by means whereof it became, and during all of said time it was, necessary, in order that the said citizens of this state, having occasion to pass and repass in manner aforesaid, might go, pass and repass in safety as aforesaid, on foot and with their horses, carriages and teams, along said highway and across said river, that a good and substantial bridge should be there erected and built by said town of *Northumberland* across said *Ammonoosuc* river at the place where said highway crosses the same as aforesaid, of the width of *twenty* feet, and long enough to reach across said river, all of which said town of *Northumberland* had notice; and that said town of *Northumberland*, during all the time aforesaid, and still is by law holden and bound to build, keep up and keep in good repair such bridge across said river at the place aforesaid, whenever the same should or may be necessary, that it then and there became and was necessary, and it was then and there the duty of the said town of *Northumberland* to build such bridge across said *Ammonoosuc* river at the place aforesaid, where said highway crosses said river as aforesaid. Yet the said town of *Northumberland*, well knowing that said bridge had been taken down and carried away as aforesaid, during all the time aforesaid did refuse and neglect to rebuild any bridge across said river at the place aforesaid, to the great damage and common nuisance of all good citizens, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10707.*)]¹

Form No. 19253.

(Precedent in *State v. Murfreesboro, 11 Humph. (Tenn.), 217.*)²

[(*Commencement as in Form No. 10720.*)]¹

The grand jurors of the state of *Tennessee*, elected, impaneled, sworn and charged to inquire for the body of the county aforesaid, upon our oaths present, that within the incorporated limits of the town of *Murfreesboro*, in said county, there is, and for a long time has been, a certain public street and highway, extending from the turn-pike road, which leads from said town of *Murfreesboro* to *Shelbyville* and intersects the old *Shelbyville* road at the corporation line of said town of *Murfreesboro*, along which said public street and highway the good people of said state and county have been used and accustomed to pass and repass, with their horses, wagons, carts, and other carriages, at their free will and pleasure, that the mayor and aldermen of the said town of *Murfreesboro*, whose duty it is to repair and amend said public street and highway, and keep the same clear of obstructions, on the *first* day of *January*, in the year eighteen hundred and *forty-nine*, in the county aforesaid, and on divers other days and

1. The matter to be supplied within [] will not be found in the reported case.
2. This indictment was held sufficient.

times before that day and the day of finding this inquisition, did then and there, and on said other days and times, permit and suffer said public street and highway to be and remain ruinous and out of repair, and obstructed with rocks, gullies, mudholes and other obstructions, so that the good people of said state and county have been hindered and obstructed in passing and repassing along said public street and highway with their horses, wagons, carts, and other carriages, as they were wont and had a right to do, to the great damage and common nuisance of all the people of said town, county and state, and against the peace and dignity of the state.

And the jurors aforesaid, upon their oaths aforesaid, do further present that there is a certain bridge situated across *Murfreesboro* spring branch within the incorporated limits of the town of *Murfreesboro*, and on a public street and highway in said town, and near to *Shanklin's* tan yard, over which said bridge the people of said town, state and county have been used and accustomed to pass and cross, with their horses, wagons, and other carriages, and that the mayor and aldermen of the town of *Murfreesboro*, whose duty it is to repair said bridge, on the *first* day of *January*, in the year eighteen hundred and *forty-nine*, in the county aforesaid, did then and there, and on divers other days and times before that day and the day of finding this inquisition, permit and suffer said bridge to be and remain ruinous, and out of repair, so that the people of said town and county and state could not pass and cross said bridge as they were used and accustomed to do, to the great damage and common nuisance of all the good people of said state and county, and against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10720.*)]¹

2. Against Officers of Municipality.

Form No. 19254.²

(Ala. Crim. Code (1896), § 4923, No. 85.)

(*Commencing as in Form No. 10680, and continuing down to **) *John Doe, Richard Roe, Samuel Short and William West*, corporate officers of the town of *Gadsden*, a town duly incorporated under the laws of this state, the inhabitants thereof being exempt from working on the public roads, did allow a street therein, known as *Davis street* (*or, if the street is not named, it may be described*) to remain out of repair for more than *ten* days at one time, without a reasonable excuse therefor, against (*concluding as in Form No. 10680*).

Form No. 19255.³

(Whart. Prec. Ind. & Pl. (1857), No. 789-)

(*Commencement as in Form No. 10711.*)

That on (*stating time*), there was and from thence hitherto there hath been, and still is, a certain common and public highway leading

1. The matter to be supplied within [] will not be found in the reported case.
2. *Alabama*. — Crim. Code (1896), § 5384.
3. *North Carolina*. — Code (1883), § 1054).

from (*stating place*), in the county of *Wake*, towards and unto (*stating place*), in the same county, for all the good people of *North Carolina* to go, return, pass, repass, ride and labor, with their horses, coaches, carts and carriages, in and along the same, at their free will and pleasure, and that on the day aforesaid a certain part of the said highway, situate and being in the county of *Wake* aforesaid, extending from (*stating place*) and continuing to (*stating place*), in length *one hundred* yards and in breadth *fifteen* feet, was and still is in the county aforesaid very ruinous, miry, deep, broken and in great decay, for want of due and necessary amendment and reparation of the same, so that the good people of *North Carolina* in and along the same highway, with their horses, carts and carriages, could not, during the time aforesaid, go, return, pass, ride and labor without danger to themselves and the loss of their goods, and that during all the time *John Doe* was overseer of said highway, and ought, as overseer, to have repaired and amended the same; but that he unlawfully and negligently refused so to do, to the common nuisance of all the people of the said state through said highway going, returning or passing, and against (*concluding as in Form No. 10711*).

Form No. 19256.

(Precedent in *State v. Dickson*, 124 N. Car. 871.)¹

The State of *North Carolina*, *Burke* County.

Superior Court, *Fall Term*, 1898.

The jurors for the State upon their oaths present, that *John A. Dickson*, *R. K. Presnell*, *John Garrison*, *T. J. Gilliam*, *Sam Huffman*, and *N. L. Beach*, Commissioners of the town of *Morganton*, late of the county of *Burke*, on the *1st* day of *May*, in the year of our Lord one thousand eight hundred and *ninety-seven*, with force and arms, at and in the county aforesaid, unlawfully and wilfully did fail, refuse and neglect to have the road leading from the depot to *Huntling Creek* worked out and kept in proper repair. The same being a public road or street and within the corporate limits of the town of *Morganton*, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

I. F. Spainhour, Solicitor.

Form No. 19257.²

(Whart. Prec. Ind. & Pl. (1857), No. 790.)

[(*Commencement as in Form No. 10718*).]

That on (*stating time*), there was and from thence hitherto there hath been, and still is, a certain common and public road and highway leading from (*stating place*) towards and unto (*stating place*), for all the good citizens of the said state to go, return, pass and repass, ride and labor, with their horses, coaches, carts, carriages and wagons, in and along the same, at their free will and pleasure; and that a certain part of the said common and public road and highway

1. This indictment was held sufficient.

2. *South Carolina*. — Crim. Code (1902), § 436.

situate, lying and being in the district of (*stating district*) aforesaid, extending from (*stating place*) and containing in length divers, to wit, *one thousand* feet and in breadth divers, to wit, *thirty* feet on the aforesaid *tenth* day of *June*, in the year last aforesaid, and from thence until the taking of this inquisition, at the place aforesaid, in the district and state aforesaid, was and still is very ruinous, miry, deep, broken and in great decay and want of repair and amendment, so that the good citizens of the said state in and along the said public road and highway, with their horses, coaches, carts, carriages and wagons, could not during the time aforesaid, nor yet can go, return, pass and repass, ride and labor, without great danger of their lives and loss of their goods; and that *John Doe*, being commissioner of that part of the said common and public road and highway so being ruinous, miry, deep, broken and in great decay and want of repair and amendment as aforesaid, and by law bound to keep the same in good order, repair and amendment, wholly and continually, from the aforesaid *tenth* day of *June*, in the year last aforesaid, until the taking of this inquisition at the place aforesaid in the district and state aforesaid, failed and neglected to repair, amend and put in good order the same, to the great injury and common nuisance of all the people of the said state through the said highway going, returning or passing, contrary (*concluding as in Form No. 10718*).

VI. PROCEEDINGS AGAINST HIGHWAY OFFICERS.

1. Alternative Writ of Mandamus to Compel Officers of Municipality to Permit the Removal and Relocating of Wires, Conduits, etc., of an Electric Light Company.

Form No. 19258.

(Precedent in Norwalk, etc., *Electric Light Co. v. South Norwalk*, 71 Conn. 382.)¹

Superior Court, }
Fairfield County. } *November 5th, 1897.*

To *Stephen S. Hatch, George S. Kendall, George S. Trowbridge, Venancio A. Scofield, Charles N. Smith and William W. Comstock*, councilmen of the city of *South Norwalk*, and *Charles B. Bohannon*, mayor of said city of *South Norwalk*, the common council of the city of *South Norwalk*:

Whereas it has been made to appear —

1. That the city of *South Norwalk* is a municipal corporation in the town of *Norwalk*, incorporated as a city under a charter granted by the legislature of this State, and that under said charter "The Council" is the common council of said city, and that the following named persons, to wit: *Stephen S. Hatch, George S. Kendall, George S. Trowbridge, Venancio A. Scofield, Charles N. Smith and William W. Comstock*, now are councilmen, and *Charles G. Bohannon* is the mayor of said city, and has a right to preside and to vote in case of a tie, at the meetings of the said board of council, and that *Joseph R. Taylor* is now the clerk of said board.

1. A motion to quash this writ was overruled and a peremptory writ ordered.

2. That the *Norwalk & South Norwalk Electric Light Company* is a corporation organized and existing under and by virtue of the laws of the state of *Connecticut*, is located in said town of *Norwalk*, and is exercising the powers conferred upon it by charter granted by the General Assembly of this State, beginning *Wednesday* after the *first Monday* of *January*, A. D. 1887, duly approved by the Governor of said State, *April 20th*, 1887, and duly accepted by the said company in 1887.

3. That by said charter the *Norwalk & South Norwalk Electric Light Company* is authorized and empowered to generate, manufacture and sell electricity for the purposes of light and power, and for any other purposes within the town of *Norwalk*, and the city of *South Norwalk*, in said town, and may light any public or private buildings or grounds, streets, avenues, lanes, parks, alleys and squares, within said territory, by means of electricity conducted by wires, over and under the surface of the ground, and through, over, along and across the streets and public grounds of said town and city; and that said corporation is authorized to erect and construct such wires, poles, posts, fixtures and other works or structures, suspended wires, lay conduits for electric wires under the ground, and to change and alter the same as occasion may require; to maintain all electrical apparatus necessary and convenient to carry on the business of said corporation, and to have power to do all things necessary to the proper management of said business.

4. That pursuant to said authority the *Norwalk & South Norwalk Electric Light Company* has erected, constructed and now maintains at a great expense, a plant in said town of *Norwalk*, to generate and manufacture electricity, and has erected and constructed poles, posts, fixtures, other works, structures and apparatus, and suspended and laid wires to conduct and deliver electricity for light, power and any other purposes throughout portions of the town of *Norwalk*, and the said city of *South Norwalk*, and has been since its organization and equipment, and still is engaged in the manufacture, sale and delivery of electricity for the purposes of light, power and other purposes, to a large number of people in the city of *South Norwalk* desiring the same, through and by means of said wires, poles, posts, fixtures, works, structures and apparatus.

5. That a part of said wires, poles, posts, fixtures, structures and apparatus are situated on *Washington* street and on *Main* street, and on *Railroad* place in the city of *South Norwalk*, and that the same are public streets and places in the said city.

6. That by reason of the use and wear of said wires, poles, posts, fixtures, structures and apparatus so used and the increased use of electricity for said purposes, and the numerous improvements in the means and methods of economical distribution and delivery of electricity, and the proper exercise of the powers granted by said charter, it became and is necessary that said corporation should repair, improve, renew, change and alter the said system of wires, fixtures, structures and apparatus, at various places within said city, to wit: certain wires, fixtures, structures and apparatus located upon *Washington* street, *Main* street and *Railroad* place in said city, as asked for in the application hereinafter referred to.

7. That on the *first* day of *February*, 1897, said corporation duly submitted to the said council of said city of *South Norwalk* a statement of such changes and alterations as it desired to make in said *Washington* street, *Main* street and *Railroad* place, and asked for an order relative to its direction and control of such work and materials as provided by law, and according to the General Statutes of the State, which application was as follows:

"To the City Council of the City of *South Norwalk*:

The application of the *Norwalk & South Norwalk Electric Light Company* respectfully represents: That by its charter it has a right to maintain wires, fixtures, poles and other apparatus in *Washington* street, *Main* street and *Railroad* place, in the city of *South Norwalk*; that it has now upon said streets its wires, conductors, fixtures, poles and other apparatus, for the purpose of conveying and distributing electricity for the purpose of lighting; that it desires to repair and improve its present wires, conductors and transformers on said streets, made necessary by the condition of the present wires, conductors and transformers, for the purpose of furnishing lights to its customers. Said repairs to consist of taking out a large number of transformers and putting in their place *four* large transformers of *three hundred* lights capacity each, and *three* number *0* wires, all to be attached to the present poles of the company. They therefore pray for such an order as your council shall see fit relative to such direction and control over said work as is contemplated and provided by § 3946 of the General Statutes of this State.

Dated at *Norwalk*, this *1st* day of *February*, A. D. 1897.

Respectfully, (Signed) *Norwalk & So. Norwalk Elec. Light Co.*

By *W. E. Guthrie*, Supt."

8. That said corporation has repeatedly requested said common council to act upon said application.

9. That said common council has duly met and transacted business once each month since said *February 1st*, 1897, and at all times has refused, and still refuses, to act upon said application.

10. That the said city and the officers and authorities of said city have forbidden and prevented said corporation to make, and from making any of said necessary changes, alterations or repairs, to wit: the taking out of a large number of transformers, and putting in their place *four* large transformers of *three hundred* lights capacity each, and *three* number *0* wires, to be attached to the present poles of the company, and that it was at the date of said application and still is necessary that said council should exercise the powers conferred by law on said body relative to the direction and control over the placing, erection and maintenance of any such wires, conductors, fixtures, construction or apparatus, including the relocating or removal of the same, and including the power of designating the kind, quality and finish thereof.

11. That by reason of said refusal and neglect of the said common council of the city of *South Norwalk*, the *Norwalk & South Norwalk Electric Light Company* is occasioned and put to great loss and damage, and is prevented from fully discharging its charter, and from doing the necessary acts and things referred to in said application.

12. That this applicant has no other remedy at law.

Therefore, that due and speedy justice may be done in the behalf of said *The Norwalk & South Norwalk Electric Light Company*, it is required and enjoined of you, the said *Stephen S. Hatch, George S. Kendall, George S. Trowbridge, Venancio A. Scofield, Charles N. Smith* and *William W. Comstock*, councilmen of the city of *South Norwalk*, and *Charles G. Bohannon*, mayor of the city of *South Norwalk*, the common council of the city of *South Norwalk*, that on or before the 15th day of *November*, 1897, that you take action on and make some order on the application of the *Norwalk & South Norwalk Electric Light Company*, presented to your board on the first day of *February*, 1897, or signify cause of the delay thereof to this court, to be held at *Bridgeport*, within and for the county of *Fairfield*, at 10 o'clock in the forenoon, on the 16th day of *November*, A. D. 1897.

[By order of court.

Calvin Clark, Clerk.]¹

2. Return to Alternative Writ of Mandamus to Compel Street Commissioners to Consent to the Excavation of Certain Streets for the Purpose of Laying Telephone Conduits, etc.

Form No. 19259.

(Precedent in *State v. Towers*, 71 Conn. 658.)²

[(Title of court and cause as in Form No. 13521.)]³

Said *William Towers*, street commissioner of the city of *New Britain*, in obedience to a rule of this court ordering him to give his written consent as such street commissioner to the *Southern New England Telephone Company* for the opening and excavating by said company in *Church street*, in said city of *New Britain*, on the north side thereof, between *Elm* and *Main* streets, in order that the said *Southern New England Telephone Company* may put into such openings and excavations a conduit, underground, for the purpose of laying and holding therein ducts and telephone wires, and may also build and maintain manholes to said conduits, and may also put in said openings and excavations lateral ducts or small conduits, running from the main conduits to the curb, or signify cause to the contrary thereof to this court on the first Tuesday of *December*, A. D. 1898, now appears in court, and for cause why his written consent should not be given as above stated, shows as follows, to wit:

1. The city of *New Britain* was incorporated by an Act of the General Assembly of this state, approved *July 15th*, 1870, which Act was duly accepted by a majority of the freemen of the borough of *New Britain*, at a meeting held on the 13th of *January*, 1871, which acceptance was ratified by an Act of said General Assembly, approved *June 16th*, 1871.

2. Said city was reincorporated by an Act of the General Assem-

1. The matter enclosed by [] will not be found in the reported case.

2. This return was held sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

bly, approved *April 14th*, 1885, which Act was in full force from the date of said approval until *June 6th*, 1895.

3. Said city was reincorporated by an Act of the General Assembly, approved *June 6th*, 1895, and by the provisions of said Act, as well as by the provisions of the Act approved *April 14th*, 1885, the common council of said city had, and there is still vested in it, the sole and exclusive authority and control over all streets and highways, and over all parts of streets and highways within the limits of said city.

4. And by the provisions of such Act, as well as by the provision of the Act approved *April 14th*, 1885, the common council of said city was authorized to pass orders and ordinances concerning the excavation or opening of streets, highways or public grounds in said city for public or private purposes, and the location of any work therein, whether temporary or permanent, upon or under the surface thereof.

5. Chapter XXI, § 8, of the ordinances of said city, passed by the common council of said city pursuant to the power given it by the provisions of said Act of 1895, provides, "that every person who shall without the consent of the street commissioner or of the common council, dig up or excavate any portion of the streets, highways, sidewalks or gutters of said city, or shall place therein any earth, stones, rubbish, or other obstruction to the public use or travel, or shall assist or abet in any of said acts, shall be guilty of a misdemeanor, and shall for such offense pay a penalty of *ten* dollars;" and said ordinance was in force on and prior to the *8th* day of *May*, 1898, and has ever since been and now is in full force and effect, and this defendant denies that § 9, chapter XXI, of the ordinances of said city referred to in the alternative writ, is the only ordinance of said city concerning the opening of streets for said purpose of laying pipes, wires or sewers therein; but the only ordinances confirming any power upon the street commissioner to give his consent to opening or excavating streets for said purposes, are in chapter XXI, §§ 8 and 9.

6. The street commissioner of said city is appointed by the common council thereof, and is subject to the orders and directions of said common council.

7. The said *Southern New England Telephone Company* has never obtained the consent of the city of *New Britain* or of the common council thereof to lay and maintain underground wires, conduits and ducts, or any underground work whatever, in *Church* street in said city, between *Elm* and *Main* streets, and for that purpose to make excavations and openings in said street or any portion thereof, but, on the contrary, on the *8th* day of *May*, 1898, said telephone company applied to the common council of said city for permission to open the surface of *Church* street from its intersection with *Elm* street to its intersection with *Main* street for the purpose of laying ducts, building manholes, handholes, and curb lateral ducts to maintain the wires of said company, and permission was refused by said council, and no further application has been made to said council for like permission since the refusal of the application on *May 8th*, 1898.

8. The portion of *Church* street referred to in said application of *May 8th* to the common council of said city was the same portion referred to in the application made to this defendant on the *4th* of *November*, 1898, and the permission sought of and refused by said common council was for the same work for which permission was asked of this defendant in the application of *November 4th*.

9. The city of *New Britain* has a population of *twenty-five thousand* and upwards, and there are in and along the streets of said city, including *Church* street between *Main* and *Elm* streets, other than the wires of said telephone company, overhead wires for telephonic, telegraphic, fire alarm and electric lighting purposes. *Church* street is one of the main thoroughfares of said city, especially between *Main* and *Elm* streets, and the portion of said street has at much expense been macadamized by said city and is extensively used for public travel.

10. Said city desires, so far as practicable, to get underground all the overhead wires now in use in said city, but it desires to attain that end by a plan whereby there shall be as few conduits and ducts as possible, and whereby public travel upon the streets and highways, and the sewers and gas and water pipes under the surface of said streets, shall be the least interfered with; and the common council of said city does not deem it for the best interests of said city or of the public that the *Southern New England Telephone Company* shall lay its conduits and ducts for its exclusive use and under its exclusive control without any regard to a uniform system that may be adopted for all the wires in said city or the greater part thereof. On or about the *16th* of *February*, 1898, the common council of said city appointed from its own body a committee to investigate the subject of the provision by the city of a conduit or subway in the central portion of the city into which should be placed the wires of the various telegraph, telephone and electric lighting companies as well as the city fire alarm, and on or about the *16th* of *March*, 1898, said *Southern New England Telephone Company* made application to said council for permission to open certain streets in the central part of said city, including *Church* street between *Main* and *Elm* streets, for the purpose of laying conduits and ducts for its wires, and said application was heard by the committee; said common council, through its said committee, signified to said telephone company its willingness to consider and adopt, under reasonable regulations, plans relating to said underground wires, and the laying of conduits and ducts for the use of wires of said company and for other overhead wires in said city, but said telephone company insisted that under the said amendment to its charter it has the absolute right to lay conduits and ducts for its exclusive use and under its exclusive control, and refused to submit to any regulations that might be made by said council whereby other overhead wires should be taken into the conduits and ducts of said company, or whereby the wires of said company should be taken into the conduits built by said city; wherefore said council, acting, as it claims, in the interest of and under the power given it over the streets and highways of said city, on the *4th* of *May*, 1898, refused the applica-

tion of said telephone company and refused also a subsequent application of said company, made on or about *May 8th*, 1898, to open *Church* street between *Main* and *Elm* streets, for the purpose of building conduits and ducts for its wires. Said telephone company insisted that its application made to this defendant on the *4th* of *November*, 1898, should be granted without any regulations restricting the exclusive use and control by it of its conduits and ducts.

11. Said common council, since the said application of said telephone company, has had and still has under consideration the matter of underground wires in said city, and is, by a proper committee, investigating the plans and methods in use in other cities, and intends within a reasonable time, which has not yet expired, to make by a proper ordinance reasonable regulations for putting underground as many as possible of the overhead wires now in use in said city, in such manner as to interfere as little as possible with the use of the streets for public travel and other purposes.

12. Wherefore, for each and all the causes and reasons herein set forth, the defendant insists that a writ of peremptory mandamus should not issue as prayed for in said application, and prays the judgment of the court that he may be hence dismissed.

[By *Oliver Ellsworth*, his attorney.]¹

3. Alternative Writ of Mandamus to Compel a Road Overseer to Perform the Duties of His Office.

Form No. 19260.

(Precedent in *State v. Ferguson*, 31 N. J. L. 108.)²

New Jersey, ss.—The State of *New Jersey* to *William Ferguson, jun.*, one of the overseers of the highways of the town of *Upper Alloways Creek*, in the county of *Salem*—greeting:

Whereas, certain of the surveyors of the highways of the county of *Salem*, duly appointed for that purpose by the *Inferior Court of Common Pleas* of said county, heretofore, to wit, on the *seventeenth* day of *October*, in the year of our Lord one thousand eight hundred and *fifty-nine*, did lay out, according to law, a certain public road in the township of *Upper Alloways Creek*, in said county, to be *two and a half* rods wide, beginning at a stake set on land of *Henry Jarman*, near *Charles Campbell's* corner, in the road leading to *Allowaystown*, known as "commissioners' road," and running north *forty-one* degrees *ten* minutes west, on lands of said *Henry Jarman*, *Robert Wentzell*, *William S. Boltinghouse*, *Emmor Reeve*, *Maskell Ware*, heirs of *Samuel Dawson*, *Charles Stokes*, *John Hannah* and *Abigail Ann Jessup*, one hundred and *thirty-six* chains and *fifty* links, to a stake set on said *Jessup's* land, in the road leading from *Woodstown* to *Allowaystown*, and there to end, which said line is the middle of the road; and afterwards, to wit, on the day and year aforesaid, in due form of law, did make return thereof to the clerk of said court, who received the same,

1. The matter enclosed by [] will not be found in the reported case.

2. A verdict for the plaintiff was affirmed.

and after the expiration of *fifteen* days from the time of so receiving said return, did duly record the same in Book *F* of Banks and Roads, on pages *131* and *132*, the same being a book kept by him for that purpose, as by reference thereto will more fully and at large appear; and whereas, the said surveyors, in and by their said return, did appoint a certain day and year therein mentioned, to wit, the *fourteenth* day of *November*, in the year of our Lord one thousand eight hundred and *fifty-nine*, as the time when the overseers of the highways of said township of *Upper Alloways Creek* should open the said public road so by them laid out as aforesaid.

And whereas, you, the said *William Ferguson, jun.*, at the last annual town meeting of the freeholders and inhabitants of the said town of *Upper Alloways Creek*, qualified by law to vote at such town meeting, to wit, on the *tenth* day of *March*, in the year of our Lord one thousand eight hundred and *sixty-three*, was elected one of the overseers of the highways of said township for the ensuing year, and afterwards, to wit, on the day and year last aforesaid, accepted the said office and took upon yourself the burthen of executing the same.

And whereas, a township committee of said township of *Upper Alloways Creek*, or a majority of them, had theretofore, according to law, assigned and appointed to the respective overseers of the highways of said township, their several limits and divisions of the highways within said township by them severally to be opened, cleaned out, amended and repaired, one of which limits and divisions was then described, designated and known, and ever since has been and now is described, designated and known as the "fourth road district," the same having been in no wise since annulled or altered; and whereas all that part of the said public road so as aforesaid laid out by the said surveyors which begins at a run or watercourse where said public road crosses the same, the said run or watercourse being the boundary line between the fourth and seventh road districts of said township, and running from thence along said public road as laid out as aforesaid, north *forty-one* degrees and *ten* minutes west, *eighty-seven* chains, more or less, to stake set on *Abigail Ann Jessup's* land, in the road leading from *Woodstown* to *Allowaystown*; the same being the ending point of the aforesaid public roads, is situate and lies within the said "the fourth road district," and still remains unopened and unfitted for public use.

And whereas, you, the said *William Ferguson, jun.*, (having been elected overseer of the highways as aforesaid, and for the said "the fourth road district,") the township committee of said township of *Upper Alloways Creek*, duly chosen agreeably to law in said township, or a majority of them, afterwards, to wit, on the *eleventh* day of *March*, in the year of our Lord one thousand eight hundred and *sixty-three*, did assign, allot and appoint, in writing, to you, as overseer as aforesaid, the said "the fourth road district" as your limit and division of the highways within said township to be by you opened, cleared out, amended and repaired.

And whereas, although under and by virtue of your said election to an acceptance of said office of one of the overseers of the highways of said township, and of the aforesaid assignment and appointment.

to the respective overseers of the highways of said township of their several limits and divisions of the highways therein, and of the said assignment, allotment and appointment to you of the said limit or division thereof described, designated and known as "the fourth road district," and of other the premises aforesaid, it then, to wit, on the day and year last aforesaid, became and was, and ever since hath been, and now is your duty, as one of the overseers as aforesaid, to observe and conform yourself to all the said assignments, allotments and appointments of the limits and divisions of the highways within said township, and particularly to open, clear out, work, make and put in good order for public use and travel all that part of the said public road situate and lying within the said "the fourth road district," yet, that in regard of your duty in this behalf, you have wholly neglected and refused, and still do wholly neglect and refuse, to open, clear out, work, make and put in good order the same, to the great damage and grievance of the inhabitants of said township and other citizens of this state having occasion to use and to travel on and along the same, as by the complaint of *Joseph Reeves* and others, relators, we have understood.

Now, therefore, we being willing that full and speedy justice be done in this behalf as it is reasonable, command you, the said *William Ferguson, jun.*, that immediately after the receipt of this our writ, without delay you do proceed to open, clear out, work, make and put in good order for public use and travel all that part of the said public road which lies within your the said "the fourth road district," or that you show cause to the contrary thereof, lest that complaint shall again come to us by your default; and in what manner you shall have executed this our writ make known to our justices of our *Supreme Court of Judicature*, at *Trenton*, on the *first Tuesday of November next*, then and there returning this our writ; and this you are not to omit upon peril that may fall thereon.

Witness, the Honorable *Edward W. Whelpley*, Chief Justice, at *Trenton* aforesaid, the *fifteenth day of August*, in the year of our Lord one thousand eight hundred and *sixty-three*.

Charles P. Smith, Clerk.

Sam'l A. Allen, Att'y.

4. Plea to Return to Alternative Writ of Mandamus to Compel Road Overseer to Perform the Duties of His Office.

Form No. 19261.

(Precedent in *State v. Ferguson*, 31 N. J. L. 111.)¹

[(Title of court and cause as in Form No. 15225.)]²

Salem County, ss.—And thereupon, on the same *first Tuesday of November*, in the year of our Lord one thousand eight hundred and *sixty-three*, before our justices of our *Supreme Court of Judicature*, at *Trenton*, came as well the said *Joseph Reeves* in the said writ and

1. A verdict for the plaintiff was affirmed.

2. The matter to be supplied within [] will not be found in the reported case.

return named, by *Samuel A. Allen*, his attorney, as the said *William Ferguson, jun.*, in the aforesaid writ and return likewise named, by his attorney; and the said *Joseph Reeves*, having heard the said writ and return read, protesting that the said return and the matter therein contained are insufficient in law to bar or preclude him, the said *Joseph Reeves*, from having a peremptory writ of mandamus in this behalf. For plea, the said *Joseph Reeves*, by force of the statute in such case made and provided, saith, that at the time when the said writ of alternative mandamus was served upon and delivered to the said *William Ferguson, jun.*, to wit, on the *twenty-fourth* day of *August*, in the year of our Lord one thousand eight hundred and *sixty-three*, he, the said *William Ferguson, jun.*, was and ever since hath been, and now is, an overseer of the highways of the township of *Upper Alloways Creek*, in the said county of *Salem*, to wit, at *Salem*, in said county, and this he, the said *Joseph Reeves*, prays may be inquired of by the country, etc.

[(Signature of attorney as in Form No. 15216.)]¹

5. Answer to Complaint for an Injunction to Restrain Road Overseer from Removing Gravel from Land Adjoining a Road.

Form No. 19262.

(Precedent in Jeffersonville, etc., *R. Co. v. Daugherty*, 40 Ind. 34.)²

[(Commencement as in Form No. 12696.)]¹

First. The defendant, for answer to the complaint herein, says that he is the supervisor for road district number —, in *Wayne* township, *Bartholomew* county, in the state of *Indiana*, duly elected and qualified therefor; and was such supervisor at the time or times of the several acts charged in the complaint; the state road is a public highway leading from the city of *Columbus* to the town of *Jonesville*, in said county; and so much thereof as passes through defendant's said road district was seriously out of repair, the same being muddy and full of holes, caused by frequent travel; it was necessary that said road adjacent to said land in said district should be repaired, and defendant, in good faith, as such supervisor as aforesaid, entered upon the said lands of the said plaintiff, which were in defendant's said road district and adjoining said highway and the portions thereof out of repairs as aforesaid, to obtain the material for the preservation and repair of said public highway as aforesaid; and the defendant did then and there, as aforesaid, remove from said lands, at a point adjoining said highway, *ninety* wagon loads of gravel, and no more, which was placed on said public highway adjoining said lands for the preservation and repair thereof; and the same was necessary therefor, and defendant did no unnecessary damage to said premises, and moved no more gravel therefrom than was necessary and was, in fact, used in said public highway within defendant's

1. The matter to be supplied within [] will not be found in the reported case. 2. This answer was held sufficient.

said road district; that it was the most convenient point at which said gravel could be procured as aforesaid for said purposes aforesaid.

Second. The defendant for further answer herein says, that he is now, and was at the time of the several acts charged in the complaint, supervisor of road district number ———, in *Wayne* township, in *Bartholomew* county, in the state of *Indiana*, duly elected and qualified therefor; that the public highways in said district adjoining said lands were greatly out of repairs, containing holes made by frequent public travel, and almost obstructed by the accumulation of mud; and defendant, as supervisor, entered upon said lands adjoining his said public highway, which was out of repair as aforesaid, to obtain material for its repair and preservation, and without doing any unnecessary damage, defendant removed from said premises at a point adjoining said public highway *ninety* loads of gravel, and no more, which were placed in said public highway in said district for repairs and preservation thereof; and no more gravel was removed than was necessary and was used for said purpose; that said point was the most convenient at which said material could be procured; that gravel can be procured at intervals along the entire route of plaintiff, and more than enough for all its purposes for any length of time; that at said point where said gravel was removed, and adjoining thereto, and in the immediate vicinity thereof, and for many miles above and below said point, and either side thereof, there are immense and immeasurable deposits of gravel, that would answer all the purposes of said plaintiff so long as it might exist as a corporation; that at said point where said gravel was removed there is no track for the removal of gravel for the use of the company or other purposes, and plaintiff has not procured gravel thereat for *ten* years last past.

[(*Signature and verification as in Form No. 11065.*)]¹

VII. ACTION AGAINST MUNICIPALITY TO RECOVER FOR WORK IN REPAIR OF HIGHWAY.

Form No. 19263.

(Precedent in *Ryan v. Coldwater*, 46 Kan. 243.)²

[(*Title of court and cause as in Form No. 5917.*)]¹

Plaintiffs, for cause of action, allege that defendant is a municipal corporation created by the laws of the state of *Kansas*; that as such corporation defendant did, by ordinance approved on the *16th* day of *August*, 1886, provide a tax of *10* mills on the dollar on all the taxable real estate within the corporate limits of said city of *Coldwater*, the defendant in this case, for the purpose of grading, opening, widening, improving, etc., all streets, avenues, etc., in said city; that as such corporation defendant did, by resolution approved by the mayor and council of said city, defendant, on the *27th* day of *July*, 1887, provide for surveying and grading all streets within the limits of said city, defendant; that in pursuance of said resolution, on *Main*

1. The matter to be supplied within 2. It was held that this petition was sufficient.
[] will not be found in the reported case.

street, in said city, was established a grade, which said grade was, by resolution of the mayor and council of said city, adopted and approved on the 20th day of December, 1887; that plaintiffs herein, with the knowledge, consent and direction of defendant herein, did, between the ——— day of ———, 1887, and the 8th day of November, 1887, do certain filling and work on *West Main* street, between *Central* and *Brooklyn* avenues, in said city, in compliance with the grade as established aforesaid, on account of said filling and work being herewith attached, marked "Exhibit A," and made a part hereof; that plaintiffs did, on the 3d day of December, 1887, present to the city council of the city of *Coldwater*, the defendant, a full account of the items of their claim, the same being duly verified by the oath of *George Schwisberger*, one of the plaintiffs herein; that said account was reasonable, correct and just, which said claim so presented defendant refused to allow; that said filling and work is worth the sum of \$220; that said amount of \$220 is due and wholly unpaid.

Wherefore plaintiffs ask judgment in the sum of \$220, with interest, at the rate of 7 per cent. per annum from the 8th day of November, 1887, and costs of this suit.

[(Signature and verification as in Form No. 5917.)]¹

VIII. ACTION AGAINST MUNICIPALITY TO RECOVER FOR WORK IN BUILDING HIGHWAY.

Form No. 19264.

(Precedent in *Chapman v. Wayne County Ct.*, 27 W. Va. 497.)²

[[Commencing as in Form No. 6952, and setting out the common counts.]]¹

And for this, that heretofore, to-wit, on August 10, 1880, the said defendant, by its commissioner, *G. F. Ratliff*, entered into a contract with this plaintiff for the building of a certain piece of road in said county by the plaintiff over what is known as the *Blankinship Hill*, for which work to be done according to the plans and specifications made known at the time of letting said contract to plaintiff by its said commissioner, and defendant agreed and promised said plaintiff to pay him the sum of \$600.00 for said work. The plaintiff proceeded, continued and completed the building of said road according to plans and specifications aforesaid; that at the time of the completion of said road, the plaintiff notified the defendant that the work under such contract was completed, and asked that the same be examined and reported to the defendants; that the defendants, nor its commissioner for them, examined said work nor made a report upon the same when requested to do so by this plaintiff; that afterwards the defendant appointed a new commissioner, who, after frequent solicitations by this plaintiff, made an examination of said work, and upon his said report, the defendants paid to this plaintiff upon said contract the sum of \$200.00, and refused to discharge the balance of their

1. The matter to be supplied within 2. This declaration was held sufficient.
[] will not be found in the reported case.

said debt to this plaintiff and ordered that certain changes be made in said road; said changes were not a part not parcel of the contract with said defendants; that this plaintiff did make all and every of such changes ordered to be made by said defendant at a great and additional outlay of money and time; that when such additional work was completed, as ordered by defendant, this plaintiff requested said defendants to receive said work and pay him therefor. Said defendants did, on *November 10, 1881*, pay to said plaintiff upon said contract the further sum of \$200.00, but failed and refused to pay the balance, to-wit, the sum of \$200.00, due him upon said contract; that this plaintiff has at divers times sought and requested the payment of said debt due from defendant on said contract; that the defendant refuses and wholly fails to pay the same; and in consideration thereof then and there promised to pay to him (to said plaintiff) the several moneys aforesaid upon demand, yet said defendant has never paid any of said moneys but wholly neglects so to do, to the damage of the plaintiff in the sum of \$1,000.00. And therefore he sues, etc.

[(Signature as in Form No. 6952.)]¹

IX. ACTION BY MUNICIPALITY TO RECOVER FOR REPAIRS MADE TO A BRIDGE.

Form No. 19265.

(Precedent in *Middlefield v. Church Mills Knitting Co.*, 160 Mass. 268.)²

[(Commencement as in Form No. 6942.)]¹

And the plaintiff says that there was in said *Middlefield* an ancient highway which crossed a stream by means of a bridge about *thirty* feet long, which was ample therefor, which way and bridge plaintiff town was bound to keep in repair; that the owners of land on said stream thereafter desired to raise and did raise the water of said stream into a pond for manufacturing purposes by means of a dam which they built below said bridge, which raised the water back over said highway and bridge; and said owners also, at their own expense, changed and raised said highway by a filling of earth, and built about *twelve hundred* feet of railing at the sides thereof to make travel on it as changed by them safe, and built a new bridge to carry said changed way over their pond, which new bridge was *eighty-eight* feet long, and which new or changed highway and bridge were made in size, form and location, for their own convenience by said owners, and to adapt the same to their own wants and to secure for them a desired length of apron for their said dam; none of which changes were necessary parts of said ancient highway, but only became necessary or desirable by the building of said dam by said owners, all of which new work and changes were done and made by said owners under an agreement with plaintiff town whereby the owners of said land were to do and make the same and to maintain the same at their

1. The matter to be supplied within [] will not be found in the reported case.

2. It was held that a demurrer to this declaration should have been overruled.

own cost; and the same and the proper maintenance and repair of the same became incident to the water power and pond created by the erection of said dam; and the burden of maintaining the same attached to and has since run with said land, pond, water power and privilege; and the owners of said land and water power and privilege have for many years maintained the same in repair, as they were bound to do; and defendant is the owner of said land and water power and pond and privilege, and has succeeded to the rights and obligations of said former owners, and is bound to maintain said filling, railing and bridge in repair, and to rebuild the said bridge in case of necessity; and the same, by defendant's neglect, became out of repair and unsafe, and there was necessity to rebuild said bridge, and plaintiff town requested defendant to repair the same, and to rebuild said bridge, and defendant refused so to do, or any part thereof; and plaintiff made the necessary repairs thereof, and in so doing rebuilt said bridge at a cost of \$189.95, which sum plaintiff had demanded of defendant, but no part of it has been paid plaintiff; and defendant owes plaintiff said sum of \$189.95, with interest thereon.

Also the plaintiff says there was in *Middlefield* an ancient highway which crossed a stream by means of a bridge about *thirty* feet long, which was ample therefor, which way and bridge plaintiff town was bound to keep in repair; that the owners of land on said stream thereafter raised the water of said stream into a pond for manufacturing purposes by means of a dam which they built below said highway and bridge, which raised the water back over said highway and bridge, and made them both impassable for travel, though they were parts of the system of public ways in said town; and said owners also, at their own expense, substituted in place of the part of said highway which they had so flowed and said bridge a new filling of earth, and built upon it about *twelve hundred* feet of railing at the sides thereof to make travel thereon safe, which was necessary therefor, and built a new bridge over said pond, which new bridge was *eighty-eight* feet long, which substitutes were made necessary by said pond and for the convenience of said owners, and to adapt the same to their wants as well as to accommodate public travel, which their works interrupted as aforesaid, over said ancient highway; all of which new work was done by said owners under an arrangement with plaintiff town whereby the same should be substituted for such part of said way as they rendered unfit for travel as aforesaid and for said old bridge, and at the expense of said owners, and should be maintained and kept in repair by them and their successors at their own cost and free from the expense of the plaintiff town forever; which new work has for many years been a part of the necessary public highway which the plaintiff town was bound by law to maintain and keep in repair; and the burden of maintaining the same attached to and has since run with said land, pond, water power and privilege; and the owners thereof made covenant which runs with the same with the plaintiff town that they would maintain the same; and the defendant company is the owner thereof and is bound to maintain said filling, railing and bridge so as to make the

same safe for public travel and to save plaintiff town harmless in that regard, and has from time to time done the same, and has agreed with said town forever so to do; and the defendant maintains and long has maintained water in said pond over and much higher than the top of said old highway at that point and the old bridge, and renders the same as they were before said pond was maintained impossible of use, and maintains an obstacle to necessary public travel unless the said substitutes for the part of said way inundated and said bridge are kept in repair, and unless kept in repair the part as maintained would amount to a public nuisance; and the same by defendant's neglect became out of repair and unsafe for travel, and there was necessity to rebuild said bridge; and plaintiff requested defendant to repair the same and to rebuild said bridge, but defendant refused so to do or any part thereof; and plaintiff made the necessary repairs thereof, and in so doing rebuilt said bridge of necessity at a cost of \$189.95, which sum plaintiff has demanded of defendant, but no part of it has been paid plaintiff; and defendant owes plaintiff said sum of \$189.95, and interest thereon.

[(Signature as in Form No. 6942.)]¹

X. INDICTMENT AGAINST DIRECTORS OF TURNPIKE COMPANY FOR FAILURE TO CAUSE TO BE MADE OUT A STATEMENT OF THE FINANCIAL CONDITION OF THE COMPANY.

Form No. 19266.

(Precedent in *Baker v. State*, 57 Ind. 255.)²

[(Commencement as in Form No. 10692.)]¹

The grand jurors of the state of *Indiana*, in and for the county of *Dearborn*, good and lawful men, duly and legally impaneled, sworn and charged in the *Dearborn Circuit Court*, at its *February* term, A. D. 1877, to inquire in and for the body of said county, in the name and by the authority of the state of *Indiana*, upon their oaths, present and charge that, at and in the county of *Dearborn* and state of *Indiana*, one *William H. Baker*, *Zachary T. Baker*, *Mortimer K. Goodrich*, *William Hill* and *Ambrose E. Nowlin* were, on the 3d day of *January*, A. D. 1876, duly selected and qualified as the members of a board of directors of a certain corporation, commonly called and known by the name of "*The Lawrenceburgh and Napoleon Turnpike Company*," a corporation created and organized under a special act of the General Assembly of the state of *Indiana*, and now conducted and doing the business of said corporation under the general laws of the state of *Indiana*, defining the rights, powers and duties of turnpike companies, etc., and the officers thereto belonging, and in the corporate name, "*The Lawrenceburgh and Napoleon Turnpike Company*," being located in the said *Dearborn* county and state of *Indiana*; and the directors aforesaid, officers of said corporation, reside in said *Dearborn* county and state aforesaid; they, the said *William H.*

1. The matter to be supplied within 2. This indictment was held sufficient. [] will not be found in the reported case.

Baker, Zachary T. Baker, Mortimer K. Goodrich, William Hill and Ambrose E. Nowlin, members of the board of directors of said turnpike company as aforesaid, did then and there, to wit, during the *first week of July, A. D. 1876*, unlawfully fail, neglect and refuse to make or cause to be made out a full and complete statement of all the moneys, rights, credits, property and assets of every kind owned or held by the said turnpike company, together with the amount of its liabilities, also showing the amount of capital stock of said company, and its gross receipts for the previous years of 1875 and 1876, with the amounts paid out for repairs, for improvements, on account of litigation, on account of its officers and on account of all other expenses, which shall be properly classified, and have said statement sworn to by the members of said board of directors of the "*Lawrenceburgh and Napoleon Turnpike Company*," and attested by the clerk or secretary of said company; and did then and there unlawfully fail, neglect and refuse to have said statement published within *fifteen days after the first day of July, 1876*, in a newspaper of general circulation, printed and published in said *Dearborn county*, through which county said road runs, and have the same published *two* consecutive weeks in such newspaper, they, the said *William H. Baker, Zachary T. Baker, Mortimer K. Goodrich, William Hill and Ambrose E. Nowlin*, being, during all of said time, and still being, members of said board of directors; and that they unlawfully failed, neglected and refused to make or cause to be made out and publish the said report, as required of them as such directors as aforesaid, until the *24th day of August, A. D. 1876*, contrary to the statute in such case made and provided.

George R. Brumblay, Prosecuting Attorney.

[(*Indorsements as in Form No. 10692.*)]¹

XI. INDICTMENT FOR RACING HORSE ON PUBLIC ROAD.

Form No. 19267.

(Precedent in *State v. Fleetwood*, 16 Mo. 449.)²

[(*Title of court and cause as in Form No. 10703.*)]¹

The grand jurors for the state of *Missouri*, impaneled, sworn and charged to inquire in and for the county of *Ozark*, in the state of *Missouri*, upon their oath present, that *Isaac Fleetwood, Jr.*, late of the county of *Ozark*, in the state of *Missouri*, on the *nineteenth day of September*, in the year of our Lord eighteen hundred and *fifty-one*, with force and arms, at *Ozark county* aforesaid, then and there did run upon a public road, in common use in the county of *Ozark*, and state of *Missouri*, a horse, so as to interrupt travelers [thereon], and did then and there run said horse at and against one *Elvira Martin*, then and there being, thereby greatly hurting and

1. The matter to be supplied within [] will not be found in the reported case.

2. It was held that the last three counts of the indictment were sufficient; that the first count of the in-

dictment was bad because it failed to allege that the defendant ran a horse upon the highway so as to interrupt travelers thereon. This count has been amended so as to avoid that objection.

interrupting the said *Elvira Martin*, then and there being, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

And the grand jurors aforesaid, upon their oath aforesaid, do further present that *Isaac Fleetwood, Jr.*, late of the county of *Ozark* aforesaid, with force and arms, at *Ozark* county, in the state of *Missouri*, on the *nineteenth* day of *September*, in the year of our Lord eighteen hundred and *fifty-one*, did then and there run upon a public road and highway, in common use in this state, a horse, so as to interrupt travelers thereon, and put to fright horses and other animals by them rode and driven, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

And the grand jurors aforesaid, impaneled, sworn and charged as aforesaid, upon their oath as aforesaid, do further present that *Isaac Fleetwood, Jr.*, late of *Ozark* county, in the state of *Missouri* aforesaid, with force and arms, at the said county of *Ozark*, on the *nineteenth* day of *September*, in the year of our Lord eighteen hundred and *fifty-one*, did then and there run upon a public highway in common use in *Ozark* county, in the state of *Missouri*, a horse, so as to interrupt travelers thereon, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

And the grand jurors aforesaid, impaneled, sworn and charged as aforesaid, upon their oath aforesaid, do further present that *Isaac Fleetwood, Jr.*, late of *Ozark* county, in the state of *Missouri*, with force and arms, at *Ozark* county aforesaid, on the *nineteenth* day of *September*, A. D. eighteen hundred and *fifty-one*, did then and there run upon a public road and highway, in common use, in the county of *Ozark*, and state of *Missouri*, a horse, so as to interrupt travelers thereon, by means of which said running the horse as aforesaid he, the said *Fleetwood*, then and there greatly interrupted and injured one *Elvira Martin*, then and there being, and other wrongs to the said *Elvira Martin* then and there did, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

[(*Signature and indorsement as in Form No. 10703.*)]¹

XII. INDICTMENT FOR FAILURE TO HAVE A COMPETENT MAN IN FRONT OF AN ENGINE PROPELLED BY STEAM AND TO STOP SAID ENGINE TO ALLOW PERSONS WITH HORSES TO PASS.

Form No. 19268.

(Precedent in *State v. Kowolski*, 96 Iowa 347.)²

[(*Commencement as in Form No. 10693.*)]¹

For the said defendants did, on or about *September 3*, 1894, in *South Fork* township, said county, drive or cause to be driven, a

1. The matter to be supplied within [] will not be found in the reported case. was not bad for duplicity because it charged a failure to stop and to keep a
2. It was held that this indictment man in front.

steam engine, being propelled by steam, on and over the public highway, and did not have a competent man in front of said engine, to assist persons passing the same to control their horses or animals, and did not stop said engine when *one hundred* yards distant from persons going on said highway with horses or other animals, until the same had passed, and failed to render any assistance to any one passing on the public highway, contrary to the statute, [(concluding as in Form No. 10693).]¹

1. The matter to be supplied within [] will not be found in the reported case.

STRICT FORECLOSURE.

See the title MORTGAGES, vol. 12, p. 390.

STRIKES AND BOYCOTTS.

See the titles CONSPIRACY, vol. 5, p. 138; *INJUNCTIONS*, vol. 9, p. 822; *RIOT, ROUT, AND UNLAWFUL ASSEMBLY*, vol. 16, p. 678.

STRIKING OUT.

See the titles AMENDMENTS, vol. 1, p. 712; *REDUNDANT AND IRRELEVANT MATTER*, vol. 15, p. 906; *SHAM AND FRIVOLOUS PLEADINGS*, *ante*, p. 98.

STRUCK JURIES.

See the title SPECIAL AND STRUCK JURIES, *ante*, p. 297.

SUBMISSION OF CONTROVERSY WITH- OUT ACTION.

See the title FRIENDLY SUIT, vol. 8, p. 929.

SUBMITTED CASE.

- I. AGREED CASE OR AGREED STATEMENT OF FACTS, 857.
- II. ORDER CONTINUING AGREED CASE FOR HEARING, 895.
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CROSS-REFERENCES.

For Forms in Amicable Actions, see the title FRIENDLY SUIT, vol. 8, p. 929.

For Forms relating to Submission of Controversy Without Action, see the title FRIENDLY SUIT, vol. 8, p. 929.

See also the GENERAL INDEX to this work.

I. AGREED CASE OR AGREED STATEMENT OF FACTS.¹

1. Definition and Nature.—An agreed statement of facts, strictly speaking, corresponds to a special verdict. It presupposes that the issues have been settled, the evidence passed upon, and contains, therefore, no questions arising on the pleadings or any matter of evidence, but results in the form of ascertained facts. When these facts are submitted to a court, it is the business of the court to deduce from them the proper legal conclusions. *Barden v. St. Louis Mut. L. Ins. Co.*, 3 Mo. App. 248.

Definiteness and Certainty.—All the facts necessary to a determination of the case must be definitely ascertained. If there be any ambiguity, any omission of facts necessary to a recovery, any lack of clearness and certainty on material points, the judgment will not be allowed to stand. *Tyson v. Western Nat. Bank*, 77 Md. 412; *Brinkley v. Hambleton*, 67 Md. 169; *Jackson v. Salisbury*, 66 Md. 459; *Keller v. State*, 12 Md. 322; *Burgess v. Pue*, 2 Gill (Md.) 254; *Marine Bank v. Merchants Bank*, 12 Gill & J. (Md.) 498; *Old Colony R. Co. v. Wilder*, 137 Mass. 536; *Gillett v. Detroit Board of Trade*, 46 Mich. 309; *Goodrich v. Detroit*, 12 Mich. 279; *Carr v. Lewis Coal Co.*, 96 Mo. 149; *Gage v. Gates*, 62 Mo. 412; *Ford v. Cameron*, 19 Mo. App. 467; *Moore v. Henry*, 18 Mo. App. 35; *Hughes v. Moore*, 17 Mo. App. 148; *Union Sav. Bank v. Fife*, 101 Pa. St. 388; *Kinsley v. Coyle*, 58 Pa. St. 461; *Holmes v. Wallace*, 46 Pa. St. 266; *Washburn v. Baldwin*, 10 Phila. (Pa.) 472, 30 Leg. Int. (Pa.) 21; *Whitesides v. Russell*, 8 W. & S. (Pa.) 44; *Brewer v. Opie*, 1 Call (Va.) 212; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; *Stockton v. Copeland*, 23 W. Va. 696; *Glenn v. Fant*, 134 U. S. 308.

Sufficiency of a Special Verdict.—The agreed statement must be a statement of the ultimate facts or propositions

which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of the jury to be discharged by the court, but must have all the sufficiency, fullness and perspicuity of a special verdict. *Ringgold v. Hoblitzell*, 6 Gill & J. (Md.) 259; *Powers v. Provident Sav. Inst.*, 122 Mass. 443; *Com. v. Howard*, 149 Pa. St. 302; *Luzerne County v. Glennon*, 109 Pa. St. 564; *Union Sav. Bank v. Fife*, 101 Pa. St. 388; *Kinsley v. Coyle*, 58 Pa. St. 461; *Holmes v. Wallace*, 46 Pa. St. 266; *Parker v. Urie*, 21 Pa. St. 305; *Ramsey v. McCue*, 21 Gratt. (Va.) 349; *Sawyer v. Corse*, 17 Gratt. (Va.) 230; *Glenn v. Fant*, 134 U. S. 398; *Raimond v. Terrebonne Parish*, 132 U. S. 192; *Martinton v. Fairbanks*, 112 U. S. 670; *U. S. v. Eliason*, 16 Pet. (U. S.) 291; *Norris v. Jackson*, 9 Wall. (U. S.) 125; *Burr v. Des Moines R., etc., Co.*, 1 Wall. (U. S.) 99.

The statement must be such that the court can render judgment upon the facts as stated. *Keith v. Rucker*, 16 Ill. 389; *Phelps v. Phelps*, 145 Mass. 416; *State v. Sias*, 17 N. H. 558; *Berks County v. Pile*, 18 Pa. St. 493; *Washburn v. Baldwin*, 10 Phila. (Pa.) 472, 30 Leg. Int. (Pa.) 21. And the court cannot go outside of its terms for facts, nor assume them by way of inference. *Com. v. Howard*, 149 Pa. St. 302; *Seiple v. Seiple*, 133 Pa. St. 460; *Ford v. Buchanan*, 111 Pa. St. 31; *Philadelphia, etc., R. Co. v. Waterman*, 54 Pa. St. 337; *Berks County v. Pile*, 18 Pa. St. 493; *Canonsburg Iron Co. v. Union Nat. Bank*, (Pa. 1886) 6 Atl. Rep. 574; *Diehl v. Ihrie*, 3 Whart. (Pa.) 143.

Form No. 19269.¹(Precedent in *Trulock v. Taylor*, 26 Ark. 57.)[*(Title of court and cause as in Form No. 17871.)*]²

For the trial and determination of the issues joined in this cause, and now submitted to the court as a jury, and for the purpose of such trial, the said parties, by their respective attorneys, agree that the facts are as follows: The tract of land described in the declaration was located with an *eighty* acre pre-emption float, under the act of Congress of 29th of May, 1830, by *Antoine Barraque*, of the United States land office, at *Little Rock*, on the 27th of April, 1836, and the purchase money thereof (\$100) paid by him to the receiver of said land office, but no patent has ever been issued on said entry.

On the 12th day of *December*, 1843, said *Barraque* and wife made a deed of trust, of and upon said land, to *Frederick Notrebe* and *William B. Wait*, to secure the payment of certain debts owing by him.

On the 21st day of *February*, 1845, said trustees, *Notrebe* and *Wait*, sold said land, under and in pursuance of said deed of trust, when the same was purchased by *James H. Trulock*, the husband of said *Amanda*, father of said other defendants, and conveyed to him, by deed of said trustees, and he entered into possession thereupon, and cleared the same, and it has ever since then been in cultivation; and under and by virtue of such purchase, at said trustees' sale, said tract of land has been in possession of the said *James H. Trulock*, and of the said defendants, succeeding and claiming under him, ever since the 21st day of *February*, 1845, and down to the present time; and this paragraph includes the fact that said defendants were in possession of said land at the time of the institution of this suit, and of any former suit for said land. So far, such fact may be relied on by said plaintiff.

Said *Antoine Barraque* and *James H. Trulock* are both dead, and both died in or prior to the year 1848.

Ever since said *James H. Trulock* purchased said land at said trustees' sale, he and said defendants, claiming under him, have been in the actual possession of said land, openly and notoriously claiming the same as owners, and using and cultivating the same.

Said tract of land has never been overflowed, so far as known to any person now living, and was not at the time of the passage of the act of Congress of the United States, entitled "An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits," approved September 28, 1850, and has not since been swamp or overflowed land, or in any way made unfit thereby for cultivation.

Said tract of land was selected by the agents of the state of *Arkansas* as part of the swamp lands in said state, under and by virtue of said act of Congress, and on the 9th day of *August*, 1855, the intestate, *Solon B. Jones*, entered and purchased the same at the state swamp land office at *Pine Bluff*.

Such selection was confirmed by the commissioner of the general

1. See, generally, *supra*, note 1, p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

land office at *Washington City*, and the same, along with other lands so selected, were patented to the state; and said tract of land was conveyed by the governor of said state, pursuant to such entry, to *Solon B. Jones*, by deed, on and bearing date *January 14, 1858*.

On the *10th* day of *February, 1862*, said plaintiff instituted an action of ejectment for said lands against the defendants thereto. The declaration and writ in that suit, on file in the office of the clerk of this court, and indorsements thereon, as the same appears of record, are here referred to and made a part thereof, the same as if here inserted at full length.

On the *19th* day of *March, 1866*, said plaintiff, on account of the supposed loss of said papers, instituted this suit, and on the *3d* day of *December, 1866*, dismissed the said former suit.

And upon the foregoing facts this case is submitted to the court, sitting as a jury, upon the issues joined herein, with leave to either party to except to any rulings of the court upon propositions of law that may be moved by either as applicable to this case, and take a bill of exceptions in respect thereof.

[(Signatures of attorneys.)]¹

Form No. 19270.

(Precedent in *People v. Henshaw*, 76 Cal. 437.)²

[(Title of court and cause as in Form No. 5910.)]¹

It is hereby stipulated and agreed by and between the respective parties hereto, plaintiff and defendant:

1. That there was a municipal election held in the city of *Oakland* on the *eighth* day of *March, 1886*, at which relator, *S. F. Daniels*, received the highest number of votes cast for police judge of the city of *Oakland*, for the full term of *two* years next ensuing after such election, to succeed himself, he then being the duly elected, qualified and acting incumbent of the office.

2. That within the time prescribed by law he took the oath of office, and duly qualified as required by law.

3. That he is eligible, qualified and competent to discharge and perform the duties of the office.

4. That he is of right entitled to have, hold and enjoy the rights and emoluments of the office of police judge of the city of *Oakland* for the full term of *two* years from and after his said election, and that he should be let and put into possession of the said office, and should receive its emoluments, if such office now exists.

5. It is further stipulated and agreed that the only question involved in this proceeding is, whether or not the office of police judge of the city of *Oakland* was abolished by an act of the legislature of the state of *California*, entitled "An act to provide for police courts in cities having thirty and under one hundred thousand inhabitants, and to provide for officers thereof," approved *March 18, 1885*.

It being further stipulated and agreed that if the act above named did abolish the office of police judge of the city of *Oakland*, as

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. 857.
[] will not be found in the reported case.

provided by an act of the legislature entitled "An act to establish a police court in the city of Oakland, and define its jurisdiction, duties, and fees of courts and its officers," approved March 10, 1866, and the supplementary and amendatory acts thereto, then the defendant is entitled to have and hold the said office, and exercise its functions; but that if the said act did not abolish said office, then and in that event the relator, *S. F. Daniels*, should be let and put into possession of the said office, and have and receive its emoluments and exercise the functions of said office.

[Dated (*concluding as in Form No. 19275*).]¹

Form No. 19271.³

(Precedent in *Saguache County v. Decker*, 10 Colo. 149.)

[[*Title of court and cause as in Form No. 17872.*]]³

The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The points agreed upon are as follows: That there is now, and has been since the year 1881, within the county of *Saguache*, state of *Colorado*, an incorporated town designated and known as the town of *Bonanza City*; that said town has now, and has had since 1881, a duly elected and qualified board of trustees; that the board of trustees of said town for the years 1882 and 1883 appointed a board of health of, in and for said town, which said board of health qualified and acted as such board of health in pursuance of such appointment; that said board of health, so acting, were notified that certain persons residing within said town of *Bonanza City* aforesaid were infected with a disease dangerous to the public health, to wit, *small-pox*; that on receiving such notice, said board of health proceeded to act as provided in sections 2093 and 2094 of the General Laws of the state of *Colorado*, which action was as follows: They purchased through one of their members, *J. R. Ramsey*, physician of the board, medicine, drugs, etc., from *Decker Bros.*, as shown by bill presented to board of county commissioners, and certified as part of record and proceeding had before said board, and that they deemed the same necessary for the safety of the sick and the inhabitants of the town; that the physician deemed a bath-tub necessary for the safety of the sick, which the said board purchased from Mrs. *Alice Hunt*, as per bill rendered commissioners; that they employed *Anna Gray* as a nurse, which they provided to take care of the sick; that the infected persons could not be removed without endangering their health; that they, the said board of health, provided for said infected persons in the houses in which they were; that said board of health thought it necessary for the safety of the inhabitants that *two* guards, *one* at night and *one* by day, be employed to guard said premises and prevent the spread of said disease, for which purpose they employed *W. L. Taylor* and *Edward Nathan*, as per bills presented to county

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1. p. 857.

3. The matter to be supplied within [] will not be found in the reported case.

commissioners and made part of this record; that said board of health deemed it necessary for the safety of the inhabitants that a messenger be employed to bring to and take from the infected premises such things as were needed by the nurses or sick, for which purpose they employed *J. M. Brown*, as per bill rendered county commissioners and made part of the record hereto; that, after the disease had been suppressed, the several parties presented their bills to the county commissioners for payment; that the board of county commissioners had no notice of the contracting of such bills till presented; that the board of county commissioners disallowed said bills on the ground that the county was not liable therefor.

The points in controversy, and upon which the decision of the court is asked, are as follows: The foregoing bills having been contracted by a duly appointed and organized board of health within the county of *Saguache*, when said board of health is the board of health of an incorporated town, is or is not the county liable therefor? [(Signatures of attorneys.)]¹

Form No. 19272.²

(Precedent in *Speelman v. Chaffee*, 5 Colo. 248.)

[(Title of court and cause as in Form No. 17872.)

It is hereby stipulated and agreed by and between the respective parties hereto, plaintiff and defendant:]³

First. That in *October*, 1875, *George C. Corning* brought suit by attachment against the *Mining Company Nederland*, which was a foreign corporation organized under the laws of *Holland*, which writ was made returnable to the *January* term of the *district* court in and for *Boulder* county, *Colorado*, A. D. 1876.

The said writ was levied upon all the real estate owned by said company, and situate in the then territory of *Colorado*.

That upon the *18th* day of *January*, A. D. 1876, the company appeared in said suit and filed a plea, and upon the *18th* day of *January*, A. D. 1876, judgment was rendered in said suit by said court for the plaintiff, and against said company for *thirty-two thousand four hundred and ninety* dollars.

Second. That upon the *fifth* day of *January*, A. D. 1876, *Jerome B. Chaffee* commenced a suit by attachment against said *Mining Company Nederland*, which writ was also returnable to the *January* term of the *district* court in and for said *Boulder* county, *Colorado*, and was levied upon the identical real estate which the writ in the *Corning* case was levied upon, and in addition thereto the writ levied upon a large quantity of personal property of said mining company.

That said suit was continued from the *January* to the *July* term of said *district* court, 1876, when judgment was rendered thereon in favor of *Chaffee* for *forty-seven thousand nine hundred ninety-three and 33-100* dollars against said company.

Third. That upon the *5th* day of *January*, A. D. 1876, *Marc. A.*

1. The matter to be supplied within [] will not be found in the reported case. 3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 857.

Shaffenburg and *Moses Anker*, partners, as *Anker & Shaffenburg*, also commenced a suit by attachment against said *Mining Company Nederland*, which writ was made returnable to the *January* term, 1876, of the *district* court in and for *Boulder* county, *Colorado*, and was levied upon the identical real estate and personal property of said *Mining Company Nederland*, which the writ of attachment in the *Chaffee* case was levied upon.

That upon the *19th* day of *July*, A. D. 1876, the said *district* court rendered judgment in said case in favor of *Anker & Shaffenburg* and against the said company for *fourteen thousand four hundred and twenty-seven 86-100* dollars (\$14,427.86)

Fourth. That upon the *5th* day of *January*, A. D. 1876, *Moses Anker* brought suit by attachment against said *Mining Company Nederland*, returnable to the said *January* term of the *district* court in and for *Boulder* county, *Colorado*; which writ was levied upon the identical real estate and personal property which was seized under the writ of attachment in the said case of *Chaffee* against the said *Mining Company Nederland*, and said case was continued from term to term until the *February* term, 1877, of said court.

That upon the *9th* day of *February*, A. D. 1877, judgment was rendered in said case in favor of said *Anker*, and against said *Mining Company Nederland*, for *one hundred and forty thousand* dollars (\$140,000).

Fifth. That upon the *6th* day of *January*, A. D. 1876, *Hiram R. Johnson* brought suit by attachment in the *district* court in and for *Boulder* county, *Colorado*, against said *Mining Company Nederland*, which writ of attachment was made returnable to the *January* term of said *district* court in and for *Boulder* county, 1876, and was levied upon the same identical real estate of said company upon which the attachment in the said case of *Chaffee* against said company was levied.

That upon the *20th* day of *January*, A. D. 1876, the said *district* court of *Boulder* county rendered a judgment in said case in favor of said *Johnson* and against said company for the sum of *two thousand five hundred and twenty-four and twenty one-hundredths* dollars (\$2,524.20).

Sixth. That upon the *5th* day of *January*, 1876, *John S. Brown* and *Junius F. Brown*, partners, as *J. S. Brown Brothers*, brought suit by attachment against the said *Mining Company Nederland*, in the *district* court in and for *Boulder* county, *Colorado*, to the *January* term thereof, 1876, which writ was levied upon the identical real estate and personal property of said company which was seized under the writ of attachment in the case of *Chaffee* against said company.

That upon the *3d* day of *August*, A. D. 1876, the said *district* court rendered judgment in favor of said *Brown Bros.* in said cause and against said company for the sum of *one thousand and sixteen* dollars (\$1,016).

Seventh. That at the time of the issuing of said respective writs of attachment, they were duly served and levied upon the real estate and personal property of said company, and the levy and seizure was properly indorsed on each writ, and the proper certificates of levy in each case were filed and recorded in the office of the clerk and

recorder of *Boulder* county, and the personal property was seized and held by the sheriff thereof; that personal service was had upon said company in each and all of the foregoing cases, and that the estate of the said company was liable to attachment when so served.

Eighth. That all the foregoing judgments, viz: that of *George C. Corning, Anker & Shaffenburg, Moses Anker, Hiram R. Johnson and Brown Bros.*, have all been properly assigned to said *Chaffee*, who is now the owner thereof; that the assignment of each judgment was made prior to *September, 1877*.

Ninth. That each and all of said judgments now remain in full force and effect and in no way or manner paid or satisfied.

Tenth. That upon the *6th* day of *April, 1876*, *Sible Speelman* sued the said *Mining Company Nederland*, in an action of assumpsit in the *district* court in and for *Gilpin* county, *Colorado*, and brought said suit to the *May* term thereof, *1876*, and upon the *4th* day of *May, 1876*, it being the *third* day of said term, the said company appeared in said cause and filed its plea of general issue, and afterwards and upon the *4th* day of *May, 1876*, judgment was rendered in said cause in favor of said *Speelman* and against said company for *fifty-three thousand (\$53,000)* dollars, which judgment is still in force and effect and in no way satisfied or paid.

Eleventh. That upon the *20th* day of *April, 1876*, an execution was issued upon the said *Corning* judgment, and delivered to the sheriff of *Boulder* county, and was indorsed as received by him the same day, but nothing was done under the same, and upon the *12th* day of *May, 1876*, it was returned by said sheriff with the following indorsement: "I hereby certify that I return this execution by order of the plaintiff without having made any money thereon and entirely unsatisfied.

(Signed) *C. N. Hockaday*, Sheriff of *Boulder* County."

Twelfth. That upon the *12th* day of *September, 1876*, an alias execution was issued in the case of *Corning* against said *Mining Company Nederland*, and on said judgment, and received by the sheriff of *Boulder* county on that day.

And upon the *12th* day of *September, 1876*, said sheriff made levy of said writ upon the real estate attached in said suit.

And afterwards the following indorsement was made by said sheriff upon said execution, to wit: "I hereby certify that I returned the within writ by order of the plaintiff's attorney unsatisfied; also, that I have held the within writ until this day for costs; but the costs now having been paid, I now return the same as per order.

Done this *4th* day of *June, 1877*. Signed, *C. N. Hockaday*, Sheriff." That nothing more was done under the said execution.

Thirteenth. That upon the *11th* day of *September, 1876*, an execution was issued by the clerk of the said *district* court in and for *Boulder* county on the judgment so as aforesaid given in favor of said *Jerome B. Chaffee* and against said *Mining Company Nederland*, which writ was delivered to the sheriff of said *Boulder* county on the day of its issuance; and upon the same day it was levied upon the real and personal estate of said company which was attached under said writ of attachment.

That afterwards the sheriff of *Boulder* county made the following indorsement on said writ: "I hereby certify that I return the within writ by order of the plaintiff's attorney unsatisfied; also certify that I have held the within writ until this date for costs; and the costs having been paid in full by plaintiff, I now return the same as per order.

Done this 4th day of *June*, 1877. Signed, *C. N. Hockaday*, Sheriff." That nothing further has been done under the said execution.

Fourteenth. That upon the 15th day of *September*, 1876, an execution was issued by the clerk of the *district* court of said *Boulder* county in said case of *J. S. Brown Bros.* against said *Mining Company Nederland*, on the judgment so as aforesaid given in that case; which writ was delivered to the sheriff the same day, and upon that day the sheriff of *Boulder* county levied the same upon the real estate only of the said company attached in said suit; that nothing further was done under said execution until afterwards the sheriff of *Boulder* county made the following indorsement upon the same:

"I hereby certify that I returned the within writ by order of the plaintiff's attorney unsatisfied; also certify that I have held the within writ until this day for costs; but the costs having now been paid in full, I now return the same as per order.

Done this 4th day of *June*, 1877. Signed, *C. N. Hockaday*, Sheriff."

Fifteenth. That afterwards, and upon the 11th day of *September*, 1876, an execution was issued out of the *district* court by the clerk thereof, in the case of *Anker & Shaffenburg*, upon the judgment so as aforesaid rendered in their favor and against the *Mining Company Nederland*, which execution was delivered to the sheriff of *Boulder* county on the day of its issuance, and he levied the same upon the real estate and personal property of said *Mining Company Nederland*, which was attached in that suit.

That nothing further was done under said execution, except the sheriff of said county afterwards made the following indorsement thereon:

"I hereby certify that I returned the within writ, by order of the plaintiff's attorney, unsatisfied; also certify that I have held the within writ until this date for costs, but the costs now having been paid in full by plaintiff, I now return the same as per order.

Done this the 4th day of *June*, 1877. Signed, *C. N. Hockaday*, Sheriff."

Sixteenth. That upon the 25th day of *March*, 1876, an execution was issued by the clerk of said *district* court in and for the county of *Boulder*, upon the judgment of *Hiram R. Johnson* against said *Mining Company Nederland*, and delivered to the sheriff the same day, who levied the same upon certain personal property not attached under the writ of attachment in the case wherein the execution was issued, and such personal property was sold, and brought some five hundred dollars, which was indorsed upon the execution.

And afterwards, and upon the 1st day of *September*, 1876, said sheriff returned said execution, unsatisfied as to the sum of twenty-

two hundred seventy-nine dollars, having made the sum of four hundred twenty-one dollars only upon the same. Signed, "C. N. Hockaday, Sheriff."

Seventeenth. That on or about the *first* day of *November*, 1875, one *James Pippin* filed his petition against said company for a mechanic's and miner's lien in the *district* court in and for *Boulder* county, and summons was issued thereon returnable to the *January* term thereof, 1876, for himself and others, which petition covered all the real estate of the said *Mining Company Nederland* in said state of *Colorado*, which included all of the identical real estate attached under these several writs of attachment issued in the names of said *Corning*, *Chaffee*, *Anker* and *Shaffenburg*, *Anker* alone, *Brown Brothers*, and *Johnson*, against said company; that such proceedings were had under the said petition for lien; that upon the *21st* day of *January*, 1876, in the *district* court in and for *Boulder* county, a decree was rendered on said petition in favor of said *Pippin* and against said *Mining Company Nederland*, in the sum of *twenty-three thousand* dollars (\$23,000).

That the said attachment suits mentioned, and each and every of them, were made subservient to and subject to the said lien. That upon the *15th* day of *September*, 1876, the master in chancery of the said court sold said real estate under the said decree for lien in said lien suit, and the same was bid off by said *Chaffee*, and he received a master's deed therefor.

Eighteenth. That upon the *29th* day of *December*, 1877, one *Sible Speelman* caused an execution to issue from the *district* court in and for *Gilpin* county, directed to the sheriff of *Boulder* county, on said judgment, against said *Mining Company Nederland*, so as aforesaid rendered in *May*, 1876.

The sheriff, on the reception of said execution, proceeded to levy the same upon all the personal property of said company which was attached under the respective writs of attachment issued and sued out as above set forth, and upon the *28th* day of *January*, 1878, the sheriff sold the said personal property described in the complaint for the sum of \$2,200, and the same was sold to said *Speelman*.

That on the *26th* day of *January*, 1878, executions were again issued in the cases of said *Jerome B. Chaffee* against said company; *Moses Anker* against said company; *Anker & Shaffenburg* against said company, and in the name of *Brown Bros.* against said company, and the name of *Hiram R. Johnson* against said company, in their respective attachment suits above named. And the sale of this identical personal property so as above attached took place under said respective executions, and the property was bid off by *Jerome B. Chaffee* for the sum of \$2,200; that the said personal property so sold is of the value of \$2,200, and that the plaintiff demanded this property of the defendant before suit was brought.

Eighteenth. Upon the foregoing facts, who has the better title to said property, said *Chaffee* or said *Speelman*?

Nineteenth. It is further agreed and stipulated, that the above is all the evidence in the case, and these facts may be considered by the court, and this stipulation as to those facts shall be taken and

deemed by the court as a part of the record in this case, without any bill of exceptions; and in case either party desires to appeal this case to the *Supreme Court*, they shall have the right to do so by simply giving bond for the costs which may accrue.

Twentieth. That for the purpose of this suit, the returns of the sheriff upon the respective executions above set forth are to be treated as true; and the value of the personal property is fixed at \$2,200 for the purpose of this suit only.

Lewis C. Rockwell, Attorney for Plaintiff.

Thomas George, Attorney for Defendant.

Form No. 19273.¹

(Precedent in *Hallowell v. Brown*, 8 Houst. (Del.) 501.)

[(*Title of court and cause as in Form No. 17817.*)]²

And now, this 17th day of *October*, A. D. 1882, it is hereby agreed by and between the parties to the above suit that the following case be stated for the opinion of the court in the nature of a special verdict.

On the ninth day of *February*, A. D. 1875, *Levin B. Brown* recovered by confession, in the *Superior Court* of the state of *Delaware*, in and for *Sussex* county, a judgment against *John K. Brown* and *Hugh Brown*, the said judgment being No. 154, to *October* appearances, 1874, and the real debt therein being the sum of one thousand dollars, payable on the first day of *January*, A. D. 1866, with interest from the twenty-seventh day of *December*, A. D. 1864.

The following credits are indorsed on the record of said judgment, to wit: *May*, 1867, by \$70; *December 27*, 1868, by \$110; *January 1*, 1873, Cr., by \$300; *September 10*, 1873, by \$67.38.

On the ——— day of ———, A. D. 1875, a fi. fa. vice comes was issued on said judgment, being No. 354, to *October Term*, 1875.

On the ——— day of ———, A. D. 1875, the said *Hugh Brown* departed this life.

On the first day of *November*, A. D. 1876, the said judgment debt, interest and costs was duly assigned, transferred and set over by the said *Levin B. Brown* to *George Hallowell*.

On the 28th day of *October*, A. D. 1878, the said *George Hallowell* caused to be issued on said judgment a writ commonly called a fieri facias, being No. 7 to *April Term*, 1879, and in favor of *George Hallowell*, assignee of *Levin B. Brown v. John K. Brown*, who both survived *Hugh Brown*, deceased, the said *Hugh Brown* having departed this life on or about the ——— day of ———, A. D. 1875.

The following return was made upon said writ of fieri facias, to wit: Levied on goods and sold, and nothing to apply to this execution suit. *B. W. Truitt*, L. Shff.

On the ——— day of ———, A. D. 1879, a thirty-day rule was issued on said judgment, being No. 238 to *October Term*, 1879, on which the following return was duly made, to wit: "Inquiry held *June 10*, 1897, and lands condemned," saith *B. W. Truitt*, L. Shff.

On the ——— day of ———, A. D. 1879, a writ commonly called

1. See, generally, *supra*, note 1, p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

a writ of venditioni exponas to sell lands, being No. 331 to *October Term*, 1879, was issued at the suit of the parties last aforesaid, against the parties last aforesaid on said judgment.

To the said writ of venditioni exponas the following return was made, to wit: Lands advertised and sold *July 19*, 1879, at the hotel of *H. C. Pennington*, in *Seaford*, to the *Nanticote Building and Loan Association*, for the sum of \$1100.00, and applied as follows, to wit: The sum of \$291.42 to a judgment of *Wm. H. Ross* and *Jacob Williams v. John K. Brown*, as garnishee, as per answer *October 11*, 1866, being the amount in full thereon, which settles the same; the sum of \$142.32 to judgment No. 149 to *April Term*, 1867, at suit of *Jacob Williams v. John K. Brown*, which settles the same; the sum of \$152.61 to judgment No. 136 to *October Term*, 1871, at the suit of *George W. Windsor v. John K. Brown*, which settles the same; the sum of \$241.35 to judgment No. 19 to *April Term*, 1872, at suit of *James Rawlins v. John K. Brown*, which settles the same, and the sum of \$272.30 to this execution in part payment and exhausts the said fund. Saith *B. W. Truitt*, Shff.

On the 17th day of *March*, A. D. 1875, letters of administration on the estate of said *Hugh Brown*, deceased, were in due form of law granted to *Eliza Brown* and *Severn A. Brown*. On the 18th day of *February*, A. D. 1882, they passed their fifth account on the estate of said deceased, in and by which they are decreed to have in hand an unappropriated balance of seventy-seven dollars and eighty-five cents.

On the 23d day of *March*, A. D. 1875, a judgment by confession was recovered in the said *Superior Court* (being No. 228 to *October* appearances, 1874), at the suit of the said *Hugh Brown v. Hugh C. Brown*, for the sum of fourteen hundred and forty-eight dollars and sixty cents (\$1,448.60), real debt with interest from the 7th day of *November*, A. D. 1874, and payable as follows, to wit: \$150 with interest on the whole, *January 1st*, A. D. 1876, and the balance in \$150 payments with interest on the whole annually until paid.

The following entry has been made upon the record of said judgment, to wit: "1882, *April 10th*, Cr., this judgment by cash paid on the 11th day of *January*, 1875, to *Hugh Brown*, in his lifetime, \$400, *S. A. Brown*, Adm. of *Hugh Brown*, deceased."

On the 2d day of *March*, A. D. 1882, a writ, commonly called a writ of scire facias, was issued out of said *Superior Court* at the suit of *George Hollowell*, assignee of *Levin B. Brown v. John K. Brown*, who hath survived *Hugh Brown*, deceased, and the heirs and terre tenants of the lands of said *Hugh Brown*, deceased, said suit being No. 28, *April Term*, 1882, and in and by which said writ the sheriff was commanded to make known to said *John K. Brown*, who hath survived *Hugh Brown*, deceased, that he be and appear in said *Superior Court* on a day therein named to show cause "why the said *George Hollowell*, assignee of *Levin B. Brown*, ought not to have his execution against him of the debt and damages as aforesaid according to the form, force and effect of said recovery," and in and by which said writ the said sheriff was further commanded to make known "to the heirs and terre tenants of the lands and tenement which were of the aforesaid *Hugh Brown*, deceased, on the ninth day of *February*, A. D.

1875 (on which day the judgment aforesaid was rendered), or at any time said * * * that they and each of them be and appear before the said court on a day therein named to show cause "why the debt and damages aforesaid of the land and tenements aforesaid ought not to be made, and to the said *George Hollowell*, assignee of *Levin B. Brown* as aforesaid, rendered according to the form, force and effect of the recovery aforesaid."

To the said writ of scire facias, *Samuel J. Martin*, sheriff of *Sussex* county, to whom it was directed, made the following return, to wit: Made known by *John Den* and *Richard Fen*, personally to *Sallie D. Sharp*, *Henry W. Brown*, *Levin B. Brown*, *Susan A. Brown*, *Hugh C. Brown* and *John K. Brown*, March 7, 1882, so answers *Samuel J. Martin*, sheriff.

If the court be of the opinion that the said scire facias is properly issued, then judgment to be entered for the plaintiff, but, if not, then judgment to be entered for the defendant. The costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon.

[Dated (concluding as in Form No. 19275).]¹

Form No. 19274.¹

(Precedent in *Ex p.* *Bailey*, 39 Fla. 739.)

[(Title of court and cause as in Form No. 17819.)]³

It is agreed between counsel representing the petitioner, *E. W. Bailey*, and counsel representing the State of *Florida* and the sheriff of *Nassau* county, *Florida*, to submit the application of *E. W. Bailey* for a writ of habeas corpus and for a discharge from the custody of the said sheriff of *Nassau* county, *Florida*, under the commitment referred to in the petition herein, upon the following agreed statement of facts: It is admitted that the said *E. W. Bailey* did on *August 28th*, 1897, sample *twenty-one* cars of hard rock phosphate at the port of *Fernandina*, *Florida*; and that said phosphate was mined in the state of *Florida* by *G. M. Hubbard*, who is a citizen of the state of *Florida*, and by him forwarded by rail to *Fernandina* for shipment through said port to *F. Gesterding*, at *Hamburg, Germany*, a port in a foreign country; and that the said *E. W. Bailey* was selected by the said *G. M. Hubbard*, the miner and seller of said rock, and by the said *F. Gesterding*, the purchaser thereof, to sample said *twenty-one* cars of phosphate, and that he sampled the same in pursuance of said selection, said sampling being done in the port of *Fernandina, Fla.*, and at the request of the said seller and purchaser; and that the contract under which the said phosphate was sold provided that the said phosphate should be sampled by the stevedore or some other person selected by the parties; and that it had been the custom of miners of phosphate in the state of *Florida* and buyers thereof to provide in their contract of sale that the phosphate should be sampled by some third person to be afterwards

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. See, generally, *supra*, note 1, p. 857.

3. The matter to be supplied within [] will not be found in the reported case.

agreed on by them, and that the said samples so taken should be analyzed by one or more chemists, to be agreed upon between them, and that this custom prevailed long prior to *April 1st, 1897*; and that the said phosphate sampled by the said *Bailey* was sold upon a guarantee of quality; and that *Fernandina* is a port of the state of *Florida* from which phosphate is shipped; and that Mr. *John Chipman* had been duly appointed official sampler at the said port of *Fernandina, Florida*, and had qualified as such prior to *August 21st, 1897*; and that the said *Bailey* had no authority from the said *Chipman* to sample the said phosphate rock; and that large quantities of hard rock phosphate mined in *Florida* are constantly being transported by rail to *Brunswick* and *Savannah*, ports in the state of *Georgia*, for shipment through said ports to foreign ports; that phosphate rock mined along the line of the *Savannah, Florida and Western Railway Company* in the counties of *Marion, Levy, Alachua, Columbia, Suwannee, Citrus, Hernando* and *Basco* is in the usual course of business transported over that railroad to the said ports of *Savannah* and *Brunswick*, in the state of *Georgia*, for shipment by water; and that phosphate rock in said counties along the line of the *Florida Central and Peninsular Railroad Company* is in the usual course of business transported over that line to the port of *Fernandina* for shipment by water, the place of shipment in each instance usually depending upon the location of the mine.

Anderson & Hocker,

H. J. Baker,

R. H. Liggett,

Attorneys for Petitioner.

Wm. B. Young,

Attorney for Prosecutor.

A. G. Hartridge,

State Atty. 4th Judicial Circuit of *Florida*.

Form No. 19275.¹

(Title of court and cause as in Form No. 17820.)

John Doe, plaintiff, and *Richard Roe*, defendant, in the above entitled cause now pending in this court, do, according to the statute in such case made and provided, hereby agree to make this an agreed case and stipulate as follows, to wit:

1. That the plaintiff on the first day of *May*, A. D. 1901, duly filed his declaration setting forth that on (*stating time*), at (*stating place*), the said defendant entered into a certain contract with the plaintiff whereby he, the said defendant, promised and agreed (*set forth the substance of the contract*), and assigns the following breaches of said contract, to wit: (*set forth the breaches assigned as in the declaration*), and claims damages by reason of such alleged breaches in the sum of *one thousand* dollars.

That on (*stating time*), the said defendant duly filed his plea of the general issue to said declaration, to which plea the plaintiff joined issue.

1. *Illinois*. — Starr & C. Anno. Stat. See also, generally, *supra*, note 1, p. 857.
(1896), c. 110, par. 75.

That the facts of the matter in controversy in this suit are the following: (*set forth the facts as agreed upon*).

Said parties further stipulate and agree that the points of law at issue between them are as follows, to wit: (*Here set out the points of law at issue, numbering each in order*).

The said parties further stipulate and agree that upon the foregoing agreed case, containing the points of law at issue between them as aforesaid, the court shall determine the questions of difference between them in this cause and shall render judgment thereon according as the rights of the said parties in law may appear, in the same manner as if the facts aforesaid were proven upon the trial of the said issue, as by statute provided.

Dated this *tenth* day of *June*, A. D. 1903.

John Doe, by *Jeremiah Mason*, his Attorney.

Richard Roe, by *Oliver Ellsworth*, his Attorney.

Form No. 19276.¹

(Precedent in Illinois Cent. R. Co. v. Herr, 54 Ill. 357.)

State of *Illinois*, }
Jo Daviess County. } ss. In the *Circuit* Court of said *Jo Daviess*
county. *February* Term, A. D. 1870.

David Herr, who sues as well for himself as for the People of the State of *Illinois*, v. *The Illinois Central Railroad Co.*

Appeal from justice of the peace.

It is stipulated that said cause may be submitted at this term of said court, for trial by the court, upon the following agreed statement of facts:

1. This is a suit originally brought before a justice of the peace on the *thirtieth* day of *October*, A. D. 1869, to recover penalties, brought under section 38 of an act entitled "an act to provide for a general system of railroad incorporations," approved November 5, 1849; also section 13 of special laws, passed February 10, 1851, entitled "an act to incorporate the Illinois Central Railroad Company," and amended laws thereto, passed February 27, 1869, as claimed by the plaintiff.

2. It is agreed that, on the *eleventh* day of *October*, 1869, there existed, and had existed for years prior thereto, a public highway running from the city of *Galena*, in the county of *Jo Daviess* and state of *Illinois*, to the town of *Scales Mound* and town of *Apple River*, and to *Thompson's Mills*, in said *Jo Daviess* county, and being the old state road running to *Freeport* and *Dixon*; said public highway being one of the most traveled public roads in said county; that at a point on said public highway east of where said public highway passes over the iron bridge across the *Galena* river, the defendants' railroad crosses said public highway, and is within the corporate limits of the city of *Galena*.

3. It is further agreed that the defendants are a railroad corporation, incorporated by charter from the legislature of the state of *Illinois*, approved February 10, 1851, and were running their cars in said *Jo Daviess* county, and over said public highway, in said county,

1. See, generally, *supra*, note 1, p. 857.

at the crossing before mentioned, on the *eleventh* day of *October*, A. D. 1869, and for a number of years prior thereto.

4. That on said *eleventh* day of *October*, A. D. 1896, two freight trains, owned, controlled and run by said defendants, crossed the said public highway at said point east of the iron bridge, within the corporate limits of the city of *Galena*, in said county, on the track of said defendants' railway, which runs over said highway at said point as above mentioned, and the defendants' servants and agents did not ring the bell and did not blow the steam whistle on either of the locomotive engines (drawing the said trains) for a distance of *eighty* rods from the place where said railroad crosses said public highway as above mentioned, and did not ring the bell and did not blow the steam whistle at all; that both of said trains were running west—from *Council Hill* to *Galena*, in said county—one of said trains passing at *three* o'clock P. M. and the other train passing said crossing at *3:30* o'clock P. M. on said day; that each of said engines had a bell of over *thirty* pounds weight at the same time, and was running at the usual rate of speed.

This case is to be submitted to the court upon the above statement of facts and argument of counsel. In case the court finds for the plaintiff, the judgment of the justice of the peace is to be affirmed. Either party is to have leave to appeal from the judgment of the court.

L. Shissler, Plaintiff's Attorney.

R. H. McClellan, Defendant's Attorney.

Form No. 19277.¹

(Precedent in *State Treasurer v. Wright*, 28 Ill. 509.)

[[*Title of court and cause as in Form No. 17820.*]]²

It is agreed by and between *William Butler*, treasurer of the state of *Illinois*, and *Presco Wright*, treasurer and collector of *Sangamon* county, that the said *Presco Wright*, as treasurer and collector of *Sangamon* county, had collected and had in his hands due to the state of *Illinois*, on the *sixth* day of *May*, 1862, the sum of *one thousand* dollars, collected by him on taxes assessed, laid and collected by him in the year 1862, due to the state of *Illinois*, for all the various items of taxation required by law to be collected and paid into the state treasury, which sum had been collected by him from the inhabitants of *Sangamon* county, and received by him from them in the United States treasury notes hereinafter described, and that on that day the auditor of public accounts issued from his office the following order, to wit:

"\$1,000. Auditor's Office, *Illinois*, *Springfield*, *May 6th*, 1862.

Mr. Treasurer:—Receive of *Presco Wright*, Collector of *Sangamon* county, *one thousand* dollars, being the amount in part of taxes collected by him for the year 1861. *Jesse K. Dubois*, Auditor."

And it is further agreed, that on the same day the said *Presco Wright* presented the said order to the treasurer, the said *William*

1. See, generally, *supra*, note 1, p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

Butler, and then and there, at the office of the treasurer of the state of *Illinois*, tendered and offered to pay to said treasurer the said sum of *one thousand* dollars in demand treasury notes of the United States, issued under and in pursuance of the provisions of an act passed by the Congress of the United States, approved July 17, 1861, entitled "An act to authorize a national loan, and for other purposes," which treasury notes the said treasurer then and there refused to receive from the said *Presco Wright*; and thereupon the said *Presco Wright* tendered and offered to pay to the said treasurer the said sum of *one thousand* dollars in treasury notes of the United States, issued under and by virtue of an act passed by the Congress of the United States, approved February 25, 1862, entitled "An act to authorize the issue of United States treasury notes, and for the redemption or funding thereof, and for funding the floating debt of the United States;" which last mentioned sum of treasury notes the said treasurer also refused to receive from the said *Presco Wright*; and it is now further agreed to submit to the decision of the court whether the said treasurer was bound to receive the said sum of *one thousand* dollars in either description of treasury notes before described; and if the court shall be of opinion that the treasurer was bound to receive the said sum of *one thousand* dollars, in either description of treasury notes above described, then the court shall award a peremptory mandamus, commanding the treasurer to receive said sum of *one thousand* dollars in treasury notes, the parties hereby waiving the issuing of an alternative mandamus. And it is further agreed, that a *pro forma* judgment of the *Circuit* Court may be entered, awarding a peremptory mandamus, commanding the treasurer to receive said treasury notes of either kind. And the parties further agree, that an appeal be granted by the court to the *Supreme* Court of the state of *Illinois*, to the said *William Butler*, on his filing a copy of this record in said *Supreme* Court, sitting at *Ottawa*, in the *Third* Grand Division, during the *April* term of said court, without bond or security. And they further agree, that said *Supreme* Court shall enter such judgment as in their opinion the law justifies and requires on the agreed case.

William Butler, State Treasurer.

Presco Wright, Treasurer and Collector,
Sangamon County, Ill.

Form No. 19278.¹

(Precedent *In re Hess*, 5 Kan. App. 764.)

[(Title of court and cause as in Form No. 17876.)]²

It is agreed by and between the petitioners by *H. J. Bone* and *M. W. Sutton*, their attorneys, and *George M. Grimes*, respondent, by *Temple Houston*, his attorney, that the above entitled cause may be heard upon the following agreed statement of facts, not only in this court but to all courts to which this case may be taken or appealed.

First. That *Charles Hess* and *Reuben Orr* are now and have been

1. See, generally, *supra*, note 1, p. 857. [] will not be found in the reported

2. The matter to be supplied within case.

for more than *one* year prior to the institution of the proceedings hereinafter mentioned, residents of the county of *Woodward*, territory of *Oklahoma*; that on the *twenty-fourth* day of *October*, 1896, a complaint, duly sworn to, was made before a justice of the peace of said county, charging said petitioners with the crime of grand larceny, a copy of which complaint is referred to and made a part hereof, the same being set out in full in petitioners' application; that on the *twenty-sixth* day of *October*, 1896, said justice of the peace issued a warrant upon said complaint, by virtue of which the petitioners were arrested by the sheriff of *Woodward* county, *Oklahoma*, and taken before said justice of the peace; that a hearing or preliminary examination was had, and the petitioners were held and bound to await the action of the *District* Court of *Woodward* county and the grand jury thereof; that on the *eighteenth* day of *December*, 1896, they were, by the grand jury of said *Woodward* county, indicted and charged with the crime of grand larceny, and that the offense laid in the indictment was and is the same for which they are arrested and charged before the justice of the peace aforesaid; that they were arrested upon a warrant issued by the clerk of the court of *Woodward* county by virtue of said indictment, on said *eighteenth* day of *December*, 1896, and were taken before the court on said day and there plead not guilty to said indictment, and bail by the court fixed at the sum of *seven hundred* dollars each for their appearance at the *June* term of said court for the year 1897, which bail was then and there given and the petitioners were discharged; and thereupon said cause was by said court continued until the *June* term for the year 1897, of said court, and that said proceedings are still pending and undetermined in said *Woodward* county *District* Court; that afterwards and on the *eleventh* day of *November*, 1896, the county attorney of *Clark* county, *Kansas*, filed an information in the *District* Court of *Clark* county, *Kansas*, charging these petitioners with the crime of grand larceny, and afterwards an application was made to the Governor of the State of *Kansas* for a requisition upon the Governor of the Territory of *Oklahoma*, based upon a certified copy of said information, which is fully set out in the petitioners' application for a writ of habeas corpus in this case, and an affidavit stating the facts constituting the crime, sworn to by *Temple Houston*, Esq., attorney at law, who had appeared and prosecuted as an attorney for the territory and appeared for the territory in the *District* Court of *Woodward* county as private counsel for complainant, representing the territory in the proceedings therein had and herein set out; that upon application so made to the Governor of *Kansas* a requisition was issued upon the Governor of *Oklahoma* Territory, and upon the requisition so made the Governor of *Oklahoma* Territory issued his warrant for the arrest and return to *Kansas* of the petitioners, which warrant of the Governor of *Oklahoma* Territory was signed and issued prior to discharge of petitioners herein upon their giving bail as aforesaid in the *District* Court of *Woodward* county, *Oklahoma*; that the warrant so issued by the Governor of *Oklahoma* Territory was executed on the *eighteenth* day of *December*, 1896, and these petitioners were arrested and brought to the state of *Kansas*, and incar-

cerated in the jail of *Clark county, Kansas*, and were and are confined in said jail; that the claim of the state in the case of the state of *Kansas* against these petitioners pending in *Clark county District Court*, is that these petitioners stole the property described in the information filed in the *District Court of Clark county, Kansas*, in *Woodward county, Oklahoma territory*, and drove the same into *Clark county*, in the state of *Kansas*; that the property for the stealing of which the petitioners were arrested and indicted is the identical property described in the information upon which petitioners are being prosecuted in *Clark county, Kansas*, and if taken at all was taken in the same transaction and at the same time, and that the action for which these petitioners are being prosecuted is brought under paragraph 2559, being section 419 of the Crimes and Punishments Act of the State of *Kansas*, General Statutes of 1889, volume 1. It is further agreed that all of the proceedings of the court that are of record in *Woodward county, Oklahoma territory*, are embraced and embodied in the application of your petitioners herein, together with the further statement herein made concerning habeas corpus in *Woodward county, Oklahoma territory*; that after the Governor of *Oklahoma* had honored the requisition aforesaid of the Governor of *Kansas*, and issued his warrant thereon for the arrest of petitioners, and while they were in custody by virtue of such warrant, petitioners, on the —— day of *December, 1896*, applied to the Hon. *Frank Dale*, Judge of the *First Judicial District, territory of Oklahoma*, for a writ of habeas corpus in order that petitioners might be released and discharged from such arrest, and upon a hearing of such application during a term of the *District Court of Woodward county, said territory*, on the —— day of *December, 1896*, the said judge *Frank Dale* ordered that petitioners be remanded and surrendered to the custody of *Geo. M. Grimes*, agent of the state of *Kansas*, for the apprehension and arrest of petitioners, in order that said petitioners might answer whatever charges pended against them in said state of *Kansas*.

It is further agreed that the petitioners were in *Clark county, Kansas*, at the time at which the commission of the offenses charged in the information filed against them in said county is laid, and on which the warrant by virtue of which petitioners are held was based, and that petitioners were in *Woodward county, Oklahoma territory*, at the time of their arrest. It is expressly stipulated by and between counsel for petitioners and respondent that the stipulations herein contained shall not be used in the case of *Eddleman Brothers v. Charles Hess et al.*, pending in the justice's court of *Center township, Clark county, Kansas*, nor in a certain criminal cause pending in the *District Court of said county*, entitled *The State of Kansas v. Charles Hess et al.*, and that no recital in the record shall be construed as applying to said causes, but is limited in its operation to the application of petitioners for release under the writ of habeas corpus.

[Dated (concluding as in Form No. 19275).]¹

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

Form No. 19279.¹(Precedent in *Dodge v. Hamburg-Bremen F. Ins. Co.*, 4 Kan. App. 418.)[(*Title of court and cause as in Form No. 17876.*)]²

It is hereby stipulated and agreed between the parties to this action that the above entitled cause may be tried in the court without a jury, and that the court may render judgment upon the pleadings filed herein, and the following facts which are hereby agreed to:

That the defendant, *Hamburg-Bremen Fire Insurance Company*, is a corporation organized under the laws of *Germany*, and duly authorized to and is transacting business in the state of *Kansas* as an insurance company; that on the 9th day of *January*, 1890, the defendant herein, for a valuable consideration paid to it by Mrs. *Flora Cowley*, issued to her its certain fire insurance policy (said original policy is attached to the plaintiff's petition herein); that at the time said policy was issued Mrs. *Flora Cowley* was the owner of the fee title of the property described in said policy; that on the 1st day of *April*, 1889, the said *Flora Cowley*, with her husband, *Hale Cowley*, executed a mortgage on the premises described in said policy to the *Sedgwick Loan and Investment Company*; that on or about the 9th day of *January*, 1890, the date on which the policy of insurance was delivered to the said Mrs. *Flora Cowley*, she delivered the same, with the mortgage clause attached to said policy, to the *Sedgwick Loan and Investment Company*; that subsequent to the delivery of said policy of insurance by Mrs. *Flora Cowley* to the *Sedgwick Loan and Investment Company*, the said the *Sedgwick Loan and Investment Company* assigned, indorsed and delivered said mortgage hereinbefore mentioned, together with this policy of insurance, to *John L. Dodge*, plaintiff herein; that on the 21st day of *January*, 1892, *John L. Dodge*, plaintiff herein, as plaintiff, commenced an action in this court against *Hale Cowley* and *Robert E. Lawrence*, administrator of the estate of *Flora Cowley*, deceased, and others, to foreclose the said mortgage herein mentioned on the premises described in the policy sued on in this action (a copy of petition in said action of *John L. Dodge* against said *Hale Cowley* and others, together with a copy of the mortgage sued on herein, above mentioned, is hereto attached and made a part of these facts, and marked exhibits "A" and "B" respectively); that thereafter, on the 24th day of *October*, 1892, the said *John L. Dodge*, as plaintiff, recovered a judgment in said cause which has never been vacated, reversed, set aside or modified (a copy of said judgment is hereto attached, marked exhibit "C," and made a part of these facts); that on the 6th day of *September*, 1893, *I. T. Ault*, the then duly elected, qualified and acting sheriff of *Sedgwick* county, *Kansas*, did, pursuant to said last mentioned judgment, sell the premises described in said policy to the said *John L. Dodge*; that on the 12th day of *October*, 1893, the Hon. *C. Reed*, judge of this court, did confirm the sale of real estate made in said action by the said sheriff (a copy of said confirmation of sale is hereto attached and made a part of these facts, and marked

1. See, generally, *supra*, note 1, p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

exhibit "D"); that on the 8th day of November, 1893, the dwelling-house and private barn insured by the policy hereinbefore mentioned, was totally destroyed by fire; that said policy sued on in this action provided, among other things, in said mortgage clause, as follows: "It being hereby understood and agreed that this insurance, as to the interest of the mortgagee or trustee only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by the terms of this policy: Provided, that the mortgagee or trustee or assigns shall notify this company of any change of ownership or increase of hazard which shall come to his or their knowledge, and shall have the permission for such change of ownership or increase of hazard duly indorsed on this policy;" and the said policy and mortgage clause attached to the plaintiff's petition herein are to be considered a part of these facts as if fully set out herein; that this defendant company had no knowledge or information of the suit, or any of the proceedings had therein by said John L. Dodge against Hale Cowley and others, to foreclose said mortgage herein mentioned, or of the sale of said premises by the said sheriff to John L. Dodge, on the 6th day of September, 1893; that on or about the 10th day of November, 1893, the plaintiff, John L. Dodge, by his agent, R. E. Lawrence, notified this defendant company, by stating verbally to Caldwell & Fellows, agents of this defendant company, that the house and private barn insured by this policy had been destroyed by fire; that on the 2d day of December, 1893, the plaintiff herein submitted proof of loss as provided for by conditions in said policy of insurance, a copy of which is hereto attached and made a part of these facts and marked "Exhibit E."

Dated Wichita, Kan., December 4, 1894.

[(Signatures of Attorneys.)]¹

Form No. 19280.²

The Circuit Court for the County of Montcalm.

John Doe, plaintiff, }
against
Richard Roe, defendant. }

This is an action of covenant. The declaration sets forth that on the first day of May, A. D. 1901, at (stating place), the said defendant made and executed to the said plaintiff a certain deed or agreement in writing, sealed with his seal, whereby he, the said defendant, covenanted and agreed (set forth the covenant) and assigns the following breaches of the said covenant, to wit, (set forth the breaches assigned as in the declaration), and claims damages by reason of such alleged breaches in the sum of one thousand dollars.

The plea of the said defendant to the said declaration is the general issue, with a notice thereto annexed, that the said defendant, on the trial of this cause, will give in evidence under such general issue

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p.
[] will not be found in the reported case. 857.

and insist in his defense, in bar of the said action, that, (*state the substance of the notice*).

The facts of the matter in controversy in this suit are the following: (*set forth the facts tending to establish the execution of the deed or instrument declared on*).

And it is stipulated and agreed by and between the said parties, that upon the foregoing facts, the said *Circuit* Court shall determine the questions of difference between them in this cause, and shall render judgment therein, according as the rights of the said parties in law may appear, in the same manner as if the facts aforesaid were proven upon the trial of the said issue.

Dated this *tenth* day of *June*, A. D. 1903.

Jeremiah Mason, Attorney for Plaintiff.

Oliver Ellsworth, Attorney for Defendant.

Form No. 19281.¹

(Precedent in *U. S. v. Foreman*, 5 Okla. 242.)

John A. Foreman, Plaintiff, *v. United States of America*, Defendant.
Agreed statement of facts.

James Thompson, Plaintiff, *v. United States of America*, Defendant.
Agreed statement of facts.

Thomas Jensen, Plaintiff, *v. United States of America*, Defendant.
Agreed statement of facts.

It is here stipulated and agreed by and between the plaintiff and the defendant, in each of the above entitled cases, that the material allegations of the plaintiffs' petition except the allegation of demand in each of said cases, are true, and the allegations thereof are confessed, except it is not admitted nor confessed that any demand was made upon the defendant in either of the said cases for a return of the money mentioned in said several petitions to the plaintiffs under the rules of the department of the interior.

Upon the question of demand for the return of the said money, no proof is submitted in either of said cases or agreed upon, but if the court holds that a demand is necessary, before said actions would lie, then said actions are to be dismissed by the court without prejudice; and if the court holds that such demand was not necessary, then the court is to render judgment as the pleadings and confessed facts warrant.

Gillett & Libby,
Attorneys for *Foreman & Thompson*.
John I. Dille,
Attorney for *Thos. Jensen*.
Roy Hoffman,
Assistant Attorney for *United States*.

Form No. 19282.¹

(Precedent in *Lowe v. Guthrie*, 4 Okla. 290.)

Before the *District* Court in and for *Logan County, Oklahoma Territory*.

1. See, generally, *supra*, note 1, p. 857.

City of Guthrie v. T. J. Lowe et al.

In the above stated case it is hereby stipulated and agreed by and between the parties to said case as follows, to-wit:

First. That *E. G. Millikan* was duly elected, qualified and acting city clerk of the city of *Guthrie* as set forth in plaintiff's petition, and that on the 16th day of *April*, 1892, he gave the bond with the defendants as sureties, a copy of which bond is attached to plaintiff's petition.

Second. That the said *E. G. Millikan*, claiming authority as city clerk, collected the sum of \$280.02, money due the city of *Guthrie* for and on account of taxes due and collectible on dogs, known as the dog tax, and also on account of the tapping of water mains and water rates. (See No. 9.) Thirty-five dollars (\$35.00) being collected from dog tax.

Third. That the said *E. G. Millikan* collected over the sum of \$3,000 due the city of *Guthrie* for and on account of liquor license.

Fourth. That the said *E. G. Millikan* failed and refused to pay over either of said sums or any part thereof to the plaintiff, the city of *Guthrie*, or to any one for said city.

Fifth. That on the ——— day of ———, 1893, the plaintiff, the city of *Guthrie*, brought suit in the *District* Court aforesaid against the said *Millikan* for and on account of the collections hereinbefore mentioned, and that on the 12th day of *May*, 1894, the said plaintiff, the city of *Guthrie*, recovered a judgment against the said *E. G. Millikan* for the sum of \$3,379.02, which said judgment remains in full force and effect.

Sixth. That there was not at the time said bond was executed and the money collected by said *Millikan* on account of liquor tax any ordinance of the said city of *Guthrie* making it the duty of the said *E. G. Millikan*, or any part of this duty, to collect any of the said liquor tax.

Seventh. That there was not at the time said bond was executed and delivered, and at the time said money was collected, any ordinance of said city defining and prescribing the duties of said *E. G. Millikan* as city clerk wherein and whereby it was made any part of his duty to collect said liquor tax.

Eighth. That at the time said bond was executed and delivered, and at the time the money was collected as hereinbefore set forth, there was a duly elected, qualified and acting city treasurer of the city of *Guthrie*.

Ninth. Said water rents and main-tap funds being collectible under and by virtue of ordinances numbered 181 and 184, hereto attached. Should judgment be rendered against said defendants upon account of either of the items set forth in stipulation number two and not upon the others, the amount to be determined.

Tenth. That there was due the said *E. G. Millikan*, as salary, the sum of seventy-eight dollars (\$78.00), at the time he was removed from office.

Eleventh. That there was not at the time said bond was executed nor prior to *April* 28, 1893, any ordinance providing for the collection of water rents or main-tap fund; that there was not at the time

the said bond was executed and said money collected any ordinance of the city of *Guthrie* fixing the duties of the city clerk, except one providing that the dog tax should be paid to him.

John F. Stone, Atty. for Defendants.

J. A. Baker, Atty. for City.

Form No. 19283.¹

(Precedent in *Blankinship v. Oklahoma City Light, etc., Power Co.*, 4 Okla. 243.)

Territory of *Oklahoma*, *Oklahoma* County, ss:

In the *Probate* Court, before *S. A. Steward*, Judge.

Southern Distilling Co., plaintiff, v. *Oklahoma City Light and Water Power Co.*; *Charles Clark*, as constable; *T. C. Rice*, *M. R. Krausnick* and *G. W. White*, as constables, defendants.

Stipulation.

It is hereby agreed by and between the above named plaintiff and the defendants, and each and all of them, that the facts in the above entitled cause are as follows, and that the said court may enter judgment accordingly, the same as if such facts had appeared from the preponderance of the testimony, duly and properly given in said court upon the trial of this cause, and that such judgment may be made and entered, without reference to formality as to the time of setting said cause; such facts so agreed upon being these, to wit:

That the property in controversy, to wit, *two* barrels of whiskey, were sold by the plaintiff to one *Myer Winter* for a consideration of \$165, and a few days prior to the commencement of this action, and said goods are of the value of said sum; that the plaintiff is a non-resident and is doing business in *Dallas*, in the state of *Texas*, and was doing business when said goods were so sold, and that said *Myer Winter* was doing business in said *Oklahoma City*, said county and territory, at the same time, and that said goods were sold on credit and were shipped by the plaintiff to said *Myer Winter*, at *Oklahoma City*, and there received by him and kept unopened and unused for some *four* or *five* days; and that the said *Winter*, being unable to pay all of his lawful debts as they fell due, and not having the ready money for that purpose, placed said goods in the hands of a drayman in *Oklahoma City* for the purpose of returning the same to the plaintiff in payment of the purchase price thereof; that said goods were detained by said drayman for some time, and then, under the express directions of said *Winter*, were taken to the *Atchison, Topeka & Santa Fe* depot, in said city, and delivered to said railroad company to be shipped to the plaintiff at *Dallas*, in the state of *Texas*, (that evidence may be taken that a bill of lading therefor was executed by the agent of said company and delivered to said drayman), and said goods left in the custody, possession and charge of said railroad company, so consigned by said *Winter* to the plaintiff; that the consignment of said goods by said *Winter* to the plaintiff was agreeable and acceptable to the plaintiff, in payment of the purchase price therefor; and that from the time said goods were so

1. See, generally, *supra*, note 1, p. 857.

delivered to said drayman they were never returned to the possession of said *Winter*, he having immediately quit the county and exercised no further control or authority over the same; that said indebtedness was bona fide, and said sum a fair value and consideration for said goods, and all of said transactions were had, and said acts done, before any actions were brought by any of the creditors of said *Myer Winter*; but afterwards actions in attachment were brought by several of the creditors of the said *Myer Winter*, among whom are some of the defendants herein, and orders in attachment were issued and levied on the goods here in question, which were taken into the possession of the constables above named, who are defendants herein, and were in their possession at the time this action was brought under such order in attachment, and that this action is brought by the plaintiff after demand to recover the possession from the defendants of said goods; the contention of the plaintiff being that its rights in the premises to the possession of said property are superior to the rights of said officers under said order of attachment.

Dated this 22d day of July, 1893.

Southern Distilling Co., Plaintiff.

By *Rogers & Howard*, their Attorneys.

Oklahoma City Light & Power Co.

By *Selwyn Douglas*, Attorney.

Clark & Burwell, Attorneys for *Krausnick*.

Form No. 19284.¹

(Precedent in *Baker v. Witten*, 1 Okla. 161.)

[(*Title of court and cause as in Form No. 17887.*)]²

It is hereby agreed by the parties to this action that the testimony of the witnesses, if sworn and introduced, would show, and the case by agreement of both plaintiff and defendant is hereby submitted to the court for its decision and judgment, upon the following facts, to wit:

That on the 21st day of *March*, 1891, defendant had in his employ a laborer, by the month, upon his farm in *Oklahoma* county, *Oklahoma* Territory, one *George Hoffman*, who resided during the time of said employment at the house and with the family of defendant; that on the 21st day of *March*, 1891, the said *George Hoffman* and one *Bode Baker*, a son of the defendant, became involved in a difficulty, which resulted in the said *Bode Baker* shooting and severely wounding the said *George Hoffman*. That the services of a physician were necessary for the said *George Hoffman*, and that Mrs. *J. W. Baker*, wife of the defendant, dispatched a messenger for a physician; that said messenger found and requested the plaintiff to attend the said *George Hoffman*. That plaintiff did, at said time, go to see and render medical services to said *George Hoffman*. That after said services were rendered for said *George Hoffman*, Mrs. *J. W. Baker*, wife of the defendant, asked the plaintiff the amount of his bill for said services, and was informed by plaintiff that his charge was \$10.

1. See, generally, *supra*, note 1.
p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

That she thereupon informed plaintiff that her husband was absent in *Kentucky*, but that they would be responsible for the bill and would pay it on his return from *Kentucky*. That plaintiff relied upon said promise of the said Mrs. *Baker*, and made no effort to secure the payment of his bill from any person other than this defendant.

It is agreed that the plaintiff rendered the services in a professional manner and that his charge therefor was reasonable. It is further agreed and admitted that at the time defendant's wife made said agreement in reference to payment of said bill of plaintiff, the defendant was absent from his home, in the state of *Kentucky*, and had been for several weeks, and that his said wife had no express authority from defendant to bind him to payment of said bill, and no authority other than such as she had by reason of being his wife and by reason of his absence, and that his said wife made said contract without any authority from defendant, except as above stated.

Hammons, Witten & Mitchell, Att'ys for Plaintiff.
Stone, Lewis & Snyder, Att'ys for Defendant.

Form No. 19285.¹

(Precedent in *Luzerne County v. Glennon*, 109 Pa. St. 565.)

[(Commencing as in Form No. 19286, and continuing down to *.)]²

1. That *Joseph H. Glennon* was elected recorder of deeds, etc., in and for *Luzerne* county at the general election in the fall of 1883, and having duly qualified, entered upon the duties of his office on the *first Monday* in *January*, 1884, and is still in office discharging said duties.

2. That in 1880, when the last decennial census was taken, the population of *Luzerne* county was *one hundred and thirty-three thousand and sixty-six*, and when the said plaintiff entered on his official duties the population of *Luzerne* county was over *one hundred and fifty thousand* and less than *two hundred and fifty thousand*, based upon the reasons incorporated in the following paragraph:

3. That the population of *Luzerne* county when the plaintiff entered on his official duties is determined by getting at the ratio between the taxables of *Luzerne* county and the population of the same for the year 1880, as ascertained by the decennial census of that year, and then multiplying the number of taxables of *Luzerne* county for the year 1883 by the ratio aforesaid. The assessment books of 1880 in the commissioners' office of said county show the number of taxables for that year to be *thirty-five thousand six hundred and thirty-three*, the population of the county for the same year, as per the decennial census for that year was *one hundred and thirty-three thousand and sixty-six*, and that the ratio existing between these last two numbers is *three and seven hundred and thirty-four thousandths* (3.734). That the assessment books of 1883, in the commissioners' office of said county, show the number of taxables for that year to be *forty-two thousand six hundred and eighty-five*, and that this number of taxables multiplied by the ratio *three and seven hundred and thirty-four*

1. See, generally, *supra*, note 1, p. 557. 2. The matter to be supplied within [] will not be found in the reported case.

thousandths (3.734) amounts to one hundred and fifty-nine thousand three hundred and eighty-five.

4. That the population of *Luzerne* county in 1870, was, as determined by the decennial census of that year, *one hundred and sixty thousand nine hundred and fifteen*; and therefore it is contended by the plaintiff that, under the provisions of the Act of May 11, 1881 (P. L. 21), *Luzerne* county is still under the provisions of the Salary Act of March 31, 1876.

5. That the said plaintiff made out against the county of *Luzerne* a bill amounting to \$291.66 for his salary for the month of *January*, 1885, under the Salary Act of March 31, 1876, which the commissioners of said county, upon presentation of the said bill to them, refused to pay.

6. That the earnings of the said plaintiff as recorder of the said county for the month of *January*, 1885, after deducting therefrom all clerk hire for the said month, was greater than the amount of the bill aforesaid, and that the said plaintiff, before making out and presenting his bill, complied with all the requirements of said Act of 1876, but the said county withheld payment of said bill, because the commissioners of said county were advised and were and are now of the opinion that the said plaintiff was not entitled to compensation under the provisions of the said Act of 1876, because *Luzerne* county, at the taking of the decennial census for the year 1880, contained a population of less than *one hundred and fifty thousand*, and hence the plaintiff, elected to and entering upon the duties of his office afterwards and before another decennial census, was not within the provisions of the said Act of 1876, and that the second section of the Act of 1881, above referred to, is unconstitutional.

7. If the court should be of opinion that, under the facts as stated, as matter of law, the said plaintiff is entitled to compensation under the provisions of the Salary Act of March 31, 1876, then judgment to be entered in his favor and against the county of *Luzerne*, for the sum of \$291.66; if otherwise, then judgment to be entered generally against the county of *Luzerne*.

[(Signatures of attorneys.)]¹

Form No. 19286.¹

(Precedent in *Ruchizky v. De Haven*, 97 Pa. St. 202.)

[(Title of court and cause as in Form No. 17828.)]¹

And now, *September 13th*, 1878, it is hereby agreed by and between the parties to the above suit, that the following case be stated for the opinion of the court in the nature of a special verdict.* That *Joseph Ruchizky*, the plaintiff decedent, at the time of bringing this suit, was an infant under *twenty-one* years of age, and only obtained his majority on *August 12th*, 1877. That the defendants are and were since *January 1st*, 1875, and before that, stockbrokers, having their place of business on *Third street, Philadelphia*; that the plaintiff decedent was on *January 1st*, 1875, and before that, a clerk in the

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p.
[] will not be found in the reported case. 857.

banking-house of the *Northern Saving Fund*, in *Philadelphia*, and so continued until *September* of 1876; that in *January*, 1875, he began dealing in corporation stocks on margins through the defendants, who acted as his brokers, not knowing him to be an infant; that these transactions continued from time to time until some time in *August*, 1876; that the value of stocks purchased by the defendants for the decedent on his order during this time, at the price paid for the same, was \$472,419.55.

That the plaintiff decedent, while these transactions were being carried on, transferred certain corporate stocks to the defendants, and paid to them certain sums of money, all to be held and used by defendants as collateral security to them against loss by or on account of purchases or sales made by them for him as follows:

1875.

Jan. 22,	40 shares	<i>Philadelphia & Erie R. R. Co.</i>	\$759 37
" 14	"	<i>Philadelphia & Reading R. R. Co.</i>	785 75
" 25,	Cash		43 25
May 7,	100 shares	<i>Oil Creek & Alleg'y V. R. R. Co.</i>	1,175 00
" 14,	20 "	<i>Keystone National Bank</i>	900 00
July 12,	Cash		300 00
Aug. 4,	"		90 00
Nov. 2,	"		175 19
Dec. 30,	"		400 00

1876.

Jan. 19,	Cash		500 00
" "	"		60 00
Feb. 7,	"		500 00
" 8,	"		283 00
April 1,	"		300 00
" 5,	"		100 00
40 shares	<i>Northern Saving Fund, S. D. & T. Co.</i>		700 00
Aug. 5,	Cash		30 40
May 2,	"		300 00
" 16,	"		130 00
" 22,	"		200 00
June 12,	"		100 00
" 19,	"		100 00
" 26,	"		100 00

The net proceeds of the sale of the said *forty* shares stock of the *Northern Saving Fund Company* was \$593.00.

The full amount thus paid and transferred to the defendants by the decedent, estimating the stocks as cash, at the prices at which they were sold by the defendants, is \$7,024.96, in addition to that they took *twenty* shares *Keystone Bank* in the final settlement at \$900; but it would not bring that amount then, or any time since, and has not been sold.

That the defendants from time to time repaid to the plaintiff various sums of money amounting to \$2,695.92.

That these transactions, taking them as a whole, resulted in a heavy loss to the plaintiff decedent, and on the *second* day of *August*,

1876, the defendants sold the last of the stocks held by them for plaintiff decedent, and closed the account, which showed an indebtedness from said decedent to defendants.

That, except the sum of \$2,655.92, repaid to plaintiff decedent by defendants, as aforesaid, he never received anything from defendants on account of said transactions, and none of the stock purchased by defendants on his order was ever actually delivered to him, except on January 3d, 1876. Five shares of *Pennsylvania Railroad Company* stock were transferred to J. A. Landis and cost of same charged to plaintiff decedent; but all other stocks were retained by defendants as security for the purchase money paid therefor, and all of the said stocks were sold by the order of said decedent during, on or before August, 1876.

The decedent was a clerk at a salary of \$500 a year, and had no estate or property except that, at the commencement of his operations with defendants, he left, as collateral security for his transactions, forty shares of the *Pennsylvania and Erie Railroad*, standing in his name, of the value of \$759.37, and fourteen (14) shares of the capital stock of the *Philadelphia and Reading Railroad Co.*, standing in his name, of the value of \$785.75; that said stock was sold by defendants and the proceeds lost in the aforesaid transactions, and at the time this suit was brought the decedent had no means out of which he could repay to defendants the money which they had paid him from time to time, nor did he acquire any means until the day of his death.

The twenty shares *Keystone Bank* that decedent left as collateral was in his own name. The one hundred shares *Oil Creek Railroad* and the forty shares *Northern Saving Fund, Safe Deposit and Trust Company*, were both in the name of P. K. Landis.

On May 2d, 1876, an account was opened in the name of decedent, in trust for P. K. Landis, and all the transactions in this account were entered by defendants in above name with the knowledge and consent of decedent, and at the close of their transactions the decedent acknowledged in writing his indebtedness jointly with P. K. Landis to the defendants in the sum of \$655.29. A copy of this paper is as follows:

“Philadelphia, August 4th, 1876.

I have paid De Haven & Townsend twenty-eight 47-100 dollars that, with the forty shares *Northern Saving Fund, Safe Deposit and Trust Company* at (\$17.50), \$17 50-100 dollars per share, and twenty shares *Keystone National Bank*, at forty-five dollars (\$45) per share, is in settlement of my individual indebtedness to De Haven & Townsend, and I do hereby acknowledge my joint individual liability with P. K. Landis for the balance of \$655 29-100.

(Signed,)

Joseph Ruchizky.”

That for the purposes of this case it is admitted that the fact that this account of the decedent was opened in trust for P. K. Landis, was unknown to the said Landis at the time it was opened, and while business was being carried on under it and until some time after the day of the date of the above recited writing. That the account was so opened without any direction from the said Landis and without any

consideration therefor moving from the said *Landis*, or any one on his behalf, and he does not, and never did claim any benefit therefrom, or in any way acquiesce in, or accept the benefit of the act of decedent.

The charge to decedent on *August 7th*, 1876, was for \$200 loaned to him on *January 7th*, 1876, and the payment of the same was guaranteed in writing by *P. K. Landis*; and the check given to said defendants for the same, with the indorsement of *P. K. Landis*, was given to decedent in the final settlement with him.

That plaintiff decedent died on or about *March 17th*, 1878, and letters of administration on his estate were issued to *Conrad Anwalter* on *April 1st*, 1878.

If the court be of the opinion that, on the above facts, their judgment should be for the plaintiff, then judgment is to be entered for plaintiff for \$5,229.04, and interest from *August 1st*, 1876, but on the delivery to said plaintiff of twenty shares *Keystone National Bank* (formerly *Keystone Bank*), together with all dividends that have or may have been declared on the same between *May 14th*, 1875, and the time when said stock shall be returned, the said judgment is to be reduced to \$4,329.04, with interest from above date; but if not, then judgment to be entered for the defendants; the costs to follow the judgment, and either party reserving the right to sue out a writ of error thereon.

[(Signatures of attorneys.)]¹

Form No. 19287.²

(Precedent in *Reading v. Ludlow*, 43 Vt. 628.)

[(Title of court and cause as in *Form No. 17831.*)]¹

It is agreed by and between the towns above named to try the case between them as above named, which is a question concerning the legal settlement of one *Lydia Catherine Buck*, a pauper now supported by said town of *Reading* at the Insane Asylum at *Brattleboro, Vt.*, in all its stages to final judgment thereon, upon the following facts, to wit: The said *Lydia* is the legitimate daughter of one *Richard Warren*, who was born in said *Ludlow*, *February 3*, 1797, and had a legal settlement there, and he lived there until *November 9*, 1835, when he removed to *Jaffrey, N. H.*, where he has ever since resided with his family. The said *Lydia* was born at said *Ludlow*, *November 9*, 1827, and generally lived in her father's family and made her home there until her marriage to *George H. Buck*, as hereinafter mentioned. She worked in factories to considerable extent, and went to school at *Townshend Female Seminary* a few terms. From the time the said *Lydia* was about seventeen years old she had occasional fits of lunacy, and about 1852, while in one of those fits, she was sent by her friends to the Insane Asylum at *Concord, N. H.*, for her recovery, where she remained a few months and was discharged as recovered. *September 10*, 1855, she had another attack of the same malady, and was sent by her friends to the Insane Asylum at *Brattleboro, Vt.*, for her recovery, and *January 25*, 1856, she was dis-

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. [] will not be found in the reported case. 857.

charged therefrom as recovered. In the summer and fall of 1861 she taught a district school in *West Windsor, Vt.*, and *January 22, 1862*, she went to live with the said *George H. Buck*, in said *Reading*, as a hired girl and nurse for his wife, who was then sick, and on the death of said first wife she had another like fit from which she recovered in a few days, and then took the charge of her domestic affairs as housekeeper about *fifteen* months, and until about *September 14, 1863*, when she was married to said *George*, at *Woodstock, Vt.*, as appears by the record thereof, which is referred to. The said *George* then lived in said *Reading*, was born there, has always lived there from his birth, and all that time has had a legal settlement in said *Reading*, and both before and at the time of said marriage had a full knowledge of the said *Lydia's* situation, lunacy and confinement in said Insane Asylum on account of such lunacy. The said *Lydia* lived with said *George* as his wife from said marriage until the decree of nullity was made as hereinafter specified, except such time as she was confined at *Brattleboro* in the Insane Asylum, as hereinafter set forth. *April 14, 1865*, the said *George* carried her to *Brattleboro* to said asylum on account of her lunacy, where she stayed until discharged on *July 14, 1865*, as improved. *February 28, 1867*, for the same reason, she was again carried to the same asylum by the said *George*, where she was confined until *June 20, 1867*, when she was discharged as recovered. *August 3, 1867*, the said *George* again carried her to said Insane Asylum for the same cause, where she still remains at the expense of said *Reading* since *February 3d, 1869*. Said *George* preferred his petition to the *Supreme Court* in *Windsor county, Vt.*, at *February* term, 1868, to annul and vacate said marriage, and at their *February* term, 1869, said court did vacate the same, as appears by the files and records of said court, which are referred to. A guardian ad litem of the said *Lydia* was appointed by said court on the hearing of said petition, who accepted said trust and was present at said hearing, but made no defense thereto. It is further agreed that if any parts of the foregoing statement of facts are not legitimate evidence in the case, such portion thereof as is not such evidence shall be rejected by the court trying the same, and the cause decided as if such portion of this agreement had not been made.

[(Signatures of attorneys.)]¹

Form No. 19288.²

(Title of court and cause as in *Form No. 17832*.)

This day came the parties by their attorneys and a case was agreed by them to be argued in lieu of a special verdict, which case is in the words following, to wit: (*Here set out the case as agreed*).

Form No. 19289.²

(Precedent in *Levy v. Sheehan*, 3 Wash. 421.)

[(Title of court and cause as in *Form No. 17892*.)]¹

It is hereby stipulated and agreed by and between the parties hereto, plaintiff and defendant, by their attorneys, that the following

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. 857.
[] will not be found in the reported case.

are the facts, and all the facts, upon which this case shall be tried, and that the same are true, to wit: (*Here follow the facts*). And it is further stipulated that this cause shall be submitted to the court without a jury upon the complaint and answer as amended and reply, and upon the note and mortgage in this case, and the aforesaid facts as the evidence, and all the evidence, in this action.

[(*Date and signature as in Form No. 19275.*)]¹

Form No. 19290.²

(Precedent in Union Pac. R. Co. v. U. S., 2 Wyo. 174.)

Territory of Wyoming, }
County of Carbon. } ss.

In the District Court of the Second Judicial District.

The United States of America, plaintiff,

v.

The Union Pacific Railroad Company, defendant. }

Stipulation and agreed statement of facts.

It is hereby stipulated and agreed by and between the said *The United States of America*, plaintiff, by *E. P. Johnson*, its attorney, and the *Union Pacific Railroad Company*, defendant, by *W. R. Steele*, its attorney, that the facts in this case are as follows:

The goods replevined in this action are the property of the *United States*, furnished for the *Indian* service.

That one *Dwight J. McCann* had a contract with the *United States* for the transportation of the goods replevined and for other goods from the city of *New York*, and other points, to the *White River Indian Agency*, in *Colorado*, that as such contractor the possession of said goods was delivered to said *Dwight J. McCann*, who was lawfully in possession of the same, being the goods replevined.

That said *Dwight J. McCann* made a contract with the defendant, *The Union Pacific Railroad Company*, to transport and carry the goods replevined in this action and other goods from *Omaha*, in the state of *Nebraska*, to *Rawlins*, in the territory of *Wyoming*.

That the defendant carried the goods replevined, as a common carrier, from said *Omaha* to said *Rawlins*, for which its proper charges was the sum of *five hundred and ninety-six* dollars and *eighty-six* cents.

That the goods replevined were stored in the warehouse of the defendant at *Rawlins, Wyoming*, for a long period of time, for which the proper charges of the defendant for storage was the sum of *ninety-one* dollars and *thirty* cents.

That on the *20th* day of *November*, A. D. 1877, the proper charges of the defendant, for the transportation and storage of the goods replevined in this action, was the sum of *five hundred and eighty-eight* dollars and *sixteen* cents.

That no part of said charges have ever been paid, either by the said *Dwight J. McCann*, or the plaintiff, *the United States of America*, and no tender of the sum so due, or any part thereof, was ever made to the defendant before the commencement of the action herein, and

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. [] will not be found in the reported case. 857.

the taking of the said goods from the possession of the defendant on replevin.

That the goods of the plaintiff, previously carried by the defendant under said contract with said *McCann*, had always been held by it until its charges thereupon had been paid by said *McCann*.

That the appraised value of the property taken on replevin in this action is the sum of *four thousand nine hundred and fifty-one* dollars.

That the defendant claimed the right of lien as a common carrier upon the goods replevined, and the right to hold the possession of the same until its charges for the transportation and storage of said goods replevined should be paid.

That *the United States* refused to pay defendant its said charges or any part thereof.

It is agreed that had the goods replevined been the property of said *Dwight J. McCann*, the defendant would have had a lien thereon for its said charges for freight and storage, and a right to hold possession of said goods until its charges were paid.

The question submitted to the court is:

The property replevined being the property of *the United States* is and was the defendant entitled to a lien upon said property for its charges, and had it a right to hold possession of the same until its charges were paid?

If the court shall find, upon the facts, that the defendant had and was entitled to a lien, and was entitled to the possession of the goods at the time they were replevined, and that the court has authority to render judgment herein against the plaintiff, then judgment should be in favor of defendant, and against the plaintiff, and sureties for the said sum of *five hundred and eighty-eight* dollars and *sixteen* cents, and interest.

Should the court, upon the facts, find that the defendant was not entitled to such lien, and could not hold possession of said property replevined until its charges were paid, then judgment should be in favor of the plaintiff, and against the defendant.

The parties expressly waive their right to trial by jury and agree to try this cause to the court.

E. P. Johnson, Attorney for Plaintiff.
The Union Pacific Railroad Company,
By *W. R. Steele*, its Attorney.

Form No. 19291.¹

(Precedent in *Moore v. Sweetwater County*, 2 Wyo. 8.)

[(Title of court and cause as in Form No. 19290.)]²

It is hereby agreed and stipulated by and between the parties plaintiff and defendant hereto that said cause shall be heard, tried and determined by the court without the intervention of a jury upon the following agreed statement of facts; it being agreed further between the parties hereto that the following are the facts and all the facts in this case: This action is brought to recover moneys paid

¹ See, generally, *supra*, note 1, p. 557.

² The matter to be supplied within [] will not be found in the reported case.

by the plaintiff to the collector of taxes for said county of *Sweetwater* for the years 1873, 1874 and 1875, respectively, as taxes regularly assessed against the said plaintiff for poll and property taxes for said years respectively. It is admitted that said taxes were paid by said plaintiff under protest; and that said taxes were regularly assessed and levied and were payable to said collector for said years respectively, unless, by reason of the residence of said plaintiff and the location of the property assessed, the law did not authorize the public authorities in said territory to collect the same from the said plaintiff.

It is further admitted that at the time of the assessment, levy and payment of all said taxes said plaintiff resided upon a regularly established military reservation of the United States of America, and that such military reservation was at all of said times within the territorial limits of *Sweetwater* county, and was also at all of said times within and surrounded by a regularly established Indian reservation, known as the *Shoshone and Bannock Indian Reservation*. It is further admitted that the amount of such taxes received from said plaintiff were as follows: For 1873, \$116.39; for 1874, \$93.42; for 1875, \$232.25. It is further admitted that for the year 1874 said plaintiff was assessed upon property as follows: Merchandise, \$2,000; 4 horses, \$350; 67 cattle, \$8,120; 10 wagons, \$550; other property, \$75; total, \$6,095. That at the time the assessment for said year 1874 was made, all of said property was within the geographical limits of said *Sweetwater* county, and that said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where plaintiff was engaged in selling goods as a merchant; that said horses, cattle and wagons were at that time within said county and were being used as a train by said plaintiff for the purpose of freighting goods from the *Union Pacific Railroad* in said county, at points thereon not on either said military or Indian reservation, to said military reservation and across portions of said county and portions of said Indian reservation; that the amount and kinds of said property owned by said plaintiff in the year 1874 were furnished to the assessors of said county by said plaintiff.

And it is further admitted that for the year 1875 said plaintiff was assessed upon property as follows: Buildings, \$500; merchandise, \$3,500; 5 horses, \$250; 575 neat cattle, \$10,350; 12 wagons, \$550; other property, \$200; total, \$15,350. That at the time the assessment for said year 1875 was made, all of said property last described was within the geographical limits of said *Sweetwater* county, and that said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where plaintiff was engaged in selling said goods as a merchant; that said horses, wagons and 75 head of neat cattle were within said county and were being used as a freighting train by said plaintiff for the purpose of freighting goods from the *Union Pacific Railroad* in said county at points thereon not on either of said reservations, and across portions of said county and Indian reservation; that 500 head of said neat cattle were at that time kept by said plaintiff as a stock-grower or stock-raiser for gain and profit, and were for the most part kept by said plaintiff upon said military reservation, but were at times allowed to graze and sub-

sist upon said Indian reservation, and at times not upon either said reservations but within said county. That the amount and kinds of the property last described and owned by said plaintiff in the year 1873 were furnished to the assessor of said county by said plaintiff; said building was, when assessed, owned by said plaintiff and was situated on said military reservation.

It is further admitted that for the year 1873 said plaintiff was assessed upon property as follows: Merchandise, \$3,000; 4 horses, \$350; 70 cattle, \$3,300; 12 wagons, \$600; other property, \$509; total, \$7,759. That at the time the assessment for the year 1873 was made, all of said property was within the geographical limits of said *Sweetwater* county, and the said merchandise was upon said military reservation in a storehouse owned by said plaintiff, where he was engaged in selling goods as a merchant; that said horses, cattle and wagons were at the time within said county, and were being used as a freighting train by said plaintiff for the purpose of freighting goods from the *Union Pacific Railroad* at all points thereon not in said military or Indian reservation, to said military reservation and across portions of said county and portions of said Indian reservation; that the amount and kinds of said property were furnished to the assessor of said county for the year 1873 as property owned by said plaintiff. It is further admitted as a fact that portions of the taxes aforesaid paid by said plaintiff were poll taxes, and portions were territorial taxes, and portions were for the county school fund of said county, and that all of said territorial taxes were paid to the treasurer of said territory before the commencement of this action by the treasurer of said county; that all of said taxes belonging to the school fund of said county were paid out and delivered to the several school districts of said county before the commencement of this action, the same having been duly apportioned to said districts.

It is also admitted that before the commencement of this action all of said taxes had been paid to the treasurer of said county.

It is also admitted as a fact that the amount of poll tax, territorial tax, and taxes belonging to the different funds of said county, and paid by plaintiff as aforesaid, are correctly shown by the memoranda upon the margin of three exhibits attached hereto and made a part hereof and marked "A," "B" and "C," respectively, and that the said exhibits are the tax receipts for said taxes given to said plaintiff for said taxes for the years 1873, 1874 and 1875; and that exhibit "A" is the tax receipt of plaintiff for the year 1873, exhibit "B" is the tax receipt given to said plaintiff for the said taxes for the year 1874, and that exhibit "C" is the tax receipt given to said plaintiff for said taxes for the year 1875.

It is further admitted as a fact during the years aforesaid said plaintiff was the regular post trader at said military reservation, duly appointed by the United States, and that during the same time he was duly licensed as an Indian trader to trade with the Indians to whom said Indian reservation belonged; and that said plaintiff during the same time sold goods from his store, upon said military reservation, to people not residing on either of said reservations nor

connected therewith, as well as to persons in the military reservation of the United States, or connected with or residing upon said Indian reservation. At the time all of the property aforesaid was assessed to the same plaintiff, it was all within the limits of *Sweetwater* county, as said limits were established by the legislature of *Wyoming* territory; and that said plaintiff claimed to and did exercise the right of suffrage in said county during the years said taxes were assessed to him.

It is further admitted as a fact that said military reservation, upon which said plaintiff resided as aforesaid, was regularly established by the United States prior to the year 1873, and subsequent to the ratification of the treaty establishing the *Shoshone and Bannock Indian Reservation* aforesaid, and out of lands which had theretofore constituted part of the Indian reservation; and that said military reservation was created in the same manner as other military reservations created by and under the authority of the United States.

Upon the above statement of facts, the question submitted to the court for its determination is: Can the said plaintiff in this action recover the whole or any portion of the said taxes paid as aforesaid by the plaintiff, from the defendant, and if so what portion of the same can plaintiff recover in this action?

E. P. Johnson, Attorney for Plaintiff.

W. W. Corlett, Attorney for Defendant.

Form No. 19292.¹

(Precedent in *Harman v. Chicago*, 147 U. S. 397.)

[(*Title of court and cause as in Form No. 17895.*)]²

It is hereby stipulated and agreed that for the purpose of determining the right of the defendant to require of the plaintiff a license, and to impose and collect a fine or license fee therefor, under an ordinance of the said defendant hereinafter set forth, the following are the ultimate facts under which the said license was required, and the fine or license fee imposed and collected, viz.: That on the 26th day of *September*, 1888, the said plaintiff was the owner and manager of the following steam tugs, viz.: *Tom Brown*, *F. S. Butler*, *J. H. Hackley*, *C. W. Parker*, *Bob Teed*, *A. B. Ward*, *W. H. Wolf*, *Crawford*, *G. B. McClellan*, *Mary McLane*, *Success* and *Wahbun*; that said tugs and each of them were of twenty tons burden and upwards, and were on the said date and for a long time prior thereto had been enrolled and licensed for the coasting trade in pursuance of and under the provisions of "Title L" of the Revised Statutes of the United States, to which reference is hereby made, and which are made a part hereof; that prior to the date aforesaid and on the 5th day of *March*, 1883, the common council of said city of *Chicago*, acting under the power supposed to be vested in it by chapter 24 of the Revised Statutes of the state of *Illinois*, and under which the said city was at said time incorporated, passed and enacted an ordinance regulating the navigation of steam tugs and other vessels on *Chicago* river and

1. See, generally, *supra*, note 1, p. 857.

2. The matter to be supplied within [] will not be found in the reported case.

Lake Michigan and the waters tributary thereto, requiring that the owner thereof take out a license therefor, and imposing upon him a fine or penalty for failing so to do, which said ordinance is in the words and figures following:

“Be it ordained by the city council of the city of *Chicago*:

Sec. 1. No person or persons shall keep, use or let for hire any tug or steam barge or tow-boat, for towing vessels or craft in the *Chicago* river, its branches or slips connecting therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned.

Sec. 2. All applications for such license shall be made to the mayor, and upon payment of *twenty-five* (\$25) dollars to the city collector, a license shall be issued for the period of *one* year by the city clerk for such tug or steam barge or tow-boat, and it shall be the duty of the city clerk to keep a register of the name of the person to whom such license is granted or transferred, the day when issued or transferred, the number of the license, and the name and description of the tug so licensed.

Sec. 3. Every tug or steam barge or tow-boat shall have the number of the license and the name of the owner marked on both sides of such tug or steam barge or tow-boat in plain, legible figures and letters.

Sec. 4. Any individual or person violating any provisions of this ordinance shall be subject to a fine of not less than *five* dollars (\$5) nor more than *fifty* dollars (\$50) for each offense.

Sec. 5. This ordinance shall be in force from and after its passage.”

That said steam tugs were enrolled and licensed in the manner and for the purpose aforesaid by the United States authorities in and at the *Northern* district of *Illinois*, in which the said defendant, the city of *Chicago*, is situated, and were on the *26th* day of *September*, 1888, and for a long time prior thereto had been, engaged in the coasting and foreign trade, and in commerce and navigation, namely, in towing vessels engaged in interstate commerce, into and out of the *Chicago* river and harbor from and to said *Lake Michigan*, and in pursuance of the conduct of the said trade, were navigating the said *Chicago* river and the waters of *Lake Michigan*, and the tributaries thereto, which said river is from time to time deepened for navigation purposes by dredging under the direction and at the expense of said city of *Chicago*.

That on the said day the said city collector of the said city of *Chicago*, the defendant herein, notified the said plaintiff to apply for and take out a license in pursuance of the requirements of the said ordinance for each of said steam tugs, and to pay therefor the sum of *twenty-five* dollars for each of said tugs, or the sum of *three hundred* dollars in the aggregate; that the said plaintiff thereupon notified the said collector that the said steam tugs and each of them, were licensed for the coasting trade, in pursuance of and in accordance with the requirements of the laws of the said United States, and were engaged in said trade on the said *Chicago* river and said *Lake Michigan*, and the waters tributary thereto in the manner as aforesaid, and thereupon claimed to the said collector that the said ordi-

nance was invalid, and that the said city of *Chicago* had no power or authority to require the said plaintiff to take out a license in pursuance of the requirements of the said ordinance and to pay the said fee, whereupon the said collector of the said defendant caused the said plaintiff to be arrested upon a warrant issued for that purpose, and that while the said plaintiff was under arrest he paid the said license fee under protest and took out the license as required by the said ordinance and as demanded of him by the said collector, which said license was thereupon issued to him.

That the amount of the fees so as aforesaid paid to the said collector for the said defendant was the sum of *three hundred* dollars; that the said sum was paid by the said collector into the treasury of the said defendant, the said city of *Chicago*, and that the questions which arise on the foregoing state of facts are as follows, viz:

1st. Whether or not the said defendant can require the plaintiff to take out the license and collect therefor the fees provided for in the ordinance aforesaid.

2d. Whether there was vested in the defendant the power to require of the plaintiff the license and fee provided for in the ordinance aforesaid, and in the manner shown by the foregoing state of facts.

3d. Whether the said ordinance under which said license was required and the said fee was imposed and collected, is legal and binding upon the plaintiff.

4th. Whether the plaintiff is not entitled to judgment for the amount of fees so paid by him as aforesaid.

It is hereby further stipulated that the said facts may be presented to the court and tried under the pleadings as they now stand, and that an order may be entered in said suit, submitting the same to the Honorable *Richard S. Tuthill* for trial without the intervention of a jury, and that either party shall have the right to appeal from the decision and final judgment of the court herein in the same manner and to the same extent as they would have if the same case had been tried in the usual and ordinary way.

[(Signatures of attorneys.)]¹

Form No. 19293.²

(Precedent in *Searight v. Stokes*, 3 How. (U. S.) 154.)

[(Title of court and cause as in Form No. 17895.)]¹

It is agreed that this case be submitted to the court on the following statement of facts, as if found by a jury:

The plaintiff is the commissioner and superintendent of so much of the *Cumberland* or *National* road as lies within the state of *Pennsylvania*, duly appointed under and by virtue of the laws of that state provided, and is a citizen of said state. The defendants and *Richard C. Stockton*, whom they have survived, are and were citizens of *Maryland*. The defendants, together with the said *Richard*, whom they have survived, were joint partners in certain contracts for

1. The matter to be supplied within 2. See, generally, *supra*, note 1, p. 857.
[] will not be found in the reported case.

carrying the mail of the United States hereunto annexed. The route described in said contracts extended over so much of the road called the *Cumberland* or *National* road as lies within the commonwealth of *Pennsylvania*. Said contracts were duly executed between the postmaster-general of the United States, thereto lawfully authorized by the laws of the United States, and said contractors, in conformity with law. The mail of the United States was transported by said contractors in accordance with the provisions of said contracts, during the time therein stipulated, in carriages constructed in conformity with the directions and requirements of the postmaster-general; said carriages were constructed and accommodated as well for the transportation of the mail as for carrying passengers and their baggage, but the number of said passengers was limited so as not to interfere with or impede the transportation of the mail, and in no case was any passenger carried when the transportation of the mail would be thereby retarded or interfered with. The said *National* road within the territorial limits of *Pennsylvania* was, so far and to such extent as the Constitution and laws of the United States and the state of *Pennsylvania* vested the same, the property of the United States, and had been constructed under the authority of said laws by the United States. The Constitution and laws of the United States and of the commonwealth of *Pennsylvania* bearing upon this subject, and the executive proceedings of the same respectively, are to be deemed and considered part of this agreed case. No tolls were paid by said contractors for or upon any vehicle or carriages employed or used by them for the transportation of said mail during the period of the existence of said contracts, notwithstanding said carriages ordinarily as aforesaid carried passengers, and said contractors received the passage money therefor for their own use.

Under the laws of the United States and of the state of *Pennsylvania*, so much of said *Cumberland* or *National* road as lies within the limits of the state of *Pennsylvania*, was ceded by the United States, and accepted by *Pennsylvania*, upon the terms and conditions expressed and contained in said statutes. Since the year 1835, the state of *Pennsylvania* has held said road under and by virtue of said laws, and has performed the terms and conditions therein prescribed in every respect, unless the imposition and claim of tolls as herein stated is so far an infraction of the compact created by said laws. Payment of tolls imposed by and under the laws of *Pennsylvania* has been demanded of said contractors by the plaintiff and his predecessors in office, for an account of their carriages so as aforesaid employed in the transportation of the mail with passengers so carried as aforesaid; such payment of tolls has been resisted and refused by said contractors on the ground that the carriages employed in the transportation of the mail of the United States on said road were not, under the said compact and laws, legally liable to the payment of said tolls.

The said carriages employed in the transportation of the mail were *four*-wheel carriages drawn by *four* horses each, and they ran over said route and through the *six* gates which are upon said road within the said state of *Pennsylvania* *twice* daily, being their eastern and

western routes. The full rates of toll established by law and upon said road in *Pennsylvania*, for a daily line of *four-horse* post coaches or stages, were, at each of the said *six* gates, including the eastern and western routes, daily

From 1 *January*, 1836, to 1 *April*, 1837..... 40 cents
April, 1837, to 1839..... 60 cents
 After 1839, to present time..... 100 cents

If, upon the foregoing state of facts, the court shall be of opinion that the defendants are liable to pay tolls for their carriages so employed in the transportation of the mail of the United States, judgment to be entered for the plaintiff for the sum of \$6,000. If it shall be of opinion that the said carriages so employed are not subject to the payment of said tolls, then judgment to be entered for the defendants.

R. P. Flenniken, for Plaintiffs,
Rich'd S. Cox, for Defendants.

II. ORDER CONTINUING AGREED CASE FOR HEARING.

Form No. 19294.

(*Title of court and cause as in Form No. 11882.*)

This day came the parties by their attorneys, who, waiving the issue to be tried by the jury, agreed upon a case to be argued instead of a special verdict in this cause, in the words following, to wit: (*Here set out the case as agreed*). And the cause is continued until the next term for the matters of law arising thereupon to be argued.

Form No. 19295.

(*Title of court and cause as in Form No. 11882.*)

This day came the parties by their attorneys and a case was agreed by them to be argued in lieu of a special verdict, which case is in words following, to wit: (*Here set out case as agreed*), and the cause is continued until the next term for the matters of law arising thereupon to be argued.

III. DECISION OF COURT UPON AGREED CASE.

Form No. 19296.¹

(*Title of cause as in Form No. 11850.*)

This day come the said plaintiff, by *Jeremiah Mason*, his attorney, and the said defendant, by *Oliver Ellsworth*, his attorney. And now this cause coming on to be heard by the undersigned judge of this court, upon the agreed case heretofore made by the said parties and upon the points of law in said case stated, and the counsel of the respective parties having been heard in argument and the court being fully advised in the premises, the court doth therefore decide and hold:

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 110, par. 75.

(Here set out in numbered paragraphs the decision of the court with the direction that judgment be entered accordingly.)

Dated this *tenth* day of *June*, A. D. 1903.

John Marshall, Judge.

IV. JUDGMENT THAT AGREED CASE BE SET ASIDE AS DEFECTIVE AND UNCERTAIN.

Form No. 19297.

(Title of court and cause as in Form No. 11882.)

The case agreed in this cause being defective and uncertain, the same is set aside and a venire de novo awarded.

V. FINAL JUDGMENT ON AGREED CASE.

Form No. 19298.

(Title of court and cause as in Form No. 11882.)

This day came the parties by their attorneys, and thereupon the matters of law arising upon the case agreed in this cause in lieu of a special verdict being argued, it seems to the court upon the whole matter therein contained that the law is for the plaintiff (or *defendant*).

Therefore, *(concluding according to the judgment)*.

SUBORNATION OF PERJURY.

See the title PERJURY, vol. 13, p. 789.

SUBPÆNA.

BY HAROLD N. ELDRIDGE.

- I. APPLICATION FOR SUBPÆNA, 898.**
 - 1. *In General*, 898.
 - 2. *Duces Tecum*, 899.
- II. ORDER FOR SUBPÆNA, 899.**
 - 1. *By Judge of Probate*, 899.
 - 2. *By District Judge Against Nonresident of County*, 900.
- III. SUBPÆNA, 900.**
 - 1. *Ad Testificandum*, 900.
 - a. *In General*, 900.
 - (1) *In Civil Actions*, 900.
 - (a) *In General*, 900.
 - (b) *In Justices' Courts*, 901.
 - aa. *In General*, 901.
 - bb. *Indorsed on Summons*, 909.
 - (c) *In Courts of Record*, 909.
 - aa. *In General*, 909.
 - (aa) *Forthwith*, 910.
 - (bb) *On a Future Day Named*, 912.
 - aaa. *Original Subpæna*, 912.
 - bbb. *Subpæna Ticket*, 921.
 - bb. *In Proceedings Before Referee*, 922.
 - (aa) *Original Subpæna*, 922.
 - (bb) *Subpæna Ticket*, 923.
 - (2) *In Criminal Prosecutions*, 923.
 - (a) *In General*, 923.
 - (b) *In Justices' Courts*, 925.
 - aa. *Forthwith*, 925.
 - (aa) *In General*, 925.
 - (bb) *To Inquire Into Any Violations of Law*, 926.
 - bb. *On a Future Day Named*, 926.
 - (c) *In Courts of Record*, 928.
 - aa. *In General*, 929.
 - (aa) *Forthwith*, 929.
 - (bb) *On a Future Day Named*, 929.
 - aaa. *In General*, 929.
 - bbb. *Against Nonresident of County*, 931.
 - bb. *Before Grand Jury*, 932.
 - (aa) *Forthwith*, 932.
 - (bb) *On a Future Day Named*, 933.

cc. *In Habeas Corpus Proceedings*, 935.
 dd. *In Proceedings Before United States
 Circuit Court Commissioners*, 935.

- b. *In Chancery Courts*, 936.
 - (1) *In General*, 936.
 - (2) *In Proceedings Before Masters, Commissioners or
 Examiners*, 937.
- c. *In Probate or Surrogate's Courts*, 939.
 - (1) *In General*, 940.
 - (2) *To Prove Execution of Will*, 942.
- d. *In Coroner's Inquests*, 943.
 - (1) *Forthwith*, 943.
 - (2) *On a Future Day Named*, 943.
- e. *In Proceedings Before Arbitrators*, 944.
- f. *In Proceedings Before Board of Commissioners for
 Insane*, 945.
- g. *In Proceedings Before Board of Supervisors*, 945.
- h. *In Proceedings Before Legislative Committee*, 945.
- i. *In Proceedings Before Notary Public for the Taking of
 Depositions*, 946.
- 2. *Duces Tecum*, 947.

IV. SERVICE OF SUBPŒNA, 947.

- 1. *Affidavit of Service*, 947.
 - a. *By Reading*, 947.
 - b. *By Reading or Showing the Original and Delivering a
 Copy*, 948.
- 2. *Return of Officer*, 949.
 - a. *Served by Reading*, 949.
 - b. *Served by Showing Original and Informing Witness of
 Contents*, 950.
 - c. *Served by Reading or Showing Original and Delivering
 a Copy*, 951.

CROSS-REFERENCES.

*For Forms of Subpœna for Defendant in Chancery Proceedings, see the
 title SUMMONS, post, p. 988.*

I. APPLICATION FOR SUBPŒNA.

1. In General.

Form No. 19299.¹

State of Idaho,)
 County of Boise.) ss.

Jeremiah Mason, prosecuting attorney of said county, being duly sworn, says, that *William West* is a resident of the county of *Bear Lake*, state of *Idaho*, and a necessary and material witness for the plaintiff in the action of the People of the State of *Idaho* against *Richard Roe*, and that he verily believes the evidence of said *William*

West is material, and that his attendance at the trial of said action is necessary; wherefore he prays for an order for the attendance of said witness. *Jeremiah Mason.*

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1902.

(SEAL)

Josiah Crosby, Notary Public.

2. Duces Tecum.

Form No. 19300.

(Precedent in *U. S. v. Babcock*, 3 Dill. (U. S.) 567.)¹

United States v. Orville E. Babcock. — September term.

Now comes *David P. Dyer*, attorney of the United States, and petitions for a subpoena duces tecum in the above entitled cause, to be addressed to *William Orton*, and requiring him to appear as a witness in the above entitled cause, on the *3d* day of *January*, A. D. 1876, and for the United States generally, and to bring with him, respectively, the following described papers and books, to wit: copies of all telegrams received through the office of the *Western Union Telegraph Company*, at *Long Branch*, in the state of *New Jersey*, from *June 15* to *September 15*, 1874, and from *June 15* to *September*, 1875, addressed to *General O. E. Babcock*, signed *John McDonald*, *John A. Joyce*, *John* or *J.*, with books showing the delivery of the same; all telegrams sent from *Long Branch* through said office, during said months, signed *O. E. Babcock*, *O. E. B.*, *Bab.*, or *B.*, addressed to *John McDonald*, or *John A. Joyce*, *St. Louis, Mo.*, or *Ripon, Wisconsin*; all telegrams sent through the office of said company at the city of *New York*, upon the *9th*, *10th*, *11th* or *12th* days of *December*, 1874, signed *John McDonald*, *John*, *Mac*, or *Mc.*, addressed to *John A. Joyce*, *St. Louis, Mo.*, or *General O. E. Babcock*, *Washington, D. C.*; also, copies of all telegrams received at the city of *New York* from said city of *St. Louis*, on the *25th*, *26th*, *27th*, *28th* and *29th* days of *October*, 1874, addressed to *Mrs. John A. Joyce*, *Mrs. Kate M. Joyce*, *Mrs. Kate Joyce*, *Kate Joyce*, or *Kate M. Joyce*, together with books showing delivery of same. And for cause said attorney states the above cause is pending against said defendant for having, during the period aforesaid, conspired with certain parties to defraud the United States, and said books and papers are material and necessary evidence in said cause, and are now in possession, as said attorney has good reason to believe, of *William Orton*.

David P. Dyer,

United States Attorney for Eastern District of *Missouri*.

II. ORDER FOR SUBPÆNA.

1. By Judge of Probate.

Form No. 19301.²

State of *Minnesota*, }
County of *Hennepin*. } ss. In Probate Court.

1. This petition was granted.

2. *Minnesota.* — Stat. (1894), §§ 4726, 4727.

In the matter of the estate of } Application to Sell Real Estate.
John Doe, deceased.

Richard Roe having applied for a subpœna to *William West*, *Samuel Short* and *John Jones*, as witnesses in this matter, it is ordered that a subpœna issue accordingly, returnable the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*.

John Burgess, Judge of Probate.

2. By District Judge Against Nonresident of County.

Form No. 19302.¹

State of *Idaho*, }
 County of *Boise*. } ss.

Upon reading the foregoing affidavit, it is ordered by the Hon. *Joseph Story*, judge of the *District* Court of the county of *Boise*, that *William West*, a nonresident of the county of *Boise* and a resident of the county of *Bear Lake*, state of *Idaho*, do attend as witness before the honorable the *District* Court, at the court-house of said county, as commanded by the foregoing subpœna.

Done at the court room of said court, in the county of *Boise*, this *tenth* day of *May*, A. D. 1902.

Joseph Story, Judge.

III. SUBPÆNA.

1. Ad Testificandum.

a. In General.

(1) IN CIVIL ACTIONS.

(a) In General.

Form No. 19303.²

(Vt. Stat. (1894), § 5417, No. 26.)

State of *Vermont*, }
Chittenden County, ss. }

To any Sheriff or Constable in the State or to *Charles Hatch*, an indifferent person, Greeting:

By the authority of the state of *Vermont* you are hereby commanded to summon *John Doe* and *Richard Roe*, of *Burlington*, in said county, to appear before (*Here insert the style of the court or name of the magistrate and the time and place of sitting*), to give evidence of what they know relative to an action or plea of (*Here state the plea set up*), then and there to be heard and tried, between *John Doe*, of *Burlington* aforesaid, plaintiff, and *Richard Roe*, of *Burlington* aforesaid, defendant; and this neither of them may omit, as they will answer their default under the pains and penalties of the law in such case made and provided.

1. *Idaho*. — Pen. Code (1901), § 5595.

2. *Vermont*. — Stat. (1894), § 1251 et seq. See, generally, *infra*, note 2, p. 909.

Fail not, but service and return make according to law.

Dated at *Burlington*, in the county of *Chittenden*, the first day of *May*, 1902.

Abraham Kent, Clerk, Justice of the Peace.
(Notary Public or Master in Chancery.)

(b) *In Justices' Courts.*¹

aa. IN GENERAL.

Form No. 19304.²

The State of *Alabama*, }
Jefferson County. }

To the Sheriff or any Constable of said County:

1. Statutes relating to the issuing of subpoenas in justices' courts exist as follows:

Alabama. — Civ. Code (1896), § 2682.
Arizona. — Rev. Stat. (1901), § 2498.
Arkansas. — Sand. & H. Dig. (1894), §§ 2930 *et seq.*, 4324.
California. — Code Civ. Proc. (1897), § 919.
Colorado. — Mills' Anno. Stat. (1891), § 2652.
Connecticut. — Gen. Stat. (1888), §§ 1066, 1075.
Delaware. — Rev. Stat. (1893), p. 731, c. 97, § 4.
District of Columbia. — Comp. Stat. (1894), c. 37, § 18.
Florida. — Rev. Stat. (1892), §§ 1619, 1634, 2845, 2964.
Georgia. — 2 Code (1895), § 4131.
Idaho. — Code Civ. Proc. (1901), § 3690.
Illinois. — Starr & C. Anno. Stat. (1896), c. 79, par. 59.
Indiana. — Horner's Stat. (1901), §§ 1436, 1472.
Iowa. — Code (1897), §§ 4485, 4658.
Kansas. — Gen. Stat. (1897), c. 103, § 135 *et seq.*
Kentucky. — Bullitt's Civ. Code (1895), § 709.
Maine. — Rev. Stat. (1883), c. 82, § 91.
Maryland. — Pub. Gen. Laws (1888), art. 52, § 23.
Massachusetts. — Rev. Laws (1902), c. 175, § 1.
Michigan. — Comp. Laws (1897), § 801.
Minnesota. — Stat. (1894), § 5652.
Mississippi. — Anno. Code (1892), § 2406.
Missouri. — Rev. Stat. (1899), § 4661.
Montana. — Code Civ. Proc. (1895), § 3300.
Nebraska. — Comp. Stat. (1899), § 6485.

Nevada. — Comp. Laws (1900), § 3483 *et seq.*
New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 224, § 1 *et seq.*
New Mexico. — Comp. Laws (1897), §§ 3239, 3262.
New York. — Code Civ. Proc., §§ 859, 2969 *et seq.*, 3135.
North Carolina. — Code (1883), §§ 909, 1355.
North Dakota. — Rev. Codes (1895), §§ 5654 *et seq.*, 6625.
Ohio. — Bates' Anno. Stat. (1897), §§ 583, 6537.
Oklahoma. — Stat. (1893), § 4727.
Oregon. — Bellinger & C. Anno. Codes & Stat. (1902), § 801.
Pennsylvania. — Bright. Pur. Dig. (1894), p. 1131, § 51.
Rhode Island. — Gen. Laws (1896), c. 244, § 3 *et seq.*
South Dakota. — Stat. (1901), § 6492.
Tennessee. — Code (1896); § 5602 *et seq.*
Texas. — Rev. Stat. (1895), art. 2264 *et seq.*
Utah. — Rev. Stat. (1898), § 3765.
Vermont. — Stat. (1894), § 1251.
Virginia. — Code (1887), § 3352.
Washington. — Ballingers' Anno. Codes & Stat. (1897), § 5997, 6664.
West Virginia. — Code (1899), c. 130, § 25.
Wisconsin. — Stat. (1898), § 4053 *et seq.*
Wyoming. — Rev. Stat. (1887), § 3449.

Requisites of Subpœna, Generally. — In some states, the statutes prescribing the contents of subpoenas in courts of record in civil cases apply to justices' courts. For requisites of subpoenas in courts of record in civil cases see *infra*, note 2, p. 909.

2. *Alabama*. — Civ. Code (1896), § 2682.

See, generally, *infra*, note 2, p. 909.

You are hereby commanded to summon *William West* personally to be and appear before me at (*stating place*), in *Birmingham, Alabama*,¹ on the *tenth* day of *May*, 1902,² and there remain until discharged by due course of law, to give evidence and the truth to speak, in behalf of the plaintiff³ in a cause now pending before me, wherein *John Doe* is plaintiff and *Richard Roe* is defendant;⁴ and have you then and there this writ with your indorsement thereon.

Witness my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19305.⁵

State of *Arkansas*, }
County of *Stone*, } ss.
Alco Township. }

To any Constable of *Stone* County:

You are commanded to summon *William West* to appear before me at (*stating place*), in *Alco* township in said county, on the *twentieth* day of *May*, 1902, at *ten* o'clock in the forenoon of said day, and testify on behalf of the plaintiff in an action in said court between *John Doe*, plaintiff, and *Richard Roe*, defendant.

Witness my hand, and the seal of said court, this *first* day of *May*, 1902.

(SEAL)

Abraham Kent, Justice of the Peace.

Form No. 19306.⁶

State of *California*.

In *Justice's* Court of the *City* and County of *San Francisco*, New City Hall.

The People of the State of *California* to *William West* and *Samuel Short*, Greeting:

We command you and each of you that, all and singular business and excuses being laid aside, you and each of you be and appear before the Honorable *Abraham Kent*, one of the justices of the peace of the *city* and county of *San Francisco*, on the *twentieth* day of *May*, A. D. 1902, at *ten* o'clock A. M., at the office of said justice, New City Hall, then and there to testify in a certain action now pending before said justice, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the plaintiff, and for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all losses and damages sustained thereby to the party aggrieved.

Given under my hand this *first* day of *May*, 1902.

E. W. Williams, Clerk of said Court.

1. Place of trial at which evidence is to be given must be stated. Ala. Civ. Code (1896), § 2682.

2. Time of trial at which evidence is to be given must be stated. Ala. Civ. Code (1896), § 2682.

3. Naming Party Desiring Witness. — The name of the party by whom the witness is summoned must be stated. Ala. Civ. Code (1896), § 2682.

4. Naming Parties. — The names of the parties to the suit must be stated. Ala. Civ. Code (1896), § 2682.

5. *Arkansas*. — Sand. & H. Dig. (1894), §§ 2930 *et seq.*, 4324.
See, generally, *infra*, note 2, p. 909.

6. *California*. — Code Civ. Proc. (1897), § 919.

See, generally, *infra*, note 2, p. 909.

Form No. 19307.¹

(Mills' Anno. Stat. Colo. (1891), § 2652.)

State of *Colorado*, }
 County of *Alameda*. } ss.

The People of the State of Colorado to *William West*:

You are hereby required to appear before me at (*stating place*), in *Denver*, in said county, on the *twentieth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to testify the truth, in a matter in suit, wherein *John Doe* is plaintiff and *Richard Roe* is defendant; and this you are not to omit, under the penalty of the law.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

(SEAL)

Abraham Kent, Justice of the Peace.

Form No. 19308.²

District of Columbia, ss.

To *Charles Hatch*, or any qualified Constable of said *District*, Greeting:

Summon *Samuel Short* to be and to appear before me, the subscriber, a justice of the peace in and for the district aforesaid, at (*stating place*), on the *twentieth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer as a witness in the matter in which *John Doe* is plaintiff and *Richard Roe* is defendant.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

(SEAL)

Abraham Kent, Justice of the Peace.

Form No. 19309.³

(Fla. Rev. Stat. (1892), § 1634, No. 2.)

State of *Florida*, }
Duval County. }

In the name of the State of *Florida*.

To the Sheriff or any Constable of said County:

You are hereby required to summon *William West* personally to be and appear before me at (*stating place*), in *Jacksonville*, in said county, on the *twentieth* day of *May*, A. D. 1902, to testify in behalf of the plaintiff in a suit pending in my said court, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and herein to fail not under penalty of the law.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, (SEAL)

Justice of the Peace.

Form No. 19310.⁴

In the *Justice's Court* of (*stating precinct*) Precinct, County of *Boise*, State of *Idaho*.

1. *Colorado*. — Mills' Anno. Stat. (1891) § 2652.

See, generally, *infra*, note 2, p. 909.

2. *District of Columbia*. — Comp Stat. (1894), c. 37, § 18.

See, generally, *infra*, note 2, p. 909.

3. *Florida*. — Rev. Stat. (1892), §§ 1619, 2845, 2964.

See, generally, *infra*, note 2, p. 909.

4. *Idaho*. — Code Civ. Proc. (1901), § 3690.

See, generally, *infra*, note 2, p. 909.

John Doe, plaintiff,
 against
Richard Roe, defendant. } Subpæna — Civil.
 The State of *Idaho* to *William West*:

We command you that you appear and attend before *Abraham Kent*, a justice of the peace of (*stating precinct*) precinct, at (*stating place*), on the *twentieth* day of *May*, 1902, at *ten* o'clock A. M., then and there to testify in the above entitled action now pending before said justice of the peace, on the part of the plaintiff. And for failure to attend you will be deemed guilty of contempt of court, and liable to pay all losses and damages sustained thereby by the party aggrieved, and forfeit *one hundred* dollars in addition thereto.

Witness my hand this *first* day of *May*, 1902.

Abraham Kent,
 Justice of the Peace for said Precinct.

Form No. 19311.¹

(Starr & C. Anno. Stat. Ill. (1896), c. 79, par. 59.)

State of *Illinois*, }
Macon County. } ss.

The People of the State of *Illinois* to *William West*:

You are hereby commanded to appear before me at my office in *Decatur*, in said county, on the *twentieth* day of *May*, 1902, at *ten* o'clock A. M., then and there to testify the truth in a matter in suit wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and this you are not to omit, under the penalty of the law.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace. (SEAL)

Form No. 19312.²

The State of *Indiana*, *Allen* County, ss.
 To any Constable of *Fort Wayne* Township:

You are hereby commanded to summon *William West* to appear before me at (*stating place*), in said township, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, to testify on the part of the plaintiff in the case of *John Doe*, plaintiff, against *Richard Roe*, defendant, and have you then and there this writ.

Witness my hand and seal this *first* day of *May*, 1902.

Abraham Kent, J. P. (SEAL)

Form No. 19313.³

State of *Iowa*, }
Des Moines County. } ss.

To *William West* and *Samuel Short*:

In the name of the state of *Iowa*, you and each of you are hereby required to be and appear before me, *Abraham Kent*, a justice of the

1. Starr & C. Anno. Stat. (1896), c. 79, par. 59. See, generally, *infra*, note 2, p. 909.
 2. *Indiana*. — Horner's Stat. (1901), § 1436. See, generally, *infra*, note 2, p. 909.
 3. *Iowa*. — Code (1897), §§ 4485, 4658. See, generally, *infra*, note 2, p. 909.

peace for *Des Moines* county, at (*stating place*), in *Burlington*, in said county, on the *twentieth* day of *May*, 1902, at *ten* o'clock *A. M.*, to give evidence in a suit wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the plaintiff, and this you shall in no wise omit, under the penalty of the law.

Dated *May 1*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19314.¹

State of *Michigan*, }
County of *Wayne*. } ss.

To *William West*, Greeting:

In the name of the people of the state of *Michigan*, you are commanded to appear personally before me, the undersigned, a justice of the peace of *Northville*, in said county, at (*stating place*), in *Northville*, in said county, on *Monday*, the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon* of that day, to testify the truth, according to your knowledge, in an action now pending before me, the said justice, and then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff, in a plea of (*stating plea*). Hereof fail not, at your peril.

Given under my hand at *Northville* aforesaid, the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19315.²

(Minn. Stat. (1894), § 5092.)

State of *Minnesota*, }
County of *Hennepin*. } ss.

The State of *Minnesota* to *William West*:

You are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, at (*stating place*), on the *tenth* day of *May*, at *ten* o'clock in the *forenoon* of said day, to give evidence in a certain cause then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19316.³

The State of *Mississippi* to the Constable of the *Fifth* District of *Washington* County:

You are hereby commanded to summon *William West* to appear before me, a justice of the peace of said county, at (*stating place*), in said county, on *Monday*, the *tenth* day of *May*, 1902, at *ten* o'clock *A. M.*, to testify on behalf of the plaintiff (at whose instance this writ is

1. *Michigan*.—Comp. Laws (1897), § 801. See, generally, *infra*, note 2, p. 909.
2. *Minnesota*.—Stat. (1894), § 5652. See, generally, *infra*, note 2, p. 909.
3. *Mississippi*.—Anno. Code (1892), § 2406. See, generally, *infra*, note 2, p. 909.

issued) in the case wherein *John Doe* is plaintiff and *Richard Roe* is defendant; and that he in nowise fail to so appear, under the penalty prescribed by the statute.

And have there then this writ.

Witness my hand this *first* day of *May*, 1902, the same being the day of the issuance hereof.

Abraham Kent, Justice of the Peace, *Fifth* District.

Form No. 19317.¹

The State of *New Hampshire*.

Merrimack, ss.

(SEAL) To *William West*:

You are required to appear before *Abraham Kent*, a justice of the peace for the county of *Merrimack*, at (*stating place*), in said county of *Merrimack*, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon, to testify what you know relating to a (*Here state what witness is to testify to*), to be heard and tried betwixt *John Doe*, plaintiff, and *Richard Roe*, defendant.

Hereof fail not, as you will answer your default under the penalties prescribed by law.

Dated at *Concord, N. H.*, the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19318.²

(N. Car. Code (1883), § 909, No. 26.)

State of *North Carolina*, }
Stanley County. }

To *William West* and *Samuel Short*, Greeting: (*The justice may insert any number of necessary names.*)

You (*and each of you*) are commanded to appear personally before *Abraham Kent*, Esq., a justice of the peace for said county, at his office in said county, on the *twentieth* day of *May*, 1902, to give evidence in a certain civil action, now pending before said justice, and then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the defendant (or *plaintiff*).

Hereof fail not, under the penalty prescribed by law.

Witness our said justice this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19319.³

State of *North Dakota*, } In Justice Court.
County of *McIntosh*. } ss. Before *Abraham Kent*.

The State of *North Dakota* to *William West*:

You are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, at (*stating place*), in

1. *New Hampshire*.—Pub. Stat. & See, generally, *infra*, note 2, p. Sess. L. (1901), c. 224, § 1. 909.

See, generally, *infra*, note 2, p. 909.

2. *North Carolina*.—Code (1883), § §§ 5655, 6622.

1355.

See, generally, *infra*, note 2, p. 909.

Ashley, in said county, on the *twentieth* day of *May*, A. D. 1902, at the hour of *ten* o'clock in the *forenoon* of said day, to testify on the part of the plaintiff as a witness in a certain case then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19320.¹

The State of *Ohio*, }
Summit County, ss. }
 To *William West*:

You are hereby commanded to appear before me, the undersigned, a justice of the peace of *Clinton* township, at (*stating place*), on the *twentieth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to give evidence and the truth to say in a certain action wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the plaintiff.

This you no wise omit, under the penalty of the law.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Office No. 10 *Main* street.

Form No. 19321.²

(Bellinger & C. Anno. Codes & Stat. Oregon (1902), p. 780).

Justice's Court for District No. 1, Linn County, Oregon.

State of *Oregon*, County of *Linn*.

John Doe }
 v. } Civil action to recover money (*or as the case may be*).
Richard Roe. }

To *William West*:

In the name of the state of *Oregon*, you are hereby required to appear before the undersigned, a justice of the peace for the district aforesaid, at the office of such justice, in such district, on the *twentieth* day of *May*, 1902, at *ten* o'clock in the *forenoon* of said day, to testify as a witness on behalf of the plaintiff (*or defendant*, as the case may be) in the above entitled action.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19322.³

State of *South Dakota*, } In *Justice Court*,
 County of *Brown*. } Before *Abraham Kent*, Justice of the Peace.
 The State of *South Dakota* to *William West*:

You are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, at my office in

1. *Ohio*. — Bates' Anno. Stat. (1897), See, generally, *infra*, note 2, p. §§ 583, 6537. 909.

See, generally, *infra*, note 2, p. 909.

2. *Oregon*. — Bellinger & C. Anno. 6492.
 Codes & Stat. (1902), § 801.

See, generally, *infra*, note 2, p. 909.

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Aberdeen, in said county, on the *twentieth* day of *May*, A. D. 1902, at the hour of *ten* o'clock in the *forenoon* of said day, to testify as a witness in a certain cause then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the state. Hereof fail not at your peril.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19323.¹

State of *Tennessee*, *Hamilton* County.

To any lawful officer to execute and return:

You are hereby commanded to summon *William West* to appear at (*stating place*), on the *tenth* day of *May*, 1902, at *ten* o'clock A. M., to give evidence in behalf of the plaintiff in a suit pending before me, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and this you shall in nowise omit.

This *first* day of *May*, 1902.

Abraham Kent, J. P.

Form No. 19324.²

(Ballinger's Anno. Codes & Stat. Wash. (1897), § 6664).

Subpœna.

State of *Washington*, }
County of *King*. } ss.

To *William West*:

In the name of the state of *Washington*, you are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, on the *twentieth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, at his office in *Kent*, in said county, to give evidence in a certain cause then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff (or defendant, as the case may be).

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace,

(*stating precinct*) Precinct, *King* County, *Washington*.

Form No. 19325.³

(Wis. Stat. (1898), § 4054.)

Rock County, }
Town of *Janesville*, ss. }

The State of *Wisconsin* to *William West*:

You are hereby required to appear before the undersigned, one of the justices of the peace in and for said county, at my office in said town (or *before*, designating the court, officer, or person and place of appearance), on the *twentieth* day of *May*, 1902, at *ten* o'clock in the

1. *Tennessee*. — Code (1896), § 5602 *et seq.*

See, generally, *infra*, note 2, p. 909.

2. *Washington*. — Ballinger's Anno. Codes and Stat. (1897), § 5997.

See, generally, *infra*, note 2, p. 909.

3. *Wisconsin*. — Stat. (1898), § 4053.

See, generally, *infra*, note 2, p. 909.

forenoon of said day, to give evidence in a certain cause then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

bb. INDORSED ON SUMMONS.

Form No. 19326.¹

(N. Car. Code (1883), § 909, No. 27.)

The officer to whom the within process is directed will summon the following persons as witnesses for the plaintiff: (*Here set out witnesses of the plaintiff*), and the following as witnesses for the defendant: (*Here set out witnesses of the defendant*), and will notify all such witnesses to appear and testify at the time and place within named for the return of this process.

Dated this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

(c) *In Courts of Record.*

aa. IN GENERAL.²

1. *North Carolina*. — Code (1883), § 1355.
See *infra*, note 2, this page.
2. Statutes relating to subpœnas in civil actions in courts of record exist as follows:

<i>Alabama</i>. — Civ. Code (1896), § 1824 <i>et seq.</i> <i>Arizona</i>. — Rev. Stat. (1901), §§ 1561, 2498. <i>Arkansas</i>. — Sand. & H. Dig. (1894), § 2930 <i>et seq.</i> <i>California</i>. — Code Civ. Proc. (1897), § 1985. <i>Connecticut</i>. — Gen. Stat. (1888), § 1066 <i>et seq.</i> <i>District of Columbia</i>. — Comp. Stat. (1894), c. 71, § 1 <i>et seq.</i> <i>Florida</i>. — Rev. Stat. (1892), § 1098. <i>Georgia</i>. — 2 Code (1895), § 5260. <i>Idaho</i>. — Code Civ. Proc. (1901), § 4454. <i>Illinois</i>. — Starr & C. Anno. Stat. (1896), c. 110, par. 14. <i>Indiana</i>. — Horner's Stat. (1901), § 484 <i>et seq.</i> <i>Iowa</i>. — Code (1897), §§ 3661, 4658 <i>et seq.</i> <i>Kansas</i>. — Gen. Stat. (1897), c. 95, § 335 <i>et seq.</i> <i>Kentucky</i>. — Bullitt's Civ. Code (1895), § 528. <i>Maine</i>. — Rev. Stat. (1883), c. 82, § 91. <i>Massachusetts</i>. — Rev. Laws (1902), c. 175, § 1 <i>et seq.</i>	<i>Michigan</i>. — Comp. Laws (1897), § 1092. <i>Minnesota</i>. — Stat. (1894), § 5652. <i>Mississippi</i>. — Anno. Code (1892), § 3449 <i>et seq.</i> <i>Missouri</i>. — Rev. Stat. (1899), § 4661. <i>Montana</i>. — Code Civ. Proc. (1895), § 3300 <i>et seq.</i> <i>Nebraska</i>. — Comp. Stat. (1899), § 5924 <i>et seq.</i> <i>Nevada</i>. — Comp. Laws (1900), § 3483. <i>New Hampshire</i>. — Pub. Stat. & Sess. L. (1901), c. 224, § 1 <i>et seq.</i> <i>New Jersey</i>. — Gen. Stat. (1895), p. 1399, §§ 13, 14. <i>New Mexico</i>. — Comp. Laws (1897), § 3032 <i>et seq.</i> <i>New York</i>. — Code Civ. Proc., §§ 7, 852. <i>North Carolina</i>. — Code (1883), § 1355. <i>North Dakota</i>. — Rev. Codes (1895), § 5654. <i>Ohio</i>. — Bates' Anno. Stat. (1897), § 5246. <i>Oklahoma</i>. — Stat. (1893), § 4214 <i>et seq.</i> <i>Oregon</i>. — Bellinger & C. Anno. Codes & Stat. (1902), § 801 <i>et seq.</i> <i>Pennsylvania</i>. — Bright. Pur. Dig. (1894), p. 330, § 171. <i>Rhode Island</i>. — Gen. Laws (1896), c. 244, § 3 <i>et seq.</i> <i>South Carolina</i>. — Civ. Code (1902), § 2861 <i>et seq.</i>
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(aa) *Forthwith.*

South Dakota. — Stat. (1901), § 6492.
Tennessee. — Code (1896), § 5602 *et seq.*

Texas. — Rev. Stat. (1895), art. 2264 *et seq.*

Utah. — Rev. Stat. (1898), §§ 697, 3417 *et seq.*

Vermont. — Stat. (1894), § 1251.

Virginia. — Code (1887), § 3352.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5995 *et seq.*

West Virginia. — Code (1899), c. 130, § 25.

Wisconsin. — Stat. (1898), §§ 2564, 4053.

Wyoming. — Rev. Stat. (1887), § 2594 *et seq.*

United States. — Rev. Stat. (1878), §§ 876, 877.

Address. — *To Witness.* — In many states, the subpoena must be directed to the witness. Cal. Code Civ. Proc. (1897), § 1985; Fla. Rev. Stat. (1892), § 1098; 2 Ga. Code (1895), § 5260; Idaho Code Civ. Proc. (1901), § 4454; Iowa Code (1897), § 4659; Kan. Gen. Stat. (1897), c. 95, § 336; Mont. Code Civ. Proc. (1895), § 3300; Neb. Comp. Stat. (1899), § 5925; N. Dak. Rev. Codes (1895), § 5655; Bates' Anno. Stat. Ohio (1897), § 5247; Okla. Stat. (1893), § 4214; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 801; S. Dak. Stat. (1901), § 6493; Utah Rev. Stat. (1898), § 3417; Wyo. Rev. Stat. (1887), § 2595.

To Sheriff. — In a few states, the subpoena must be directed to the sheriff. Ala. Civ. Code (1896), § 1826; Sand. & H. Dig. Ark. (1894), § 2930; Bullitt's Civ. Code Ky. (1895), § 528; Miss. Anno. Code (1892), § 3449; N. Car. Code (1883), § 1355. Or to some proper officer of the county where the witness resides. Miss. Anno. Code (1892), § 3449; N. Car. Code (1883), § 1355.

In *Alabama*, the subpoena must be directed "to any sheriff of the state of Alabama." Civ. Code (1896), § 1826.

All Witnesses Named in One Subpœna. — In some states, all of the witnesses required by the same party must be contained in one subpoena. Bullitt's Civ. Code Ky. (1895), § 528; Mo. Rev. Stat. (1899), § 4662; Neb. Comp. Stat. (1899), § 5925; N. Mex. Comp. Laws (1897), § 3033; N. Dak. Rev. Codes (1895), § 5654; Bates' Anno. Stat. Ohio (1897), § 5246; Okla. Stat. (1893), § 4214; S. Dak. Stat. (1901), § 6492; Wyo. Rev. Stat. (1887), §§ 1213, 2594.

Parties to Suit. — The names of the parties to the suit must be stated. Ariz. Rev. Stat. (1901), § 2499; Fla. Rev. Stat. (1892), § 1098; Miss. Anno. Code (1892), § 3449; N. Car. Code (1883), § 1355; S. Car. Civ. Code (1902), § 2861; Tenn. Code (1896), § 5602; Tex. Rev. Stat. (1895), art. 2265.

Court. — The court in which the suit is pending must be stated. Ariz. Rev. Stat. (1901), § 2499; Tex. Rev. Stat. (1895), art. 2265.

Time of appearance of witness must be stated. Ala. Civ. Code (1896), § 1824; Ariz. Rev. Stat. (1901), § 2499; Sand. & H. Dig. Ark. (1894), § 2930; Cal. Code Civ. Proc. (1897), § 1985; 2 Ga. Code (1895), § 5260; Idaho Code Civ. Proc. (1901), § 4454; Iowa Code (1897), § 4659; Kan. Gen. Stat. (1897), c. 95, § 336; Bullitt's Civ. Code Ky. (1895), § 528; Miss. Anno. Code (1892), § 3449; Mo. Rev. Stat. (1899), § 4661; Mont. Code Civ. Proc. (1895), § 3300; Nev. Comp. Laws (1900), § 3483; N. Mex. Comp. Laws (1897), § 3032; N. Car. Code (1883), § 1355; N. Dak. Rev. Codes (1895), § 5655; Bates' Anno. Stat. Ohio (1897), § 5247; Okla. Stat. (1893), § 4214; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 801; S. Car. Civ. Code (1902), § 2861; S. Dak. Stat. (1901), § 6493; Tenn. Code (1896), § 5602; Tex. Rev. Stat. (1895), art. 2265; Utah Rev. Stat. (1898), § 3417; Va. Code (1887), § 3352; Wyo. Rev. Stat. (1887), § 2595.

Place of appearance of witness must be stated. Ala. Civ. Code (1896), § 1824; Ariz. Rev. Stat. (1901), § 2499; Sand. & H. Dig. Ark. (1894), 2930; Cal. Code Civ. Proc. (1897), § 1985; 2 Ga. Code (1895), § 5260; Idaho Code Civ. Proc. (1901), § 4454; Iowa Code (1897), § 4659; Kan. Gen. Stat. (1897), c. 95, § 336; Bullitt's Civ. Code Ky. (1895), § 528; Miss. Anno. Code (1892), § 3449; Mo. Rev. Stat. (1899), § 4661; Mont. Code Civ. Proc. (1895), § 3300; Nev. Comp. Laws (1900), § 3483; N. Mex. Comp. Laws (1897), § 3032; N. Car. Code (1883), § 1355; N. Dak. Rev. Codes (1895), § 5655; Bates' Anno. Stat. Ohio (1897), § 5247; Okla. Stat. (1893), § 4214; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 801; S. Car. Civ. Code (1902), § 2861; S. Dak. Stat. (1901), § 6493; Tenn. Code (1896), § 5602; Tex. Rev. Stat. (1895), art. 2265; Utah Rev. Stat. (1898), § 3417; Va. Code (1887),

Form No. 19327.¹

The State of *Arkansas*, }
County of *Van Buren*. } ss.

To the Sheriff of *Van Buren* County, Greeting:

You are commanded to summon *William West* to appear in the *Van Buren Circuit* Court forthwith, to testify in behalf of the plaintiff in the case of *John Doe*, plaintiff, against *Richard Roe*, defendant.

Witness my hand, and the seal of said court, this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19328.³

Georgia — *Fulton* County.

To *William West*, Greeting:

You are hereby commanded that, laying all other business aside, you be and appear at the *Superior* Court in and for the county aforesaid, now in session, then and there to be sworn as a witness for the plaintiff in the case of *John Doe*, plaintiff, against *Richard Roe*, defendant, there pending.

Fail not, under the penalty of *three hundred* dollars.

Witness the Honorable *Joseph Story*, judge of said court, this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

§ 3352; Wyo. Rev. Stat. (1887), § 2595.

Command. — The subpoena must command the witnesses to appear in conformity with the terms of the subpoena and give testimony. Ala. Civ. Code (1896), § 1824; Sand. & H. Dig. Ark. (1894), § 2930; Cal. Code Civ. Proc. (1897), § 1985; 2 Ga. Code (1895), § 5260; Idaho Code Civ. Proc. (1901), § 4454; Iowa Code (1897), § 4659; Kan. Gen. Stat. (1897), c. 95, § 336; Bullitt's Civ. Code Ky. (1895), § 528; Mont. Code Civ. Proc. (1895), § 3300; Neb. Comp. Stat. (1899), § 5925; Nev. Comp. Laws (1900), § 3483; Leighton v. Twombly, 9 N. H. 483; N. Dak. Rev. Codes (1895), § 5655; Bates' Anno. Stat. Ohio (1897), § 5247; Okla. Stat. (1893), § 4214; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 801; S. Car. Civ. Code (1902), § 2861; S. Dak. Stat. (1901), § 6493; Tenn. Code (1896), § 5602; Utah Rev. Stat. (1898), § 3417 *et seq.*; Wyo. Rev. Stat. (1887), § 2595.

Party at whose instance witness is summoned must be stated. Ala. Civ. Code (1896), § 1824; Ariz. Rev. Stat. (1901), § 2499; Fla. Rev. Stat. (1892), § 1098; Miss. Anno. Code (1892), § 3449; Leighton v. Twombly, 9 N. H. 483; N. Car. Code (1883), § 1355; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 801; S. Car. Civ. Code (1902), § 2861; Tenn. Code (1896), § 2602; Tex. Rev. Stat. (1895), art. 2265.

Date and Attest. — The subpoena shall be dated and attested by the clerk or justice. Ariz. Rev. Stat. (1901), § 2499; Tex. Rev. Stat. (1895), art. 2265. And the date of the issuance for subpoena shall be noted thereon. Ariz. Rev. Stat. (1901), § 2499.

In *Goodman v. Armistead*, 4 Hawks. (11 N. Car.) 19, it was held that a subpoena was good which was tested in a certain year of American independence, though the year of our Lord was not named.

Signature. — A subpoena is a judicial writ and must be signed and issued by the clerk. *Horton v. State*, 112 Ga. 27.

Seal. — In some states, statutes expressly provide that the subpoena shall be issued under the seal of the court. Iowa Code (1897), § 4658; Kan. Gen. Stat. (1897), c. 95, § 335; Neb. Comp. Stat. (1899), § 5924; Nev. Comp. Laws (1900), § 3484; Bates' Anno. Stat. Ohio (1897), § 5246; Okla. Stat. (1893), § 4214; Wyo. Rev. Stat. (1887), § 2594.

In a few states, statutes provide that a seal is not necessary. Ariz. Rev. Stat. (1901), §§ 1561, 2499; Tex. Rev. Stat. (1895), art. 2265; Wis. Stat. (1898), § 4053.

1. *Arkansas.* — Sand. & H. Dig. (1894), § 2930 *et seq.*

See, generally, *supra*, note 2, p. 909.

2. *Georgia.* — 2 Code (1895), § 5260.

See, generally, *supra*, note 2, p. 909.

Form No. 19329.¹

The State of *Mississippi* to the Sheriff of *Washington* County:

You are hereby commanded to summon *William West*, if to be found in your county, to be and personally appear instanter before the *Circuit* Court of the county of *Washington*, in said state, at the court-house, in the city of *Greenville, Mississippi*, then and there to testify on behalf of plaintiff (at whose instance this writ is issued), in a certain case pending in said court, wherein *John Doe* is plaintiff and *Richard Roe* is defendant; and that he in nowise fail to so appear, under the penalty prescribed by the statute. And have there then this writ.

Given under my hand, and the seal of said court, and issued this the *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk of *Circuit* Court.

Form No. 19330.²

The State of *Texas* to the Sheriff or any Constable of *Travis* County,
Greeting:

You are hereby commanded to summon *William West* to be and appear instanter before the Honorable *District* Court of *Travis* county, *Texas*, now in session at the court-house of said county, in *Austin*, then and there to testify in behalf of the *defendant* in a certain suit now pending in said court, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and there remain from day to day and from term to term until discharged by due course of law.

Herein fail not, but of this writ make due return, showing how you have executed the same.

Witness my official signature, at *Austin*, this *first* day of *May*, 1902.

Calvin Clark, Clerk,
District Court, *Travis* County.

(bb) On a Future Day Named.

aaa. ORIGINAL SUBPÆNA.

Form No. 19331.³

The State of *Alabama*, }
Jefferson County. } *Circuit* Court. No. 404.

To any Sheriff of said County, Greeting:

You are hereby commanded to summon *William West* personally to be and appear at the present term of the *Circuit* Court on the *tenth* day of *May*, 1902, before the said court now being held for *Jefferson* county, at the place of holding the same, until discharged by due course of law, and to give evidence and the truth to speak in behalf of the plaintiff, in a suit now pending in said court wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and have you then this writ, with your indorsement thereon.

Witness, this *first* day of *May*, 1902.

Calvin Clark, Clerk.

1. *Mississippi*. — Anno. Code (1892),
§ 3449 et seq.

See, generally, *supra*, note 2, p. 909.

2. *Texas*. — Rev. Stat. (1895), art. 2264
et seq.

See, generally, *supra*, note 2, p. 909.

3. *Alabama*. — Civ. Code (1896), §
1824 et seq.

See, generally, *supra*, note 2, p.
909.

Form No. 19332.¹

In the *Superior Court, City and County of San Francisco, State of California.* Department No. 2.

John Doe, plaintiff,
against
Richard Roe, defendant. } Subpœna.

The People of the State of *California* send greeting to *William West*:

We command you that, all and singular business and excuses being set aside, you appear and attend before Hon. *John Marshall*, judge of our *Superior Court* of the *city and county of San Francisco*, state of *California*, at a session of said court to be held at the court room of said court (department No. 2) in the *New City Hall* of said *city and county of San Francisco*, on the *tenth day of May*, A. D. 1902, at *ten o'clock A. M.*, then and there to testify in the above stated cause, now pending in said *Superior Court*, on the part of the plaintiff, and for failure to attend you will be deemed guilty of contempt of court, and liable to pay all losses and damages sustained thereby to the parties aggrieved, and forfeit *one hundred dollars* in addition thereto.

By order of our said *Superior Court*, at the *New City Hall*, in the *city and county of San Francisco*, this *first day of May*, A. D. 1902.

Attest my hand, and the seal of said court, the day and the year last above written.

(SEAL)

C. F. Curry, Clerk.

Form No. 19333.²

Kent County, ss.

(SEAL) The State of *Delaware* to the Sheriff of *Kent County*,
Greeting:

We command you that you summon *William West* that he be and appear before our judges at *Dover*, at our *Superior Court* there to be held on *Thursday*, the *tenth day of May*, A. D. 1902, to give evidence in behalf of the plaintiff, in an action in our said court now depending and undetermined, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. And this he shall in no wise omit, at his peril. And have you then there this subpœna.

Witness, the Honorable *Joseph P. Comegys*, our chief justice, at *Dover*, the *first day of May*, in the year of our Lord one thousand nine hundred and *two*.

Issued *May 1*, 1902.

Calvin Clark, Prothonotary.

Form No. 19334.³

The State of *Florida*, }
Duval County. }

To *William West*, Greeting:

You are hereby commanded to be and appear before the judge of our *Circuit Court* for the *fourth judicial circuit* of the state of

1. *California*.—Code Civ. Proc. (1901), § 1985 et seq.

See, generally, *supra*, note 2, p. 909.

2. See, generally, *supra*, note 2, p. 909.

3. *Florida*.—Rev. Stat. (1892), § 1908. See, generally, *supra*, note 2, p. 909.

Florida, at the court-house in *Jacksonville*, on *Monday*, the *tenth* day of *May*, 1902, to testify and the truth to speak in behalf of the plaintiff in a certain matter before said court depending and undetermined, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. And this you shall in no wise omit.

Witness, *Calvin Clark*, clerk of our said court, and the seal of our said court, at the court-house at *Duval* county aforesaid, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19335.¹

In the *District* Court of the *Third* Judicial District of the State of *Idaho*, in and for the County of *Boise*.

John Doe, plaintiff,
against
Richard Roe, defendant. } Subpœna.

The People of the State of *Idaho* send greeting to *William West*:

We command you that, all and singular business and excuses being laid aside, you appear and attend before our said *District* Court of the *third* judicial district, state of *Idaho*, in and for the county of *Boise*, at a session of said court to be held at the court-room of said court in *Idaho* City, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to testify in the above stated cause now pending in said *District* Court, on the part of the plaintiff, and for a failure to attend you will be deemed guilty of contempt of court and liable to pay all losses and damages sustained thereby to the parties aggrieved and forfeit *one hundred* dollars in addition thereto.

Witness, Hon. *Joseph Story*, judge of the said *District* Court in and for the county of *Boise*, state of *Idaho*.

Attest my hand, and seal of said court, the day and year last above written.

(SEAL)

Calvin Clark, Clerk.

Form No. 19336.²

Suffolk, ss.

To *William West*, of *Boston*, in said *Suffolk*, Greeting:

You are hereby required, in the name of the commonwealth of *Massachusetts*, to appear before the *Superior* Court for *civil* business, *second* session thereof, holden at *Boston*, within and for the county of *Suffolk*, on the *first* day of *May*, A. D. 1893, at *nine* o'clock in the *forenoon*, and from day to day thereafter, until the action hereinafter named is heard by said court, to give evidence of what you know relating to an action of contract then and there to be heard and tried, between *Richard Roe*, plaintiff, and *John Doe*, defendant. Hereof fail not, as you will answer your default under the pains and penalties in the law in that behalf made and provided.

Dated at *Boston*, the *thirtieth* day of *April*, A. D. 1893.

Abraham Kent, Justice of the Peace.

1. *Idaho*. — Code Civ. Proc. (1901), § 4454.

See, generally, *supra*, note 2, p. 909.

2. *Massachusetts*. — Rev. Laws (1902), c. 175, § 1.

See, generally, *supra*, note 2, p. 909.

This is the form of subpoena used in the *Massachusetts* courts and is copied from *Buswell and Walcott's Massachusetts Practice* (3d ed.) 266.

Form No. 19337.¹

State of *Michigan*,
In the *Circuit* Court for the } ss.
County of *Wayne*.

In the Name of the People of the State of *Michigan*, to *William West*:

(SEAL) You are commanded that, laying aside all and singular your business and excuses, you be and appear before the *Circuit* Court for the county of *Wayne*, at the court-house in *Detroit*, in said county, on *Monday*, the *twentieth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, then and there to give evidence in the cause to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff. And for a failure to attend you will be deemed guilty of a contempt of said court, and will be responsible to the aggrieved party for the loss, hindrance and all other damages sustained thereby, and will forfeit to the said party the sum of *fifty* dollars in addition thereto.

Witness, the Hon. *Joseph Story*, judge of said *Circuit* Court, at the *Circuit* Court room in *Detroit*, in said county, on the *first* day of *May*, one thousand nine hundred and *two*.

Calvin Clark, Clerk.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19338.²

The *District* Court for the } ss. State of *Minnesota*.
Fourth District, *Hennepin* County.

The State of *Minnesota* to *William West*, Greeting:

You are hereby commanded that, laying aside all and singular your business and excuses, you be and appear before the judge of the *District* Court for the *fourth* judicial district and county of *Hennepin*, at a general term of said court to be held at the court-house in *Minneapolis*, in said county, on the *tenth* day of *May*, at *ten* o'clock in the *forenoon*, then and there to give evidence in a certain action now pending in said court, and then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the plaintiff.

Hereof fail not, on pain of the penalty that will fall thereon.

Witness, the Hon. *Joseph Story*, judge of the *District* Court aforesaid, at *Minneapolis*, this *first* day of *May*, in the year 1902.

(SEAL)

Calvin Clark, Clerk of *District* Court.

Form No. 19339.³

In the *Fifth* Judicial *District* Court, State of *Montana*.

John Doe, plaintiff, } *January* Term, 1902.
against } Subpœna.

Richard Roe, defendant. } Action for (*stating action*).

The State of *Montana* to *William West*, Greeting:

You are hereby summoned to be and appear before the above named court at *Dillon*, in the county of *Beaverhead*, at *ten* o'clock

1. *Michigan*. — Comp. Laws (1897), § 1092.

See, generally, *supra*, note 2, p. 909.

2. *Minnesota*. — Stat. (1894), § 5652.

See, generally, *supra*, note 2, p. 909.

3. *Montana*. — Code Civ. Proc. (1895), § 3300.

See, generally, *supra*, note 2, p. 909.

A. M., on *Monday*, the *twentieth* day of *May*, A. D. 1902, then and there to testify in the above entitled cause on the part of the plaintiff. Hereof fail not under penalty of the law.

Witness, the Hon. *Joseph Story*, judge, the hand of the clerk, with the seal of said court affixed, at *Dillon*, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19340.¹

Camden, ss.

(SEAL) The state of *New Jersey* to *William West* and *Samuel Short*,
Greeting:

We command you and each of you that, laying aside all and singular businesses and excuses, you severally be and appear in your proper persons before the *Circuit* Court to be held at *Camden*, in and for the county of *Camden*, on *Monday*, the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon of the same day, to testify all and singular what you severally know in a certain cause now depending and undetermined in our *Circuit* Court between *John Doe*, plaintiff, and *Richard Roe*, defendant, of a plea of (*stating plea*), on the part of the plaintiff: and this you are in no wise to omit, under the penalty of *one hundred* dollars.

Witness, *Joseph Story*, Esquire, judge of our said *Circuit* Court, at *Camden*, the *first* day of *May*, one thousand nine hundred and *two*.

Calvin Clark, Clerk.

Jeremiah Mason, Attorney.

Form No. 19341.²

The People of the State of *New York* to *Samuel Short* and *William West*, Greeting:

We command you and each of you that, all business and excuses being laid aside, you and each of you appear in your proper person before our justices of the *City* Court of *New York*, at the *city hall* in the city of *New York*, on *Monday*, the *tenth* day of *May*, at *ten* o'clock in the forenoon of the said day, then and there to testify those things which either of you know in a certain cause now pending in our said court between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the defendant. And this you or any of you are not to omit, under the penalty of *fifty* dollars for you and every of you.

Witness our said justices, at the *city hall* in the city of *New York*, the *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

By the court:

Calvin Clark, Clerk.

Form No. 19342.³

The People of the State of *New York* to *Samuel Short* and *William West*, Greeting:

We command you that, all and singular business and excuses being laid aside, you and each of you appear and attend before one of the

1. *New Jersey*. — Gen. Stat. (1895), p. 1399. §§ 13, 14.

See, generally, *supra*, note 2, p. 909.

2. *New York*. — Code Civ. Proc., § 852.

See, generally, *supra*, note 2, p. 909.

3. *New York*. — Code Civ. Proc., §§ 7, 352.

See, generally, *supra*, note 2, p. 909.

justices of our *Supreme* court, at a *special* term of the said court, to be held in and for the county of *Suffolk*, at the court-house in *Riverhead*, in said county of *Suffolk*, on the *tenth* day of *May*, 1902, at ten o'clock in the *forenoon*, to testify and give evidence in a certain action now pending in the *Supreme* Court, then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, and for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit *fifty* dollars in addition thereto.

Witness, *Wilmot Smith*, Esquire, one of the justices of our said *Supreme* Court, at *Riverhead*, the *first* day of *May*, in the year one thousand nine hundred and *two*.

Calvin Clark, Clerk.

Jeremiah Mason, Attorney for Plaintiff,
No. 2 Main street, *Northport*, N. Y.

Form No. 19343.¹

Northampton County, in the *Superior* Court.
State of *North Carolina* to the Sheriff of *Northampton* County,
Greeting:

You are hereby commanded to summon *William West* (if to be found in your county) personally to be and appear before his honor the judge of our *Superior* Court, at a court to be held at the court-house in *Jackson*, on the *fourth Monday* after the *first Monday* in *March next*, then and there to testify in behalf of the plaintiff in a certain matter therein pending, wherein *John Doe* is plaintiff and *Richard Roe* is defendant. Herein fail not, at your peril.

Issued this the *twenty-ninth* day of *February*, 1902.

Calvin Clark, Clerk.

Form No. 19344.²

State of *North Dakota*, } *Fourth* Judicial District Court.
County of *McIntosh*. } ss. *May* Term, 1902.
The State of *North Dakota* to *William West*:

You are hereby commanded to be and appear before our *District* Court within and for the *fourth* judicial district of the state of *North Dakota*, at the court-house in *Ashley*, county of *McIntosh*, in said state, on the *tenth* day of *May*, 1902, at ten o'clock A. M., then and there to testify on the part of defendant in the case of *John Doe*, plaintiff, against *Richard Roe*, defendant. And hereof fail not.

Witness, the Hon. *Joseph Story*, judge of said *District* Court, and my hand and seal, this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk of Court.

Form No. 19345.³

State of *Oregon*, }
County of *Linn*. } ss.

In the Name of the State of *Oregon*, to *William West*:

1. *North Carolina*.—Code (1883), § 1355.

See, generally, *supra*, note 2, p. 909.

2. *North Dakota*.—Rev. Codes (1895), § 5654.

See, generally, *supra*, note 2, p. 909.

3. *Oregon*.—Bellinger & C. Anno. Codes & Stat. (1902), § 801.

See, generally, *supra*, note 2, p. 909.

You are hereby commanded to appear in the *Circuit Court* of the state of *Oregon* for the county of *Linn*, at the court-house in *Albany*, in said *Linn* county, on the *tenth* day of *May*, 1902, at *ten* o'clock *A. M.*, to give evidence in a cause wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of plaintiff.

Witness my hand, and the seal of said court, affixed at *Albany*, this *fifth* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19346.¹

(R. I. Gen. Laws (1896), c. 244, § 3.)

State of *Rhode Island* and *Providence Plantations*.

Providence, sc.

(SEAL) To *William West*, of *Providence*, in said County, Greeting:

You are hereby required, in the name of the state of *Rhode Island* and *Providence Plantations*, to make your appearance before the *Common Pleas* Division of our *Supreme Court*, to be holden at *Providence*, within and for our county of *Providence*, on the *tenth* day of *May*, A. D. 1902, to give evidence of what you know relative to an action or plea of (*stating it*), then and there to be heard and tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant.

Hereof fail not, as you will answer under the penalty of the law in that behalf made and provided.

Dated at *Providence*, the *first* day of *May*, in the year 1902.

Geo. C. Webster, Clerk.

Form No. 19347.²

State of *South Carolina*, }
County of *Charleston*. }

To *William West* and *Samuel Short*:

You, and each of you, are hereby strictly required and firmly enjoined that, all business being laid aside and all excuses ceasing, you do, in your proper person, appear before the *Circuit Court* of *Common Pleas*, to be holden at *Charleston* for *Charleston* county, on the *second Monday* of *March next*, then and there to testify the truth, according to your knowledge, in a certain cause now pending and to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part and behalf of the said plaintiff. Herein fail not, on pain of the forfeiture of *fifty* dollars, as well as the consequences that may fall thereon.

(SEAL) Witness, *Calvin Clark*, Esq., clerk of the court, at *Charleston*, this *first* day of *March*, in the year of our Lord one thousand nine hundred and *two*, and in the one hundred and *twenty-sixth* year of the sovereignty and independence of the United States of America.

Calvin Clark, Clerk.

1. *Rhode Island*. — Gen. Laws (1896), c. 244, § 3.

See, generally, *supra*, note 2, p. 909.

2. *South Carolina*. — Civ. Code (1902), § 2861 *et seq.*

See, generally, *supra*, note 2, p. 909.

Form No. 19348.¹

State of *South Dakota*, {
County of *Brown*. }

In *Circuit Court*, *Fifth* Judicial Circuit.

John Doe, plaintiff, {
against

Richard Roe, defendant. }

The State of *South Dakota* to *William West*, Greeting:

You are hereby commanded and required to be and appear before our said *fifth* judicial *Circuit Court* within and for the county of *Brown*, in the state of *South Dakota*, at the court room in the city of *Aberdeen*, in said county and state, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.* of that day, then and there to testify on the part of the plaintiff in a case now pending in said court wherein *John Doe* is plaintiff and *Richard Roe* is defendant, and hereof fail not, but true return make.

Witness, the Honorable *Joseph Story*, judge of said *Circuit Court*, and my hand and the seal of said court, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk of Court.

Form No. 19349.²

State of *Tennessee* to the Sheriff of *Hamilton County*, Greeting:

We command you to summon *William West* personally to appear before the judge of our *Circuit Court*, now sitting for the county of *Hamilton*, at the court-house in the city of *Chattanooga*, on *Tuesday next*, then and there to testify and the truth to say in behalf of the plaintiff in a certain matter of controversy in our said court depending, wherein *John Doe* is plaintiff and *Richard Roe* is defendant; and this you shall in nowise omit, under the penalty prescribed by law.

Witness, *Calvin Clark*, clerk of our said court, at office, the *first* day of *May*, A. D. 1902, and the one hundred and *twenty-sixth* year of American independence.

(SEAL)

Calvin Clark, Clerk.

Form No. 19350.³

The Commonwealth of *Virginia* to the Sheriff of the County of *Albemarle*, Greeting:

We command you to summon *William West* to appear before the judge of our *Circuit Court* of the county of *Albemarle*, at the court-house thereof, on the *tenth* day of *May*, A. D. 1902, to testify and the truth to say in behalf of the plaintiff in a certain matter of controversy in our said court before the said judge depending and undetermined, between *John Doe*, plaintiff, and *Richard Roe*, defendant.

And have then there this writ.

1. *South Dakota*.—Stat. (1901), § 6492.

See, generally, *supra*, note 2, p. 909.

2. *Tennessee*.—Code (1896), § 5602 *et seq*

See, generally, *supra*, note 2, p. 909.

3. *Virginia*.—Code (1887), § 3352.

See, generally, *supra*, note 2, p. 909.

Witness, *Calvin Clark*, clerk of our said court, at the court-house, the *first* day of *May*, 1902, and in the one hundred and *twenty-sixth* year of the commonwealth.

(SEAL)

Calvin Clark, Clerk.

Form No. 19351.¹

State of *Washington*, }
County of *King*. } ss.

In the *Superior* Court of *King* County.

John Doe, plaintiff, }
against } No. 400.
Richard Roe, defendant, } Subpœna.

The State of *Washington* to *William West*, Greeting:

In the name of the state of *Washington*, you, *William West*, are hereby commanded to be and appear before the *Superior* Court of the county of *King*, in the state of *Washington*, at the court-house in *Seattle*, in said county of *King*, in the state of *Washington*, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, then and there to testify upon the trial of the above entitled cause, on the part of the *plaintiff* in said cause, and to remain in attendance on said court until discharged, and herein fail not, at your peril.

Witness, the Honorable *Joseph Story*, judge of said court, and the seal of said court, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, County Clerk
and ex-officio Clerk of the *Superior* Court
of *King* County, State of *Washington*.

Form No. 19352.¹

The President of the United States of America to *William West*, Greeting:

(SEAL) We command you that, all and singular business and excuses being laid aside, you and each of you appear and attend before the *Circuit* Court of the *United States of America* for the *southern* district of *New York*, at a *Circuit* Court to be held at the (*stating place*), in and for the said *southern* district of *New York*, on the *tenth* day of *May*, 1902, at *eleven* o'clock in the *forenoon*, to testify and give evidence in a certain cause pending in the said court and then and there to be tried between *John Doe*, plaintiff, and *Richard Roe*, defendant. And this you or any of you are not to omit, under the penalty upon you and every of you of *two hundred and fifty* dollars.

Witness, the Honorable *Melville Weston Fuller*, chief justice of the *Supreme* Court of the *United States* at the city of *New York*, the *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.

1. *Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 5995.

See, generally, *supra*, note 2, p. 909.

2. *United States*. — Rev. Stat. (1878), §§ 876, 877.

See, generally, *supra*, note 2, p. 909.

555. SUBPŒNA TICKET.

Form No. 19353.¹

Mr. *William West*:

By virtue of a writ of subpœna to you directed, and herewith shown unto you, you are commanded personally to be and appear before the *Camden* county *Circuit* Court to be held at *Camden*, in and for the county of *Camden*, on *Monday*, the *tenth* day of *May next*, at *ten* o'clock in the *forenoon* of the same day, to testify all and singular what you know in a certain cause now depending and undetermined in our said court, between *John Doe*, plaintiff, and *Richard Roe*, defendant, in a plea of (*stating plea*), on the part of the *plaintiff*.

And this you are in no wise to omit, under a penalty of *one hundred* dollars.

Dated this *first* day of *May*, 1902.

Calvin Clark, Clerk.

Form No. 19354.²

By virtue of a writ of subpœna to you directed, and herewith shown, you are commanded that, all business and excuses being laid aside, you appear and attend before one of the justices of the *Supreme* Court, at a *special* term of the said court to be held in and for the county of *Suffolk*, at the court-house in *Riverhead*, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, to testify and give evidence in a certain action pending in the *Supreme* Court, then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the *plaintiff*. And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit *fifty* dollars in addition thereto.

Dated the *first* day of *May*, 1902.

By the court:

Jeremiah Mason, Attorney for Plaintiff.
No. 2 Main street, *Northport*, *N. Y.*

To *William West*.

Form No. 19355.³

State of *South Carolina* to *William West*:

By virtue of a writ of subpœna to you directed, and herewith shown to you, you are required to be and appear personally before the *Circuit* Court of *Common Pleas* to be holden for *Charleston* county, at *Charleston*, on the *second Monday* in *March next*, to testify the truth, according to your knowledge, in a certain cause now there depending and to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part and behalf of the said *plaintiff*.

Herein fail not, on the pain of the forfeiture of *fifty* dollars, as well as the consequences that may fall thereon.

Dated at the place aforesaid, the *first* day of *March*, A. D. 1902.

Samuel Smith, Attorney.

1. *New Jersey*. — Gen. Stat. (1895), p. 1399, §§ 13, 14.

2. *New York*. — Code Civ. Proc., §§ 7, 852.

3. *South Carolina*. — Civ. Code (1902), § 2861 et seq.

Form No. 19356.¹

By virtue of a writ of subpœna to you directed, and herewith shown, you are commanded and firmly enjoined that, laying all other matters aside, and notwithstanding any excuse, you be and appear in your proper person before the *Circuit Court of the United States of America* for the *southern* district of *New York*, at a *Circuit Court* to be held at the United States court-rooms in the Postoffice Building in the borough of *Manhattan*, in the city of *New York*, in and for the said *southern* district, on the *tenth* day of *May*, 1902, at *eleven* o'clock in the *forenoon* of the same day, to testify all and everything which you may know in a certain cause now depending undetermined in the said court, then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the *plaintiff*. And this you are not to omit, under the penalty of *two hundred and fifty* dollars.

Dated the *first* day of *May*, 1902.

By the court:
To *William West*.

Jeremiah Mason, Attorney.

bb. IN PROCEEDINGS BEFORE REFEREE.³

(aa) Original Subpœna.

Form No. 19357.³

The People of the State of *New York* to *William West*, Greeting:

We command you that, all business and excuses being laid aside, you (and each of you) appear and attend before *Josiah Crosby*, Esq., the referee duly appointed by the *Supreme* Court at the office of said referee, number *10 Main* street in the town of *Riverhead*, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, to testify and give evidence in a certain action now pending in the said court, then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the *plaintiff*, and for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved and forfeit *fifty* dollars in addition thereto.

Witness, Honorable *Thomas Brown*, a justice of the said court, at

1. *United States*. — Rev. Stat. (1878), §§ 876, 877.

2. Statutes relating to attendance of witnesses before referee exist as follows:

Iowa. — Code (1897), § 3739.

Michigan. — Comp. Laws (1897), § 10091.

Mississippi. — Anno. Code (1892), § 3450.

Nevada. — Comp. Laws (1900) § 3484.

New Mexico. — Comp. Laws (1897), § 2685, subs. 146, 151, 157.

New York. — Code Civ. Proc., §§ 854, 1017.

North Carolina. — Clark's Code Civ. Proc. (1900), § 422.

North Dakota. — Rev. Codes (1895), § 5654.

Pennsylvania. — Bright. Pur. Dig. (1894), p. 131, § 51.

South Dakota. — Stat. (1901), § 6492.

Washington. — Ballinger's Anno. Codes & Stat. (1897), § 5997.

And see list of statutes cited *supra*, note 2, p. 909.

Requisites of Subpœna, Generally. — See *supra*, note 2, p. 909.

3. *New York*. — Code Civ. Proc., §§ 854, 1017.

See also list of statutes cited *supra*, note 2, this page; and, generally, *supra*, note 2, p. 909.

the court-house in the town of *Riverhead*, the *first* day of *May*, one thousand nine hundred and *two*.

By the court:

Calvin Clark, Clerk.

Samuel Smith, Plaintiff's Attorney,

No. 2 Main street, *Northport*, N. Y.

Form No. 19358.¹

John Doe, plaintiff, }
against } In the *Superior Court*, *Stanley County*.
Richard Roe, defendant. }

State of *North Carolina* to the Sheriff of *Stanley County*, Greeting:

You are hereby commanded, at the instance of the defendant, to summon *William West* to appear before me, at (*stating place*), in *Albermarle*, on the *tenth* day of *May*, 1902, then and there to testify and the truth to say in relation to the matters in controversy between said parties; and this you shall in no wise omit, under the penalty prescribed by law.

Make due return to me on or before the said *tenth* day of *May*, 1902, how you shall have executed this subpœna.

Witness, *Josiah Crosby*, referee.

Issued the *first* day of *May*, 1902.

Josiah Crosby, Referee.

(bb) Subpœna Ticket.

Form No. 19359.²

By virtue of a writ of subpœna to you directed, and herewith shown, you are commanded that, all business and excuses being laid aside, you appear and attend herein in your proper person before *Josiah Crosby*, the referee appointed by the *County Court*, at (*stating place*), on the *tenth* day of *May*, at *ten* o'clock in the forenoon, to testify and speak the truth in a certain action now pending in the *County Court*, then and there to be tried, between *John Doe*, plaintiff, and *Richard Roe*, defendant, on the part of the *plaintiff*. And for a failure to attend you will be deemed guilty of a contempt of court and liable to pay all loss and damages sustained thereby to the party aggrieved, and forfeit *fifty* dollars in addition thereto.

Dated the *first* day of *May*, 1902.

By the court:

Thomas Beacon, Plaintiff's Attorney.

To *William West*.

(2) IN CRIMINAL PROSECUTIONS.

(a) In General.

Form No. 19360.³

(Cal. Pen. Code (1901), § 1327.)

The People of the State of *California* to *William West*:

1. *North Carolina*. — *Clark's Code* See also list of statutes cited *supra*,
Civ. Proc. (1900), § 422. note 2, p. 922; and, generally, *supra*,
note 2, p. 909.

See also list of statutes cited *supra*,
note 2, p. 922; and, generally, *supra*,
note 2, p. 909.

2. *New York*. — *Code Civ. Proc.*, §§
854, 1017.

3. *California*. — *Pen. Code* (1901), §
1326.

See also list of statutes cited *infra*,
note 2, p. 928.

You are commanded to appear before *Abraham Kent*, a justice of the peace of *Oakland* township, in *Alameda* county (or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the people of the state of *California* against *Richard Roe*.

Given under my hand this *first* day of *May*, A. D. nineteen hundred and *two*.

Abraham Kent, justice of the peace (or *Samuel Smith*, district attorney, or *By order of the court*, *Calvin Clark*, clerk, or as the case may be).

Form No. 19361.¹

(Idaho Pen. Code (1901), § 5593.)

The State of *Idaho* to *William West*:

You are commanded to appear before *Abraham Kent*, a justice of the peace of (stating precinct), in *Boise* county (or as the case may be), at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the state of *Idaho* against *Richard Roe*.*

Given under my hand this *first* day of *May*, A. D. nineteen hundred and *two*.

Abraham Kent, justice of the peace (or *Samuel Smith*, prosecuting attorney, or *By order of the court*, *Calvin Clark*, clerk, or as the case may be).

Form No. 19362.²

(N. Dak. Rev. Codes (1895), § 8363.)

In the Name of the State of *North Dakota*, to *William West*:

You are commanded to appear before *Abraham Kent*, a justice of the peace, at the town of *Ashley* (or the grand jury of the county of *McIntosh*, or the District Court of the county of *McIntosh*, or as the case may be), on (stating the day and hour), as a witness in a criminal action prosecuted by the state of *North Dakota* against *Richard Roe*.

Dated at the town of *Ashley*, the *first* day of *May*, 1902.

Abraham Kent, justice of the peace (or *Samuel Smith*, state's attorney, or *By order of the court*, *Calvin Clark*, clerk, or as the case may be).

Form No. 19363.³

(S. Dak. Stat. (1901), § 8800.)

In the Name of the State of *South Dakota*, to *William West*:

You are commanded to appear before *Abraham Kent*, a justice of the peace, at the town of *Aberdeen* (or the grand jury of the county of *Brown*, or the Circuit Court of the county of *Brown*, or as the case may

1. *Idaho*. — Pen. Code (1901), §§ 5593, 5730.

See also list of statutes cited *infra*, note 2, p. 928.

2. *North Dakota*. — Rev. Codes (1895), § 8358 *et seq.*

See also list of statutes cited *infra*, note 2, p. 928.

3. *South Dakota*. — Stat. (1901), § 8795 *et seq.*

See also list of statutes cited *infra*, note 2, p. 928.

be), on (*stating the day and hour*), as a witness in a criminal action prosecuted by the state of *South Dakota* against *John Doe*.

Dated at the town of *Aberdeen*, the *first* day of *May*, 1902.

Abraham Kent, justice of the peace (or *Samuel Smith*, state's attorney, or *By order of the court*, *Calvin Clark*, clerk, or as the case may be).

(b) *In Justices' Courts.*¹

aa. FORTHWITH.

(aa) *In General.*

Form No. 19364.²

(Bates' Anno. Stat. Ohio (1897), § 7132.)

The State of *Ohio*, *Summit* County, ss.

To any Constable of the County, Greeting:

You are hereby commanded to summon *William West* to be and appear before me, the undersigned authority, at (*stating place*), forthwith, and there to give testimony and the truth to say touching a certain complaint made in behalf of the state of *Ohio* against *Richard Roe*.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

1. Statutes relating to the attendance of witnesses before justices of the peace in criminal proceedings exist as follows:

Alabama.—Crim. Code (1896), §§ 4606, 4638.

Arizona.—Pen. Code (1901), § 1215.

Arkansas.—Sand. & H. Dig. (1894), § 4324.

California.—Pen. Code (1901), § 1459.

Connecticut.—Gen. Stat. (1888), § 690.

Delaware.—Rev. Stat. (1893), p. 731, c. 97, § 4.

Florida.—Rev. Stat. (1892), §§ 2845, 2861, 2964.

Georgia.—3 Code (1895), § 8.

Idaho.—Pen. Code (1901), § 5730.

Kentucky.—Bullitt's Crim. Code (1895), § 329.

Maine.—Rev. Stat. (1883), c. 132, § 8.

Massachusetts.—Rev. Laws (1902), c. 175, § 1.

Michigan.—Comp. Laws (1897), § 1042.

Mississippi.—Anno. Code (1892), § 2429.

Missouri.—Rev. Stat. (1899), § 2756.

Montana.—Pen. Code (1895), §§ 2460, 2721.

Nevada.—Comp. Laws (1900), § 4500 et seq.

North Dakota.—Rev. Codes (1895), § 8358.

Ohio.—Bates' Anno. Stat. (1897), § 7132.

Oklahoma.—Stat. (1893), § 5334 et seq.

Oregon.—Bellinger & C. Anno. Codes & Stat. (1902), § 1541.

Rhode Island.—Gen. Laws (1896), c. 244, § 5.

South Dakota.—Stat. (1901), §§ 7428, 8795.

Texas.—Code Crim. Proc. (1895), art. 513 et seq.

Utah.—Rev. Stat. (1898), § 5017 et seq.

Vermont.—Stat. (1894), § 1251.

Virginia.—Code (1887), § 3352.

Washington.—Ballinger's Anno. Codes & Stat. (1897), §§ 5997, 6671.

West Virginia.—Code (1899), c. 130, § 25.

Wisconsin.—Stat. (1898), § 4053.

See also list of statutes cited *infra*, note 2, p. 928.

Requisites of Subpœna, Generally.—See *supra*, note 2, p. 909.

2. *Ohio*.—Bates' Anno. Stat. (1897), § 7132.

See also list of statutes cited *supra*, note 1, this page.

(bb) *To Inquire Into any Violations of Law.*

Form No. 19365.¹

The State of *Texas*, } In Justice Court,
County of *Freestone*. } Precinct No. (*stating precinct*).
The State of *Texas* to the Sheriff or any Constable of *Freestone*
County, Greeting:

You are hereby commanded to summon *William West*, if he be found in your county, to be and appear, instanter, before me, a justice of the peace of *Freestone* county, at my office, at *Fairfield*, in precinct No. (*stating number*), on the *tenth* day of *May*, 1902, then and there to answer such questions as may be asked him as to any violations of law within his knowledge; and there remain, from day to day, until discharged by the court.

Herein fail not, but execute and due return make of this writ, as the law directs.

Given under my hand this the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace,
Precinct No. (*stating number*), *Freestone* County, *Texas*.

bb. ON A FUTURE DAY NAMED.

Form No. 19366.²

State of *Connecticut*, } ss. Town of *Danbury*.
Fairfield County. }
State of *Connecticut* }
against }
Richard Roe. }

To (*naming all persons summonea*), Greeting:

By authority of the state of *Connecticut*, you are hereby commanded to appear before *Abraham Kent*, Esq., justice of the peace for the county of *Fairfield*, at his office in *Danbury*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, to testify in a certain trial then and there to be had, what you know respecting certain charges alleged against *Richard Roe*, in a complaint made by *Samuel Short*, a grand juror of said town of *Danbury*.

Hereof fail not, under penalty of the law in such case provided.

Dated at *Danbury*, this *first* day of *May*, A. D. 1902.

To any proper officer, and to *Charles Hatch*, of said *Danbury*, an indifferent person, to serve and return.

Abraham Kent, Justice of the Peace.

Form No. 19367.³

State of *Iowa*, } ss.
Des Moines County. }
To *William West*:

In the name of the State of *Iowa*, you (*and each of you*) are hereby

1. *Texas*. — Code Crim. Proc. (1895), art. 941.

See also list of statutes cited *supra*, note 1, p. 925.

2. *Connecticut*. — Gen. Stat. (1888), § 690.

See also list of statutes cited *supra*, note 1, p. 925.

3. *Iowa*. — Code (1897), § 5472.

See also list of statutes cited *supra*, note 1, p. 925.

commanded and required that, laying aside all other business and excuses, you personally be and appear before the undersigned justice of the peace, at his office in *Roscoe* township, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M. of that day, then and there to testify what you may know in a certain criminal action now pending before said justice, wherein the said state of *Iowa* is plaintiff and *Richard Roe* is defendant, on the part of the said *defendant*, and this you will in nowise omit, under penalty of the law.

Witness the hand of the said justice hereto affixed this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19368.¹

State of *Michigan*, } ss. In the Name of the People of the State of
Wayne County. } *Michigan*.
 To *William West* and *Samuel Short*, Greeting:

You are commanded to appear personally before me, the undersigned, a justice of the peace of the town of *Newberry*, in the said county, at my office, in the said town of *Newberry*, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon, to testify according to your knowledge, on behalf of said people, concerning the matter of a certain complaint made on oath before me, the said justice, by *John Doe* against *Richard Roe*, for (*stating complaint*). Hereof fail not.

Give under my hand at *Newberry*, in said county, the *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19369.²

In the *Justice's* Court for (*stating district*) District.

State of *Oregon*, } ss.
 County of *Linn*. }

In the Name of the State of *Oregon*, to *William West*:

You are hereby commanded to be and appear before the undersigned, at his office, at *Albany*, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon of said day, as a witness on the examination of a criminal charge against *Richard Roe*, defendant, on behalf of the state.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19370.³

The State of *Texas* to the Sheriff or any Constable of *Freestone* County, Greeting:

You are hereby commanded to summon *William West*, if to be

1. *Michigan*. — Comp. Laws (1897), § 1042.

See also list of statutes cited *supra*, note 1, p. 925.

2. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 1541.

See also list of statutes cited *supra*, note 1, p. 925.

3. *Texas*. — Code Crim. Proc. (1895), art. 513 *et seq.*

See also list of statutes cited *supra*, note 1, p. 925.

found in your county, to appear before me at a term of the *Justice Court* to be held at *Fairfield*, in precinct No. (*stating number*), on the *tenth* day of *May*, 1902, at *ten o'clock A. M.*, then and there to testify in behalf of the state (or *the defendant*) in a case now pending before me, wherein the state of *Texas* is plaintiff and *Richard Roe* is defendant, and that he continue his attendance from day to day, and from term to term, until duly discharged.

Herein fail not, but execute this writ and due return make, as the law directs.

Given under my hand this the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace,
Precinct No. (*stating number*), *Freestone County, Texas*.

Form No. 19371.¹

County of *Albermarle*, to wit:

To *Charles Hatch*, a Constable of the said County:

I command you in the name of the commonwealth of *Virginia* to summon *William West* to appear on the *tenth* day of *May*, 1902, at *ten o'clock A. M.*, at (*stating place*), in the said county, before me, or such other justice of the said county as may then be there, to give evidence in behalf of the *defendant* in a warrant then and there to be tried between the said commonwealth of *Virginia*, plaintiff, and *Richard Roe*, defendant.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, J. P.

(c) In Courts of Record.²

1. *Virginia*.—Code (1887), § 3352.
See also list of statutes cited *supra*, note 1, p. 925.

2. *Statutes* relating to subpoenas to secure the attendance of witnesses in criminal courts of record exist as follows:

Alabama.—Crim Code (1896), §§ 4606, 5280.

Arizona.—Pen. Code (1901), § 1113 *et seq.*

Arkansas.—Sand. & H. Dig. (1894), § 2112.

California.—Pen. Code (1901), § 1326 *et seq.*

Colorado.—Mills' Anno. Stat. (1891), § 1457.

Florida.—Rev. Stat. (1892), § 2859 *et seq.*

Georgia.—3 Code (1895), § 742.

Idaho.—Pen. Code (1901), § 5592 *et seq.*

Illinois.—Starr & C. Anno. Stat. (1896), c. 38, par. 611.

Iowa.—Code (1897), § 5492.

Kentucky.—Bullitt's Crim. Code (1895), § 150.

Massachusetts.—Rev. Laws (1902), c. 175, § 1.

Michigan.—Comp. Laws (1897), § 11900.

Minnesota.—Stat. (1894), §§ 5595, 6282.

Mississippi.—Anno. Code (1892), § 3449.

Missouri.—Rev. Stat. (1899), § 2837 *et seq.*

Montana.—Pen. Code (1895), § 2460.

Nebraska.—Comp. Stat. (1899), § 7184.

Nevada.—Comp. Laws (1900), § 4500 *et seq.*

North Dakota.—Rev. Codes (1895), § 8358.

Ohio.—Bates' Anno. Stat. (1897), § 7287.

Oklahoma.—Stat. (1893), § 5334 *et seq.*

Oregon.—Bellinger & C. Anno. Codes & Stat. (1902), § 1541 *et seq.*

Pennsylvania.—Bright. Pur. Dig. (1894), p. 545, § 1.

Rhode Island.—Gen. Laws (1896), c. 244, § 3 *et seq.*

South Carolina.—Crim. Code (1902), § 45.

South Dakota.—Stat. (1901), § 8795 *et seq.*

aa. IN GENERAL.

(aa) *Forthwith.*Form No. 19372.¹

The State of *Texas* to the Sheriff or any Constable of *Travis* County,
Greeting:

You are hereby commanded to summon *William West* to be and appear instanter before the Honorable *County* Court of *Travis* county, *Texas*, now in session at the court-house of said county in *Austin*, then and there to testify in behalf of the *state* in a criminal action now pending in said court, wherein the state of *Texas* is plaintiff and *Richard Roe* is defendant, and there remain from day to day, and from term to term, until discharged by due course of law.

Herein fail not, but of this writ make due return, showing how you have executed the same.

Witness my official signature this *first* day of *May*, 1902.²

Calvin Clark, Clerk³ *County* Court, *Travis* County.

(bb) *On a Future Day Named.*

aaa. IN GENERAL.

Form No. 19373.⁴

The State of *Alabama*, }
Jefferson County. } *Circuit* Court. No. 400.

To any Sheriff of the State of *Alabama*, Greeting:

You are hereby commanded to summon *William West* to appear at the present term of the *Circuit* Court of *Jefferson* county, now being held for said county, at (*stating place*), on *Monday*, the *tenth* day of *May*, 1902, and to continue from day to day, and from term to term thereafter, until legally discharged, to give evidence in behalf of the *state* in a certain prosecution now pending in said *Circuit* Court, wherein the state of *Alabama* is plaintiff and *Richard Roe* is defendant, and have you then this writ with your indorsement thereon.

Witness this *first* day of *May*, 1902.

Calvin Clark, Clerk.

Texas. — Code Crim. Proc. (1895), art. 513.

Utah. — Rev. Stat. (1898), § 5017 *et seq.*

Virginia. — Code (1887), § 3352.

Washington. — Ballinger's Ann o. Codes & Stat. (1897), § 5997.

West Virginia. — Code (1899), c. 130, § 25.

Wisconsin. — Stat. (1898), § 4053 *et seq.*

Wyoming. — Rev. Stat. (1887), § 3288 *et seq.*

United States. — Rev. Stat. (1878), § 877.

Requisites of Subpœna, Generally. — See *supra*, note 2, p. 909.

1. *Texas*. — Code Crim. Proc. (1895), art. 513 *et seq.*

See also list of statutes cited *supra*, note 2, p. 928.

2. **Date.** — The subpœna must be dated. Tex. Code Crim. Proc. (1895), art. 513.

3. **Signature.** — The subpœna shall be signed by the clerk issuing the same. Iowa Code (1897), § 5492; Tex. Code Crim. Proc. (1895), art. 513.

Seal. — In *Texas*, a seal is not necessary. Code Crim. Proc. (1895), art. 513.

4. *Alabama*. — Crim. Code (1896), § 5280 *et seq.*

See also list of statutes cited *supra*, note 2, p. 928.

Form No. 19374.¹

State of *Arkansas* to the Sheriff of *Boone* County, Greeting:

You are commanded to summon *William West* to appear in the *Boone Circuit Court*, at (*stating place*), on the *first* day of its *January* term, which will be the *sixteenth* day of *January*, 1902, to testify in behalf of the *state* in the case of the *state of Arkansas* against *Richard Roe*, defendant.

Witness my hand, and the seal of said court, this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19375.²

State of *Colorado*, }
County of *Arapahoe*. } ss.

The People of the State of *Colorado* to the Sheriff of *Arapahoe* County, Greeting:

We command you to summon *William West*, if he shall be found in your county, to be and appear before the *District Court* of said county, at *Denver*, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, to testify and the truth to speak in behalf of the *people* in a case now pending in said court, wherein *The People* is plaintiff and *Richard Roe* defendant. And have you then and there this writ, with a return thereon showing in what manner you have executed the same.

Witness, *Calvin Clark*, clerk of the *District Court* of said county, and the seal thereof, at *Denver*, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19376.³

The State of *Florida*, } ss. In the Name of the State of *Florida*.
County of *Duval*. }

To the Sheriff of said County:

You are hereby required to summon *William West* personally to be and appear before the judge of the *Circuit Court* for the *fourth* judicial circuit of the state of *Florida*, at the court-house in *Jacksonville*, on the *tenth* day of *May*, A. D. 1902, to testify in behalf of the *state* in a certain suit pending in said court, wherein the *state of Florida* is plaintiff and *Richard Roe* is defendant, and herein fail not, under penalty of the law.

Witness, the Honorable *Joseph Story*, judge, as also *Calvin Clark*, clerk, and the seal of said court, at the court-house in *Jacksonville, Florida*, this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Samuel Smith, Attorney.

1. *Arkansas*. — Sand. & H. Dig. (1894), § 2112.

See also list of statutes cited *supra*, note 2, p. 928.

2. *Colorado*. — Mills' Anno. Stat. (1891), § 1457.

See also list of statutes cited *supra*, note 2, p. 928.

3. *Florida*. — Rev. Stat. (1902), § 2859.

See also list of statutes cited *supra*, note 2, p. 928.

Form No. 19377.¹

State of *Illinois*, }
Macon County. } ss.

The People of the State of *Illinois* to the Sheriff of said County,
 Greeting:

We command you to summon *William West*, if he shall be found in your county, personally to be and appear before the *County Court* of *Macon county*, on the *tenth day of May, 1902*, at the court-house in the city of *Decatur*, in said county, to testify and the truth to speak in a certain case now pending and undetermined in said court, wherein *The People of the State of Illinois* is plaintiff and *Richard Roe* is defendant, on the part of the said *defendant*; and this he shall in no wise omit, under the penalty of the law; and have you then and there this writ.

Witness, *Calvin Clark*, clerk of our said court, and the seal thereof, at *Decatur*, this *first day of May, A. D. 1902*.

(SEAL)

Calvin Clark, Clerk.Form No. 19378.²

(Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 1547, No. 3.)

State of *Oregon*, }
County of Linn. } ss.

In the Name of the State of *Oregon*, to *William West*:

You are hereby commanded to appear before the *Circuit Court* for the county of *Linn*, at the court-house in *Albany*, in said county, on the *tenth day of May, A. D. 1902*, at *ten o'clock A. M.* on said day, as a witness in a criminal action prosecuted by the state of *Oregon* against *Richard Roe*, on behalf of the *state*.

Witness my hand, and the seal of said court, affixed at *Albany*, this *first day of May, 1902*.

(SEAL)

Calvin Clark, Clerk.

bbb. AGAINST NONRESIDENT OF COUNTY.

Form No. 19379.³

In the *District Court* of the *Third Judicial District* of the State of *Idaho*, in and for the county of *Boise*.

The People of the State of Idaho, plaintiff, }
 against } Subpœna for Nonresident
Richard Roe, defendant. } of County.

The People of the State of *Idaho* to *William West*:

You are commanded to appear before the *District Court* of the *third judicial district*, state of *Idaho*, in and for the county of *Boise*, at the court room of said court, at the court-house in the city of *Idaho City*, in said county, on the *tenth day of May, 1902*, at *ten o'clock*

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 38, par. 611.

See also list of statutes cited *supra*, note 2, p. 928.

2. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 1541 *et seq.*

See also list of statutes cited *supra*, note 2, p. 928.

3. *Idaho*. — Pen. Code (1901), § 5595. See also list of statutes cited *supra*, note 2, p. 928.

A. M., as witness in a criminal action prosecuted by the people of the state of *Idaho* against said *Richard Roe*, on the part of the *plaintiff*.

Given under my hand this *first* day of *May*, A. D. 1902.

Samuel Smith, District Attorney.

bb. BEFORE GRAND JURY.¹

(aa) *Forthwith*.

Form No. 19380.²

The State of *Arkansas* to the Sheriff of *Van Buren* County, Greeting:

You are hereby commanded to summon *William West* to appear before the grand jury, at the grand jury room in the court-house in the city of *Clinton*, in said county, forthwith, then and there to answer all such questions as shall be asked by said grand jury. And do you make due return of this writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19381.³

State of *Iowa*, *Des Moines* County, ss.

The State of *Iowa* to *William West*:

You are hereby commanded to appear before the grand jury of said county forthwith at (*stating place*), in said county, to give evidence in a case now before said grand jury, and this you shall in no wise omit, under penalty of the law.

Witness, *Preston Chew*, foreman of said jury, with the seal of the *District Court* affixed at *Burlington*, in said county, this *first* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk of said Court.

1. Statutes relating to subpoenas to secure the attendance of witnesses before the grand jury exist as follows:

Alabama. — Crim. Code (1896), § 5033.

Arkansas. — Sand. & H. Dig. (1894), § 2052.

Florida. — Rev. Stat. (1892), § 2807.

Idaho. — Pen. Code (1901), § 5502.

Iowa. — Code (1897), § 5262.

Kentucky. — Bullitt's Crim. Code (1895), § 105.

Michigan. — Comp. Laws (1897), § 11889.

Mississippi. — Anno. Code (1892), § 2382.

Missouri. — Rev. Stat. (1899), § 2518.

Montana. — Pen. Code (1895), § 2460.

Nebraska. — Comp. Stat. (1899), § 7125.

North Dakota. — Rev. Codes (1895), § 8358 *et seq.*

Ohio. — Bates' Anno. Stat. (1897), § 7198.

Oklahoma. — Stat. (1893), § 5334 *et seq.*

Oregon. — Bellinger & C. Anno. Codes & Stat. (1902), § 1541 *et seq.*

South Dakota. — Stat. (1901), § 8796.

Tennessee. — Code (1896), § 7049.

Texas. — Code Crim. Proc. (1895), art. 513.

Utah. — Rev. Stat. (1898), § 5017 *et seq.*

Vermont. — Stat. (1894), § 1251.

Virginia. — Code (1887), § 3352.

See also list of statutes cited *supra*, note 2, p. 928.

2. *Arkansas*. — Sand. & H. Dig. (1894), § 2052.

See also list of statutes cited *supra*, note 1, this page.

3. *Iowa*. — Code (1897), § 5262.

See also list of statutes cited *supra*, note 1, this page.

Form No. 19382.¹

The State of *Mississippi*.

Washington Circuit Court, June Term, 1902.

To the Sheriff of *Washington County*, Greeting:

We command you to summon *William West*, if to be found in your county, to personally be and appear before the grand jury of said county, at the court-house thereof, instanter, then and there to testify touching any matter upon which *he* may be legally examined.

Given under my hand, and seal of said court, and issued this the *first day of May, 1902.*

(SEAL)

Calvin Clark, Clerk of *Circuit Court*.

Form No. 19383.²

State of *Tennessee* to the Sheriff of *Hamilton County*, Greeting:

We command you to summon *William West* personally to appear before the judge of our *Circuit Court*,³ now sitting for the county of *Hamilton* at the court-house in *Chattanooga*, instanter, then and there to testify and the truth to say before the grand jury in behalf of the state against *Richard Roe*, *defendant*, in relation to (*stating substance of charge*), and this you shall in nowise omit, under the penalty prescribed by law.

Witness, *Calvin Clark*, clerk of our said court, at office, the *first Monday in June, A. D. 1902*, and the one hundred and *twenty-sixth* year of American independence.

(SEAL)

Calvin Clark, Clerk.

(bb) *On a Future Day Named.*

Form No. 19384.⁴

The State of *Florida* to *William West*, Greeting:

You are hereby commanded to be and appear before the judge of our *Circuit Court* for the *fourth* judicial circuit of the state of *Florida*, at the court-house in *Jacksonville*, on the *tenth* day of *May, 1902*, to testify and the truth to speak in behalf of the state of *Florida*, in a certain matter before the grand jury impaneled and sworn to inquire in and for the body of *Duval* county. And this you shall in no wise omit.

Witness, *Calvin Clark*, clerk of our said court, and the seal of our said court, at the court-house at *Jacksonville* aforesaid, this *first* day of *May, A. D. 1902.*

(SEAL)

Calvin Clark, Clerk.

1. *Mississippi*. — Anno. Code (1892), § 2382.

See also list of statutes cited *supra*, note 1, p. 932.

2. *Tennessee*. — Code (1896), § 7049.
See also list of statutes cited *supra*, note 1, p. 932.

3. *Command*. — In *State v. Butler*, 8 Yerg. (Tenn.) 83, it was held that a

subpœna which commanded the sheriff to summon the defendants to appear before the grand jury to give evidence was bad. "It should have required him to appear before the court to give evidence to the grand jury."

4. *Florida*. — Rev. Stat. (1902), § 2807.
See also list of statutes cited *supra*, note 1, p. 932.

Form No. 19385.¹

In the *District Court* of the *Fifth Judicial District* of the State of *Montana*, in and for the county of *Lewis and Clarke*. *June Term, 1902.*

The State of *Montana*, plaintiff, }
 against } Subpœna Before the Grand Jury.
Richard Roe, defendant.

The State of *Montana* to *William West*, Greeting:

You (*and each of you*) are hereby summoned to be and appear before the grand jury of the above named court, at the court-house in *Helena*, at *ten o'clock A. M.*, the *tenth day of May, A. D. 1902*, and from day to day thereafter until discharged by order of the court, then and there to testify generally on the part of the *state*. Hereof fail not, under penalty of the law.

Witness, the Hon. *Forrest Brown*, judge, the hand of the clerk, with the seal of said county affixed, this *first day of May, A. D. 1902.*

(SEAL)

Calvin Clark, Clerk.

Form No. 19386.²

(Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 1547, No. 2.)

Circuit Court of Linn County, Oregon.

In the Name of the State of *Oregon*, to *William West*:

You are hereby commanded to appear before the grand jury of the county of *Linn*, at the court-house in *Albany*, in said county, on the *tenth day of May, A. D. 1902*, at *ten o'clock A. M.*, as a witness before said grand jury.

Dated the *first day of May, 1902.*

Josiah Crosby, District Attorney.

Form No. 19387.³

(Vt. Stat. (1894), § 5417, No. 27.)

State of *Vermont*, }
Chittenden County, ss. }

To any Sheriff or Constable in the State, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded to summon *Samuel Short* and *William West*, of *Burlington*, in said county, to appear before the grand jury of the county of *Chittenden*, at the court-house in *Burlington*, within and for the county of *Chittenden*, on the *tenth day of May, A. D. 1902*, at *ten o'clock in the forenoon*, to give evidence of what they know relative to all matters of complaint pending and to be investigated before said grand jury.

And this neither of them may omit, as they will answer their default

1. *Montana*.—Pen. Code (1895) § 2460 *et seq.*

See also list of statutes cited *supra*, note 1, p. 932.

2. *Oregon*.—Bellinger & C. Anno. Codes & Stat. (1902), § 1541 *et seq.*

See also list of statutes cited *supra*, note 1, p. 932.

3. *Vermont*.—Stat. (1894), § 1251.

See also list of statutes cited *supra*, note 1, p. 932.

under the pains and penalties of the law in such case made and provided.

Fail not, but service and return make according to law.

Dated at *Burlington*, in said county, this *first* day of *May*, 1902.

Calvin Clark, Clerk.

Form No. 19388.¹

The Commonwealth of *Virginia* to the Sheriff of the County of *Albemarle*, Greeting:

We command you that you summon *William West* to appear before our *Circuit* Court for the county of *Albemarle*, at the court-house in *Charlottesville*, on the *tenth* day of *May*, 1902, to testify and the truth to say before the grand jury then to be in session (*Here state what the witness is to testify to*).

And this you shall in no wise omit, under the penalty provided by law. And have then there this writ.

Witness, *Calvin Clark*, clerk of our said *Circuit* Court the *first* day of *May*, 1902, in the *one hundred and twenty-sixth* year of the commonwealth.

Calvin Clark, Clerk.

cc. IN HABEAS CORPUS PROCEEDINGS.

Form No. 19389.²

The State of *Mississippi* to the Sheriff of *Washington* County, in said State:

You are hereby commanded to summon *William West*, if to be found in your county, to appear before the Hon. *Joseph Story*, judge of our *Circuit* Court, at the court-house in *Greenville*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.*, to testify for *John Doe*, on the habeas corpus trial of *John Doe*, who has made application for a writ of habeas corpus, and that he in no wise fail to so appear, under the penalties prescribed by the statute; and have you there then this writ.

Given under my hand and official seal, and issued this the *ninth* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark,

Clerk of *Circuit* Court, *Washington* County, *Miss*.

dd. IN PROCEEDINGS BEFORE UNITED STATES CIRCUIT COURT COMMISSIONERS.

Form No. 19390.

Subpœna for Witnesses.

United States of America, } ss.
District of *Idaho*.

The United States of America to *William West*, Greeting:

You are hereby commanded to be and appear before me, *Josiah Crosby*, a commissioner of the *Circuit* Court of the *United States* for

1. *Virginia*. — Code (1887), § 3352.

See also list of statutes cited *supra*, note 1, p. 932.

2. *Mississippi*. — Anno. Code (1892),

§ 2245.

See also list of statutes cited *supra*, note 1, p. 932.

the district of *Idaho*, at (*stating place*), in said district, forthwith, on the *tenth* day of *May*, 1902, at the hour of *ten A. M.*, to testify in behalf of the *United States* in the matter of a certain complaint of the *United States* against *Richard Roe*, and this you are in nowise to omit.

Witness, *Josiah Crosby*, commissioner as aforesaid, this *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*, and of our independence the one hundred and *twenty-sixth*.

Josiah Crosby,

Commissioner of the *Circuit Court* for the District of *Idaho*.

Form No. 19391.

United States of America,
Northern District of Ohio, } ss.
City of Cleveland.

The President of the *United States of America* to the Marshal of the *Northern District of Ohio*, Greeting:

You are hereby commanded to summon *William West*, if he be found in your bailiwick, to be and appear before me, a commissioner of the *Circuit Court of the United States* for the *northern* district of *Ohio*, aforesaid, at (*stating place*), in said district, on the *tenth* day of *May*, 1902, at *ten o'clock A. M.*, to give testimony and the truth to say in a cause pending before me, wherein the *United States* is complainant and *Richard Roe* is defendant, in behalf of the *United States*.

Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand this *first* day of *May*, A. D. 1902.

William Brown,

Commissioner of the *Circuit Court of the United States*
for the *Northern District of Ohio*.

b. In Chancery Courts.

(1) IN GENERAL.

Form No. 19392.

State of Michigan.
The *Circuit Court* for the County of *Wayne.* }
In Chancery.

In the Name of the People of the State of *Michigan*, to *William West*:

(SEAL) You are commanded that, laying aside all and singular your business and excuses, you be and appear before the *Circuit Court* for the county of *Wayne*, in *chancery*, at the court-room in the city of *Detroit*, in the said county, on *Monday*, the *tenth* day of *May*, A. D. 1902, at *ten o'clock* in the *forenoon*, to testify and give evidence in a certain cause now pending in said court, then and there to be heard, wherein *John Doe* is complainant and *Richard Roe* is defendant, on the part of the said *defendant*.

And for a failure so to attend you will be deemed guilty of a contempt of said court, and will be liable to pay all loss and damage

sustained thereby to the party aggrieved, together with the sum of *fifty* dollars in addition thereto.

Witness the Hon. *Joseph Story*, judge of said court, at the courtroom, in the city of *Detroit*, in said county, on the *first* day of *May*, A. D. 1902.

Calvin Clark, Register.

Jeremiah Mason, Solicitor for Defendant.

Form No. 19393.

The State of *Mississippi* to the Sheriff of *Washington* County:

You are hereby commanded to summon *William West*, if to be found in your county, to be and personally appear before the *Chancery* Court of the county of *Washington*, in said state, at the courthouse in the city of *Greenville, Mississippi*, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.*, then and there to testify on behalf of *complainant* (at whose instance this writ is issued), in a certain cause pending in said court wherein *John Doe* is complainant and *Richard Roe* is defendant; and that he in nowise fail to so appear, under the penalty prescribed by the statute; and have there then this writ.

Given under my hand, and the seal of said court, and issued this
the *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk of Chancery Court.

(2) IN PROCEEDINGS BEFORE MASTERS, COMMISSIONERS OR EXAMINERS.

Form No. 19394.1

The State of *Alabama*, } No. 400.
Jefferson County. } *Sixteenth* District, *Northwestern* Chancery
 Division of *Alabama*.

To any Sheriff of the State of *Alabama*, Greeting:

You are hereby commanded to summon *William West* personally to be and appear before the register in chancery for said district, at his office in the court-house of *Jefferson county, Alabama*, on *Monday, the tenth day of May, 1902*, and until discharged by due course of law, and to give evidence and the truth to speak in behalf of the defendant in a suit now pending in said court wherein *John Doe* is plaintiff and *Richard Roe* is defendant; and have you then this writ with your indorsement thereon.

Witness, this *first* day of *May*, 1902.

Calvin Clark, Register.

Form No. 19395.2

State of *Illinois*, }
County of *Macon*. } ss.

The People of the State of *Illinois* to *William West*:

You are hereby commanded to appear before me, at my office, No. 400 Main street, in the city of *Decatur*, in said county, on *Monday*,

1. *Alabama*. — Civ. Code (1896), § 735. 2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 22, par. 39; c. 90, par. 6.

the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to testify the truth in a suit wherein *John Doe* is complainant and *Richard Roe* is defendant; and this you shall in no wise omit, under the penalty of the law.

Given under my hand this *first* day of *May*, A. D. 1902.

Calvin Clark,

Master in Chancery of the *Circuit* Court of *Macon* County.

Form No. 19396.¹

State of *Michigan*, }
County of *Wayne*. } ss.

In the Name of the People of the State of *Michigan*:

You are hereby commanded and required to appear before me, at (*stating place*), in the city of *Detroit*, on *Monday*, the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the forenoon of the same day, to give evidence in a certain cause now pending in the *Circuit* Court for the county of *Wayne*, in *chancery*, wherein *John Doe* is complainant and *Richard Roe* is defendant, on the part of the *defendant*. Hereof fail not, at your peril.

Given under my hand this *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark,

Circuit Court Commissioner, *Wayne* County, *Michigan*.

Form No. 19397.²

The State of *Mississippi* to the Sheriff of *Washington* County:

You are hereby commanded to summon *William West*, if to be found in your county, to be and personally appear before the undersigned, commissioner of the *Chancery* Court of the county of *Washington*, in said state, at (*stating place*), in *Greenville*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to testify on behalf of *defendant* (at whose instance this writ is issued), in a certain cause pending in said court wherein *John Doe* is complainant and *Richard Roe* is defendant; and that he in nowise fail to so appear, under the penalty prescribed by the statute. And have there then this writ.

Given under my hand, and the seal of said court, and issued this the *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Commissioner.

Form No. 19398.³

New Jersey, ss.

(SEAL) The State of *New Jersey* to *William West*, Greeting:

For certain reasons offered before us in our Court of *Chancery*, we command you that you personally be and appear before *Josiah Crosby*, Esquire, one of the masters and examiners in our Court of *Chancery*, at (*stating place*), in the county of *Camden*, on *Monday*, the *tenth* day of *May*, at *ten* o'clock in the forenoon, to give evidence in a

1. *Michigan*. — Comp. Laws (1897),
§ 1079.

2. *Mississippi*. — Anno. Code (1892),
§ 3450.

3. *New Jersey*. — Gen. Stat. (1895), p.
397, § 128 et seq.

certain cause now depending in our said Court of Chancery wherein *John Doe* is complainant and *Richard Roe* is defendant. Hereof fail not, under the penalty of *two hundred* dollars.

Witness, *Joseph Story*, Esquire, our chancellor at *Trenton*, the *first* day of *May*, in the year of our Lord nineteen hundred and *two*.

Calvin Clark, Clerk.

Jeremiah Mason, Solicitor.

Form No. 19399.

State of *Tennessee* to the Sheriff or any Constable of *Hamilton* County, Greeting:

You are hereby commanded to summon *William West* personally to appear before the clerk and master of the *Chancery* Court, at his office in *Chattanooga*, on the *tenth* day of *May*, 1902, to testify and the truth to speak in behalf of the *defendant* in a certain matter of controversy in said court wherein *John Doe* is complainant and *Richard Roe* is defendant; and this he shall in nowise omit, under the penalty of *one hundred and twenty-five* dollars. Herein fail not, and have you then and there this writ.

Witness, *Calvin Clark*, clerk and master of our said *Chancery* Court, at office, this the *first* Monday in *May*, 1902.

Calvin Clark, C. & M.

Form No. 19400.¹

The Commonwealth of *Virginia* to the Sheriff of the County of *Albemarle*, Greeting:

You are hereby commanded to summon *William West* personally to appear before the undersigned, one of the commissioners in chancery of the *Circuit* Court of the county of *Albemarle*, at his office, at the court-house of said county, on the *tenth* day of *May* next, to testify and the truth to say in behalf of the *defendant* in a certain matter of (*stating matter*) referred to the said commissioner for (*stating why referrea*) by a decree of the said court in a suit in chancery therein pending between *John Doe*, complainant, and *Richard Roe*, defendant. And this you shall in nowise omit, under the penalty provided by law. And have then there this writ.

Witness, *Calvin Clark*, commissioner of our said court, at the court-house of said county, the *first* day of *May*, 1902, and in the *one hundred and twenty-sixth* year of the commonwealth.

Calvin Clark, Commissioner.

e. In Probate or Surrogate's Courts.¹

1. *Virginia*. — Code (1887), § 3352.

2. Statutes relating to subpoenas in probate or surrogate's courts exist as follows:

Alabama. — Civ. Code (1896), § 3365.

Colorado. — Mills' Anno. Stat. (1891), § 1096.

Idaho. — Code Civ. Proc. (1901), § 3690.

Kansas. — Gen. Stat. (1897), c. 95, § 335.

Massachusetts. — Rev. Laws (1902), c. 175, § 1.

Michigan. — Comp. Laws (1897), § 653.

Minnesota. — Stat. (1894), § 4726.

Nebraska. — Comp. Stat. (1899), § 5924 et seq.

(1) IN GENERAL.

Form No. 19401.¹

The State of *Alabama*, }
Jefferson County. } *Probate* Court.

To any Sheriff of the State of *Alabama*, Greeting:

You are hereby commanded without delay to summon *William West* personally to be and appear before me, the judge of the *Probate* Court of *Jefferson* county, at my office, on the *tenth* day of *May*, 1902, then and there to give evidence in a certain matter pending wherein (*Here state the nature of the proceedings and the parties thereto*), and have you then and there this writ, with your indorsement thereon, in what manner you have executed the same.

Witness, *Robert Grant*, judge of the *Probate* Court for *Jefferson* county, this *first* day of *May*, 1902.

Robert Grant, Judge of *Probate*.

Form No. 19402.²

In the *Superior* Court of the County of *Alameda*, State of *California*.
Probate.

In the matter of the estate of }
Richard Roe, deceased. } *Subpœna*.

The People of the State of *California* send Greeting to *William West*:

We command you that, all and singular business and excuses being laid aside, you appear and attend before our *Superior* Court of the county of *Alameda*, state of *California*, at the court-room thereof, in the city of *Oakland*, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock *A. M.*, then and there to testify in the above entitled action now pending in said *Superior* Court on the part of the (*stating for whom witness is required*), and disobedience will be punished as a contempt by the said court, and you will also forfeit to the party aggrieved the sum of *one hundred* dollars, and all damages which may be sustained by your failure to attend.

Witness, Hon. *Robert Grant*, judge of the *Superior* Court of the county of *Alameda*, state of *California*, at the court-room thereof, in said county, this *tenth* day of *May*, 1902.

Attest my hand, and seal of said *Superior* Court, the day and year last above written.

(SEAL)

Calvin Clark, Clerk.

Form No. 19403.³

State of *Colorado*, }
Arapahoe County. } ss.

The People of the State of *Colorado* to the Sheriff of said County,
 Greeting:

New York. — Code Civ. Proc., § 2481.

Ohio. — Bates' Anno. Stat. (1897), §

5246.

Oklahoma. — Stat. (1893), § 4214.

Rhode Island. — Gen. Laws (1896), c.

209, § 14.

South Carolina. — Civ. Code (1902),

§§ 2861, 2862.

Wyoming. — Rev. Stat. (1887), § 2594.

1. *Alabama*. — Civ. Code (1896), § 3365.

See also list of statutes cited *supra*,
 note 2, p. 939.

2. *California*. — Code Civ. Proc.
 (1901), § 1986.

See also list of statutes cited *supra*,
 note 2, p. 939.

3. *Colorado*. — Mills' Anno. Stat.
 (1891), § 1096.

See also list of statutes cited *supra*,
 note 2, p. 939.

We command you to summon *William West* to appear before the County Court of said county, at *Denver*, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon, to testify and the truth to speak in behalf of the *plaintiff*, in a cause now pending in said court wherein *John Doe*, claimant, is plaintiff, and *Richard Roe*, executor of the last will and testament of *Samuel Short*, deceased, is defendant.

And have you then and there this writ, with a return thereon showing in what manner you have executed the same.

Witness, *Robert Grant*, judge of said court, and the seal thereof, at his office in *Denver*, in said *Arapahoe* county, this *first* day of *May*, 1902.

(SEAL)

Robert Grant, Judge of the County Court.

Form No. 19404.¹

In the *Probate* Court of *Boise* County, State of *Idaho*.

John Doe, plaintiff,

against

Richard Roe, defendant.

} Subpœna — Civil.

The State of *Idaho* sends Greeting to *William West*:

We command you that, all and singular business and excuses being set aside, you appear and attend before the said *Probate* Court in and for the county of *Boise*, state of *Idaho*, at a term of said court to be held at the court room of said court at *Idaho City*, in said county of *Boise*, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M., then and there to testify in the above entitled cause, on behalf of the *defendant*.

Witness my hand, and the seal of said court, the *first* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19405.²

State of *Michigan*, } ss. *Probate* Court for the County of *Wayne*.
County of *Wayne*.

In the Name of the People of the State of *Michigan*, to *William West*:

You are commanded that, laying aside all and singular your business and excuses, you be and appear before the *Probate* Court for the county of *Wayne*, at the probate office in the city of *Detroit*, in said county, on *Monday*, the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., then and there to give evidence in a certain matter now pending in said *Probate* Court, being (*Here state matter in which witness is required*), on the part of petitioner (or *claimant* or *contestant*).

Hereof fail not, on pain of the penalty that will fall thereon.

Witness my hand, and the seal of said *Probate* Court, at the said city of *Detroit*, on the *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

(SEAL)

Forrest Brown, Judge of *Probate*.

1. *Idaho*. — Code Civ. Proc. (1901), § 3690.

See also list of statutes cited *supra*, note 2, p. 939.

2. *Michigan*. — Comp. Laws (1897), § 653.

See also list of statutes cited *supra*, note 2, p. 939.

Form No. 19406.¹

State of *Minnesota*, }
County of *Hennepin*. } ss. In *Probate Court*.

The State of *Minnesota* to *William West*, Greeting:

You are hereby required to appear before the above named court in and for said county, at the office of the judge of *probate* in *Minneapolis*, on the *tenth* day of *May*, at *ten* o'clock in the forenoon of said day, to give evidence and testify in the matter of (*stating matter before the court*), on the part of (*stating for whom witness is required to attend*).

Witness, the Honorable *Forrest Brown*, judge of *probate* in and for the county of *Hennepin*, at *Minneapolis*, this *first* day of *May*, A. D. 1902.

Calvin Clark, Clerk.

Form No. 19407.²

County of *Suffolk*, ss.

The People of the State of *New York* to *William West* and *John Doe*:

We command you that, all and singular business and excuses being laid aside, you and each of you appear in your proper person before the surrogate of the county of *Suffolk*, at his office in *Riverhead*, on the *tenth* day of *May*, at *ten* o'clock in the forenoon of the same day, to testify all and singular what you may know in relation to (*Here state the matter before the court*). Hereof fail not, under the penalty upon each of you of *two hundred and fifty* dollars.

Witness, *Thomas Brown*, surrogate of our said county, at his office aforesaid, the *first* day of *May*, one thousand nine hundred and *two*.

Thomas Brown, Surrogate.

(2) TO PROVE EXECUTION OF WILL.

Form No. 19408.³

State of *Colorado*, }
Arapahoe County. } ss.

The People of the State of *Colorado* to the Sheriff of said County, Greeting:

You are hereby commanded to summon *William West*, if to be found in your county, to be and appear before the County Court of *Arapahoe* county, on the *second Monday* in the month of *May next*, at *ten* o'clock A. M. of said day, to testify the truth in a certain matter depending before the said court touching the proof, execution and validity of the last will and testament of *Richard Roe*, late of said county, deceased, and such other matters as shall then and there be required of him relating to the same; and this you are not to omit, under penalty, and then and there return this writ.

Witness, *Robert Grant*, judge of said court, and the seal thereof, at *Denver*, this *tenth* day of *May*, A. D. 1902.

(SEAL)

Robert Grant, Judge of the County Court.

1. *Minnesota*. — Stat. (1894), § 4726.

See also list of statutes cited *supra*,

note 2, p. 939.

2. *New York*. — Code Civ. Proc., §

2481.

See also list of statutes cited *supra*,
note 2, p. 939.

3. *Colorado*. — Mills' Anno. Stat.
(1891), § 1096.

See also list of statutes cited *supra*,
note 2, p. 939.

d. In Coroner's Inquests.¹

(1) FORTHWITH.

Form No. 19409.²

State of *New Jersey*, } ss.
Union County.

Samuel Smith, one of the Coroners of the County of *Union*, to *John*
 (SEAL) *Doe*:

You are hereby commanded that, laying aside all excuses, you personally be and appear forthwith before me at (*specifying place*), in said county, to testify and declare your knowledge concerning the death of *William West*, who there lies dead; and this you are not to omit, under the penalty of *one hundred* dollars.

Given under my hand and seal this *tenth* day of *May*, 1902.

Samuel Smith, Coroner.

(2) ON A FUTURE DAY NAMED.

Form No. 19410.³

State of *Colorado*, } ss.
 County of *Ouray*.

The People of the State of *Colorado* to the Sheriff or any Constable of said County, Greeting:

You are hereby commanded to summon forthwith (*Here name the witnesses to be summoned*), to appear before a coroner's inquest, to be holden at (*stating place*), in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, to testify and the truth to speak in behalf of and concerning the matter of the death of *William West*.

And have you then and there this writ, with a return thereon showing in what manner you have executed the same.

Witness, *Samuel Smith*, coroner of said county, at *Ouray*, this *second* day of *May*, A. D. 1902.

Samuel Smith, Coroner of *Ouray* County.

1. Statutes relating to the attendance of witnesses at coroner's inquests exist as follows:

Alabama. — Crim. Code (1896), §§ 4926, 4927.

Arizona. — Pen. Code (1901), § 1260.

Arkansas. — Sand. & H. Dig. (1894), §§ 755, 2930 *et seq.*

California. — Pen. Code (1901), § 1512.

Colorado. — Mills' Anno. Stat. (1891), § 872.

Connecticut. — Gen. Stat. (1888), § 2016.

Delaware. — Rev. Stat. (1893), p. 262, c. 33, § 3.

Idaho. — Pen. Code (1901), § 5773.

Indiana. — Horner's Stat. (1901), § 5879.

Iowa. — Code (1897), § 520.

Maine. — Rev. Stat. (1883), c. 139, § 4.

Michigan. — Comp. Laws (1897), § 11821.

Minnesota. — Stat. (1894), § 847.

Mississippi. — Anno. Code (1892), § 818.

Nebraska. — Comp. Stat. (1899), § 2203.

New Hampshire. — Pub. Stat. & Sess. L. (1901), c. 262, § 8.

Ohio. — Bates' Anno. Stat. (1897), § 1221.

Texas. — Code Crim. Proc. (1895), art. 513.

And see list of statutes cited *supra*, note 2, p. 909.

2. *New Jersey*. — Gen. Stat. (1895), p. 899, § 12.

See also list of statutes cited *supra*, note 1, this page.

3. *Colorado*. — Mills' Anno. Stat. (1891), § 872.

See also list of statutes cited *supra*, note 1, this page.

Form No. 19411.¹

State of *Minnesota*,)
Jackson County.) ss.

The People of the State of *Minnesota* to the Sheriff or any Constable in said County, Greeting:

We command you to summon *Samuel Short* to appear before a coroner's inquest, to be held at (*stating place*), in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, to testify and the truth to speak in behalf of and concerning the matter of the death of *William West*.

And have you then and there this writ, with a return thereon showing in what manner you have executed the same.

Witness, *Samuel Smith*, coroner of said county, at *Jackson*, this *fourth* day of *May*, A. D. 1902.

Samuel Smith, Coroner of *Jackson County*.

Form No. 19412.²

State of *Montana*,)
County of *Yellowstone*.) ss.

The People of the State of *Montana* send Greeting to *John Doe*:

We command you that, all and singular business and excuses being laid aside, you be and appear before the undersigned, coroner of the county of *Yellowstone*, at (*stating place*), in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock *A. M.*, then and there to testify and give evidence in a certain inquisition now pending before said coroner, and disobedience will be punished as a contempt by said coroner.

Given under my hand this *fourth* day of *May*, A. D. 1902.

Samuel Smith, Coroner of the County of *Yellowstone*.

e. In Proceedings Before Arbitrators.

Form No. 19413.³

(Bright. Pur. Dig. Pa. (1894), p. 132, § 52.)

Lehigh County, ss.

The Commonwealth of *Pennsylvania* to *William West*, Greeting:

We command you that, laying all business and excuses aside, you be and appear in your proper person before *Samuel Short*, *Samuel Smith* and *Josiah Crosby*, arbitrators (or referees, as the case may be) appointed to hear and determine all the matters in variance in a certain action wherein *John Doe* is plaintiff and *Richard Roe* is defendant, at the house of *Samuel Short*, in *Allentown*, in said county, on the *tenth* day of *May next*, then and there to testify all and singular those things which you shall know, on behalf of the plaintiff

1. *Minnesota*. — Stat. (1894), § 847.

See also list of statutes cited *supra*, note 1, p. 943.

2. *Montana*. — Pen. Code (1895), § 2792.

See also list of statutes cited *supra*, note 1, p. 943.

3. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 131, § 51.

(or *defendant*, as the case may be). Hereof fail not, under penalty of *three hundred dollars*.

Witness my hand this *first* day of *May*, A. D. 1902.

Samuel Short,

one of the arbitrators (or as the case may be).

f. In Proceedings Before Board of Commissioners for Insane.

Form No. 19414.¹

State of *North Dakota*,
Board Commissioners of Insanity, } ss. At the Office of the Judge
County of *McIntosh*. } of the *County Court*.

The State of *North Dakota* to *William West*:

You are hereby commanded to be and appear before the board of commissioners of insanity within and for the county of *McIntosh*, state of *North Dakota*, at the office of the judge of the *County Court*, in the county court-house in the city of *Ashley*, in the county of *McIntosh*, in said state, on the *tenth* day of *May*, A. D. 1902, at ten o'clock in the *forenoon* of said day, then and there to testify generally to such matters and things as you shall have knowledge of concerning the alleged insanity of *John Doe*. And hereof fail not, under penalty of the law.

Witness, the Hon. *Joseph Story*, judge of the *County Court*, and chairman of the board of commissioners of insanity, at the city of *Ashley*, in said county, this *first* day of *May*, A. D. 1902.

Joseph Story,

Judge of the *County Court* and Chairman of the
Board of Commissioners of Insanity.

g. In Proceedings Before Board of Supervisors.

Form No. 19415.²

State of *Iowa*,
Des Moines County. } ss.

The Board of Supervisors to *William West*:

You are hereby commanded to appear before the board of supervisors of said county forthwith, at the court-house in *Burlington*, on the *tenth* day of *May*, 1902, to give evidence in the case of *John Doe* wherein he has made application to the board for abatement of taxes; and this you shall in nowise omit, under the penalty of the law.

Witness, *Samuel Short*, chairman of board of supervisors, *Des Moines* county, *Iowa*, this *first* day of *May*, 1902.

h. In Proceedings Before Legislative Committee.

Form No. 19416.³

(Bates' Anno. Stat. Ohio (1897), § 51.)

The State of *Ohio*, *Franklin County*, ss.

1. *North Dakota*. — Rev. Codes (1895), § 1516.

2. *Iowa*. — Code (1897), § 4669.

17 E. of F. P. — 60.

3. *Ohio*. — Bates' Anno. Stat. (1897), § 51.

To the Sergeant-at-arms of the Senate (or *House of Representatives*) of the State of *Ohio* (or *the Sheriff of the County of Franklin*, as the case may be):

By authority of the (*general assembly, senate or house of representatives*, as the case may be), of the state of *Ohio*, you are hereby commanded to summon *William West*, of *Columbus*, in said county, to be and appear before the (*naming committee*) of the said (*general assembly, senate or house of representatives*, as the case may be), at the capitol in *Columbus*, on the *tenth* day of *January*, A. D. 1902, at the hour of *ten* in the *forenoon*; then and there to testify touching matters of inquiry committed to said committee, and not to depart without leave of said committee. Of this writ make due return, with your proceedings in this behalf indorsed thereon.

Witness my hand this *first* day of *January*, A. D. 1902.

Samuel Smith, Chairman.

i. In Proceedings Before Notary Public for the Taking of Depositions.

Form No. 19417.¹

State of *Nebraska*, }
County of *Boone*. } ss.
To *William West*:

Notice of taking your deposition having been served according to law and deposited with me, you are hereby commanded to appear before me, *Josiah Crosby*, a notary public duly appointed in and for said county and state, at (*stating place*), in *Albion*, in said *Boone* county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, standard time, to give evidence to be used in a cause pending in the *District Court of Boone* county, wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the said *defendant*.

Return of this subpoena to be made on or before the *ninth* day of *May*, A. D. 1902.

Witness my hand and notarial seal this *first* day of *May*, A. D. 1902.
(SEAL) *Josiah Crosby*, Notary Public.

Form No. 19418.²

The State of *Ohio*, }
Summit County, ss. }
To *William West*:

You are hereby commanded to appear before me, the undersigned, a notary public in and for the county of *Summit* and state of *Ohio*, at my office, No. 10 *Main* street, in the city of *Akron*, county of *Summit* and state of *Ohio*, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., and then and there to give evidence and the truth to say in a certain action wherein *John Doe* is plaintiff and *Richard Roe* is defendant, on the part of the *plaintiff*.

This you no wise omit, under the penalty of the law.

Given under my hand and official seal this *first* day of *May*, A. D. 1902.

(SEAL)

Josiah Crosby, Notary Public.

1. *Nebraska*. — Comp. Stat. (1897), § 3854. 2. *Ohio*. — Bates' Anno. Stat. (1897), § 119.

2. Duces Tecum.¹Form No. 19419.²*Georgia*—*Bibb County*.To *William West*, Greeting:

You are hereby required to be and appear at the next *Superior Court*, to be held in and for said county on the *third* day of *May*, A. D. 1902, at *ten o'clock A. M.*, and to bring with you into said court a certain (*Here describe the deed, writing or other document sought*), to be used as evidence by *John Doe* in a certain case pending in said court between said *John Doe*, plaintiff, and *Richard Roe*, defendant. Herein fail not, under penalty of the law.

Witness, the Hon. *Jeremiah Mason*, judge of said court, this *twentieth* day of *April*, 1902.

Calvin Clark, Clerk.

Form No. 19420.³

(Idaho Pen. Code (1901), § 5593.)

(Commencing as in Form No. 19361, and continuing down to *.)

And you are required also to bring with you the following:
(describing intelligibly the books, papers or documents required).

(Concluding as in Form No. 19361.)

IV. SERVICE OF SUBPÆNA.

1. Affidavit of Service.

a. By Reading.

1. Statutes relating to subpoenas duces tecum exist as follows:

California.—Pen. Code (1901), § 1327.*Georgia*.—2 Code (1895), § 5255.*Idaho*.—Code Civ. Proc. (1901), § 4454; Pen. Code (1901), § 5593.*Iowa*.—Code (1897), § 4659.*Kansas*.—Gen. Stat. (1897), c. 95, § 336.*Kentucky*.—Bullitt's Civ. Code (1895), § 528.*Montana*.—Code Civ. Proc. (1895), § 3300; Pen. Code (1895), § 2461.*Nebraska*.—Comp. Stat. (1899), § 5924.*Nevada*.—Comp. Laws (1900), §§ 3483, 4506.*New York*.—Code Civ. Proc., § 867 et seq.*North Carolina*.—Code (1883), § 1372.*North Dakota*.—Rev. Codes (1895), § 5655.*Ohio*.—Bates' Anno. Stat. (1897), § 5247.*Oklahoma*.—Stat. (1893), §§ 4214, 5339.*Oregon*.—Bellinger & C. Anno. Codes & Stat. (1902), § 801.*Pennsylvania*.—Bright. Pur. Dig. (1894), p. 813, § 1.*South Dakota*.—Stat. (1901), §§ 6493, 8801.*Utah*.—Rev. Stat. (1898), §§ 3417, 5017.*Virginia*.—Code (1887), § 3353 et seq.*Washington*.—Ballinger's Anno. Codes & Stat. (1897), § 5996.*West Virginia*.—Code (1899), c. 130, § 26.

Books or Documents Specified.—The books or documents required must be specified with reasonable certainty. *Ex p. Jaynes*, 70 Cal. 638; *Ex p. Calhoun*, 87 Ga. 359; *Murray v. Louisiana*, 163 U. S. 101; *U. S. v. Babcock*, 3 Dill. (U. S.) 566; *U. S. v. Hunter*, 15 Fed. Rep. 712.

2.—*Georgia*.—2 Code (1895), § 5255. See, *supra*, note 1, this page.3.—*Idaho*.—Pen. Code (1901), § 5592 et seq.See, *supra*, note 1, this page.

Form No. 19421.

State of *Illinois*, }
Macon County. } ss.

Samuel Smith, being duly sworn, doth depose and say that he served the within subpœna at said county by reading the same to the within named *William West* on the *tenth* day of *May*, 1902.

Samuel Smith.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1902.

Calvin Clark, Clerk.

Form No. 19422.¹

The State of *Washington*, }
County of Spokane. } ss.

I, *Charles Hatch*, being first duly sworn according to law, depose and say that I am a citizen of the state of *Washington*, over the age of *eighteen* years, and a suitable person to make service of the within subpœna; that I served the same on the within named *William West* by exhibiting and reading the same to *William West*, the person named therein, in said county and state, on the *fourth* day of *May*, 1902.

Charles Hatch.

Subscribed and sworn to before me this *fourth* day of *May*, 1902.

Josiah Crosby,

Notary Public for *Washington*, residing at *Spokane*.

b. By Reading or Showing the Original and Delivering a Copy.

Form No. 19423.²

State of *Idaho*, }
County of Boise. } ss.

Charles Hatch, of said county, being duly sworn, says that he served the within subpœna by showing the said within original to each of the following persons named therein and delivered a true copy thereof to each of the said persons, personally, on the *fourth* day of *May*, A. D. 1902, at the said county of *Boise*, to wit, *Samuel Short*, who did not demand fees, and *William West*, who demanded and received his fees, *four* dollars.

Charles Hatch.

Subscribed and sworn to before me this *fourth* day of *May*, 1902.

Charles Sweet, Deputy Clerk.

Form No. 19424.³

State of *Minnesota*, }
County of Hennepin. } ss.

Samuel Smith, being duly sworn, says that at *Minneapolis*, in the county of *Hennepin*, state of *Minnesota*, on the *tenth* day of *May*, A. D. 1902, he served the within subpœna upon *William West*, therein named, by then and there reading the same to him, and exhibiting to

1. *Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 5998.

2. *Idaho*. — Code Civ. Proc. (1901), § 4456.

3. *Minnesota*. — Stat. (1894), § 5654.

him the seal of the court thereto attached, and the signature of said clerk of said court thereto, and by handing to and leaving with him a true copy thereof; that at the same time and place he paid to said *William West* the sum of *two* dollars for his witness fees and traveling expenses for one day's attendance upon said court.

Samuel Smith.

Subscribed and sworn to before me this *tenth* day of *May*, A. D. 1902.

(SEAL)

Josiah Crosby, Notary Public, *Minn.*

Form No. 19425.

Camden County, ss.

Samuel Smith, being duly sworn on his oath, says that on the *tenth* day of *May*, nineteen hundred and *two*, he served the within subpoena upon the within named *William West* by showing him the original thereof, and delivering to him a subpoena ticket, and at the same time paid to said *William West* the sum of (*stating amount paid*) as a witness fee thereon.

Samuel Smith.

Subscribed and sworn to before me this *tenth* day of *May*, 1902.

Josiah Crosby, Notary Public.

2. Return of Officer.

a. Served by Reading.

Form No. 19426.

Fairfield County, ss.

Bridgeport, Conn., May 4, 1902.

Then, and by virtue hereof, I read the within subpoena in the presence and hearing of each of the within named witnesses, *William West* and *Samuel Short*, and paid (or *tendered*) each the fees allowed by law.

Attest: *Charles Hatch*, Deputy Sheriff.

Witness fees.....	\$1 20
Service.....	24
Travel.....	1 00
Indorsement.....	24

\$2 68

Form No. 19427.

State of *Illinois*, }
Macon County. } ss.

Personally served the within subpoena by reading the same to the within named *William West*, this *tenth* day of *May*, A. D. 1902.

Charles Hatch, Sheriff.

Fees:

Service.....	\$ _____
Mileage.....	_____
Return.....	_____
Total.....	\$ _____

Form No. 19428.¹

Officer's Return.

Came to hand the *tenth* day of *May*, 1902, and executed the *eleventh* day of *May*, 1902, by reading the within subpœna in the presence and hearing of *William West*, the within named witness.

Charles Brown, Sheriff, *Travis County, Texas*.

By *Charles Hatch*, Deputy.

Fees:

Summoning 1 witness... \$ _____

Mileage, 3 miles..... _____

Total..... \$ _____

Form No. 19429.²

State of *Washington*, }
County of *Spokane*. } ss.

I hereby certify that I received the within subpœna on the *tenth* day of *May*, A. D. 1902, and personally served the same on *Samuel Short* and *William West*, therein named, by exhibiting and reading the same to each of them, in *Spokane* county, *Washington*, on the *eleventh* day of *May*, A. D. 1902.

And I further certify that after diligent search I have been unable to find *John Jones*, therein named.

Dated at *Spokane, Washington*, this *eleventh* day of *May*, A. D. 1902.

Charles Brown, Sheriff.

By *Charles Hatch*, Deputy.

Sheriff's fees:

Serving 2 names at \$0 40.... \$0 80

Mileage, 8 miles at 10.... 80

Total \$1 60

b. Served by Showing Original and Informing Witness of Contents.

Form No. 19430.³

Sheriff's Office.

State of *Idaho*, }
County of *Boise*. } ss.

I hereby certify that I served the within subpœna on the *tenth* day of *May*, A. D. 1902, on *William West*, being the witness named in said subpœna, at the county of *Boise*, by showing the original to said witness personally, and informing him of the contents thereof

Dated *May 10*, A. D. 1902.

Charles Hatch, Sheriff of the County of *Boise*.

By *Leslie Curtis*, Deputy Sheriff.

1. *Texas*. — Rev. Stat. (1895), art. 2266.

2. *Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 5998.

3. *Idaho*. — Pen. Code (1901), § 5594.

c. Served by Reading or Showing Original and Delivering a Copy.

Form No. 19431.¹

State of *Idaho*, }
 County of *Boise*. } ss.

I hereby certify that I served the within subpœna by showing the said within original to each of the following persons named therein, and delivered a true copy thereof to each of the said persons personally, on the *tenth* day of *May*, 1902, at *Idaho City*, in the said county of *Boise*, in the state of *Idaho*, to wit:

William West, who did demand fees and received his fees, \$1.00, and *Samuel Short*, who did not demand fees.

Dated *May 10*, 1902.

Charles Hatch, Sheriff of the County of *Boise*.

Form No. 19432.²

State of *Iowa*, }
Des Moines County. } ss. Officer's Return of Service of Subpœna.

I do hereby certify that on the *tenth* day of *May*, 1902, at the city of *Burlington*, in said county, I personally served the within subpœna on *William West*, the witness therein named, by then and there delivering to said *William West* a true copy of said subpœna, and by showing him personally the said original subpœna.

Dated *May 10*, 1902.

Wilbur Russell, Constable.

Fees:

Service..... \$_____

Mileage..... \$_____

Total..... \$_____

Form No. 19433.³

State of *Michigan*, }
 County of *Wayne*. } ss.

I hereby certify and return that on the *tenth* day of *May*, A. D. 1902, at *Detroit*, in said county, I served the within subpœna on *William West*, the witness named therein, personally, by then and there showing to the said *William West* the said subpœna with the seal impressed thereon, and delivering to him a true copy thereof, and paying to him at the same time and place aforesaid the sum of *two* dollars and *fifty* cents for his fees for traveling to the court named in said subpœna and for his attendance thereat.

My fees, \$1.00.

Charles Hatch, Deputy Sheriff.

Form No. 19434.⁴

State of *Minnesota*, }
 County of *Hennepin*. } ss.

In *District Court*, *Hennepin* County.

I hereby certify and return that I served the within subpœna on the within named *William West* by reading said subpœna to him and

1. *Idaho*. — Code Civ. Proc. (1901), § 4456.

2. *Iowa*. — Code (1897), § 5493.

3. *Michigan*. — Comp. Laws (1897), § 10148.

4. *Minnesota*. — Stat. (1894), § 5653.

delivering to him a true copy thereof, at *Minneapolis*, in the county and state aforesaid, on this *tenth* day of *May*, 1902.

Charles Brown, Sheriff of said County.
By *Charles Hatch*, Deputy Sheriff.

Sheriff's fees:

Service..... \$——
Mileage..... ———
Total..... \$——

Form No. 19435.¹

State of *Oregon*, }
County of *Linn*. } ss.

I hereby certify that I served the within subpœna within said state and county, on the *tenth* day of *May*, 1902, on the within named *William West*, by reading and showing the original and delivering a true copy thereof to him.

Charles Brown, Sheriff of *Linn* County.
By *Charles Hatch*, Deputy.

1. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), §§ 804, 806.
952 Volume 17.

SUBPÆNA DUCES TECUM.

See the title SUBPÆNA, ante, p. 897.

SUBPÆNA IN EQUITY.

See the title SUMMONS.

SUBROGATION.

BY HAROLD N. ELDRIDGE.

- I. ACTION BY EXECUTOR OF PERSON PAYING OFF MORTGAGE ON PROPERTY IN WHICH SHE HAD A CONTINGENT INTEREST TO BE SUBROGATED TO THE RIGHTS OF THE MORTGAGEE, 956.
- II. ACTION BY FIRE INSURANCE COMPANY PAYING AMOUNT OF INSURANCE ON PROPERTY DESTROYED BY FIRE TO BE SUBROGATED TO THE RIGHTS OF INSURED AGAINST THIRD PERSON CAUSING FIRE, 960.
- III. PROCEEDING BY HEIR OF PROPERTY ON WHICH THERE WAS A JUDGMENT LIEN TO BE SUBROGATED TO THE RIGHTS OF THE JUDGMENT CREDITOR ON PAYMENT OF SUCH JUDGMENT, 961.
 1. *Affidavit*, 961.
 2. *Order to Show Cause*, 964.
- IV. PROCEEDING BY SECOND MORTGAGEE IN AN ACTION BY FIRST MORTGAGEE FOR FORECLOSURE OF FIRST MORTGAGE TO BE SUBROGATED TO THE RIGHTS OF THE FIRST MORTGAGEE ON PAYMENT OF THE AMOUNT DUE ON FIRST MORTGAGE, 966.
 1. *In General*, 966.
 - a. *Affidavit*, 966.
 - b. *Order to Show Cause*, 967.
 - c. *Order Granting Motion*, 967.
 2. *Or for Discontinuance of Action*, 968.
 - a. *Notice of Motion*, 968.
 - b. *Order Granting Motion*, 969.

CROSS-REFERENCES.

For *Forms in Actions by Surety or Guarantor Against Principal for Reimbursement*, see the title *PRINCIPAL AND SURETY, OR GUARANTOR*, vol. 14, p. 167.

See also the title *CONTRIBUTION*, vol. 5, p. 433, and the *GENERAL INDEX* to this work.

I. ACTION BY EXECUTOR OF PERSON PAYING OFF MORTGAGE ON PROPERTY IN WHICH SHE HAD A CONTINGENT INTEREST TO BE SUBROGATED TO THE RIGHTS OF THE MORTGAGEE.¹

Form No. 19436.²

Supreme Court,
City and County of New York. }

Charles G. Pease, as executor of the last will and testament of Clara E. Pease, deceased,
against

Clara M. Egan individually, and as Executrix of, and Trustee under, the last will and testament of John Egan, deceased, William G. Egan, Josephine M. Egan, wife of William G. Egan, and Josephine Estelle Egan. }

The plaintiff above named, by Glover, Sweezy & Glover, his attorneys, complaining, alleges, on information and belief:

1. That on or about the 22d day of July, 1883, Clara E. Pease, then the wife of plaintiff, departed this life a resident of the city and county of New York, leaving a last will and testament, duly executed, whereby she devised and bequeathed all her property, real and personal, to plaintiff, and appointed plaintiff sole executor thereof; that said will was admitted to probate by the surrogate of the county of New York on or about the 13th day of January, 1886, and letters testamentary upon said will were, by the surrogate, issued to plaintiff on the 13th day of January, 1886.

2. That on or about the 17th day of May, 1875, one John Egan departed this life a resident of the city and county of New York, leaving him surviving his widow, the defendant Clara M. Egan, and his two children, the said Clara E. Pease and the defendant William G. Egan, his only heirs-at-law, and leaving a last will and testament, duly executed, a copy whereof is hereto annexed; that said will was duly admitted to probate, by the surrogate of the county of New York, on the 11th day of June, 1875, and that letters testamentary upon the same were duly issued by the surrogate to Clara M. Egan, the widow of said testator, and executrix in said will named, on the 15th day of June, 1875.

1. For the formal parts of a complaint in a particular jurisdiction see the title *COMPLAINTS*, vol. 4, p. 1019.

2. This is the complaint in *Pease v. Egan*, 131 N. Y. 262, and is copied from the records. A judgment in favor of the

defendants was reversed by the court of appeals and it was held that the plaintiff should succeed in his claim for subrogation to the rights of the mortgagee.

3. That at the time of his death the said *John Egan* was seised, among other pieces of real property, of a certain house and lot, then known as No. 33, now known as No. 43, *East 64th street*, in said city, and particularly bounded and described as follows: All that certain lot, piece or parcel of land, with the buildings thereon erected, situated in the city of *New York* and bounded and described as follows, to wit: Beginning at a point on the northerly side of *64th street*, distant *one hundred and ninety (190)* feet easterly from the corner formed by the intersection of the northerly side of said street and the easterly side of *Madison avenue*; running thence northerly parallel with said avenue, *one hundred (100)* feet and *five (5)* inches to the center line of the block between *64th* and *65th streets*; thence easterly along said center line and parallel with said street *twenty (20)* feet; thence southerly parallel with *Madison avenue one hundred (100)* feet *five (5)* inches to *64th street*, and thence westerly along said street *twenty (20)* feet to the point or place of beginning, the easterly and westerly walls of the building being party walls.

4. That at the time of the death of the said *John Egan* the premises above described were subject to the lien of a certain mortgage, dated *April 22d, 1874*, made by the said *John Egan* and the defendant *Clara M. Egan*, his wife, to one *Eugenio Coffigny*, to secure the payment of the sum of *\$18,000* and interest, conditioned to be paid by the bond of the said *John Egan* to the said *Eugenio Coffigny*, bearing even date with said mortgage, which bond and mortgage contained a proviso or condition, in substance, that the same should be void if the said sum of *\$18,000* should be paid to the said *Eugenio Coffigny*, his executors, administrators or assigns, on the *23d day of April, 1877*, with interest thereon at the rate of *seven per cent. per annum*.

5. That the said mortgage was duly recorded in the office of the register of the city and county of *New York* on the *23d day of April, 1874*, in liber *1169* of Mortgages, page *382*.

6. That at the time of his death the said *John Egan* was also possessed of a considerable personal estate, which, as plaintiff is advised and believes, by the terms of his said will became the absolute property of his *two* children, in equal shares, upon their arriving at the age of *twenty-one* years.

7. That both said children became of full age prior to the *30th day of April, 1877*, the said *William G. Egan* having been *twenty-four* years of age, and the said *Clara M. Pease* having been *twenty* years of age at the time of their father's death aforesaid.

8. That on or about the *30th day of April, 1877*, the defendant *Clara M. Egan* applied *\$18,000* of the personal estate of said *John Egan*, deceased, then in her hands as executrix as aforesaid, to the payment of the said mortgage upon the premises above described, and took a certificate of satisfaction thereof, which was filed in the office of the register of the city and county of *New York* on the said *30th day of April, 1877*, and was recorded in liber *113* of Discharges of Mortgages, page *234*.

9. That at the time the said mortgage was paid off by the defendant *Clara M. Egan* as aforesaid, and the consent hereinafter set

forth was given, the said *Clara E. Pease* had never been fully informed of her father's said will and did not know that by virtue thereof she owned absolutely *one-half* of the personal estate or that her interest in the real estate was liable to be divested by her death without issue, during the life-time of her mother, the defendant *Clara M. Egan*.

10. That at the time said mortgage was paid off as aforesaid, and also at the time the consent hereinafter mentioned was given, it was represented to the said *Clara E. Pease* that it was necessary that said mortgage should be paid as being the debt of the testator and to preserve the property covered thereby, and that it was necessary and to the advantage of all parties interested that the same should be paid out of the personal estate of said *John Egan*, deceased, as in no other way could funds for such purpose be obtained; and that the fact was, that at the time the condition of the real estate market was such that it would have been impossible for the executrix and trustee to have provided funds to pay off said mortgage, except at great sacrifice of other real estate belonging to said testator.

11. That the said *Clara E. Pease* (then *Clara Egan*), being ignorant as above stated of her rights under the will of her father, and not being aware that her legal interest in the real estate of her said father was different from her legal interest in his personal estate, and being induced thereto by the matters in the preceding paragraph set forth, did not at the time, although having knowledge thereof, object to the application of said personal estate of said deceased to the payment of said mortgage, and subsequently and in or about the month of *November*, 1877, signed a consent to the approval by the surrogate of the county of *New York* of an account of the proceedings of the defendant *Clara M. Egan*, as executrix of said *John Egan*, deceased, in which the said executrix credited herself with the sum of \$18,000, applied by her as aforesaid to the payment of said mortgage, upon which consent and a similar consent of the defendant *William G. Egan*, the said surrogate, on or about the 27th day of *March*, 1883, entered a decree settling and adjusting said account as filed in his office on the 27th day of *March*, 1883.

12. That afterwards the said *Clara E. Pease* made a motion before the said surrogate to open the said decree and allow her to present objections to the account of said executrix, filed and approved as aforesaid; that the said proceeding was continued after the death of said *Clara E. Pease* by plaintiff, as her personal representative, and on or about the 26th day of *May*, 1885, said surrogate made an order denying such application.

13. That the said *Clara E. Pease* left no issue her surviving.

14. That the said *Clara E. Pease* and the defendants *Clara M. Egan* and *William G. Egan* jointly occupied said mortgaged premises down to about the 1st day of *May*, 1883.

15. That as plaintiff is advised and believes, by reason of the payment of said mortgage out of the moneys belonging to said *Clara E. Pease* and her brother, *William G. Egan*, under the circumstances hereinbefore set forth, the said *Clara E. Pease* and her said brother became entitled in equity to be subrogated to the rights of the

mortgagee, and that plaintiff, as executor of the last will and testament of said *Clara E. Pease*, deceased, is now in equity the owner of *one-half* of said mortgage and is entitled to have the sale foreclosed and the premises covered thereby sold, and out of the proceeds of said sale to be paid \$9,000 of the principal sum secured by said mortgage, with interest thereon from the *first day of May, 1883*.

16. That the defendant *William G. Egan* has been requested to unite with plaintiff in bringing this action, and has declined to do so, and is, therefore, made a party defendant hereto.

17. That the defendant *Clara M. Egan*, individually and as executrix of the last will and testament of *John Egan*, deceased, *Josephine W. Egan*, and *Josephine Estelle Egan*, the only present issue of the defendant *William G. Egan*, have or claim some interest in the premises, which interest, if any, is subsequent and subordinated to the lien of the mortgage above mentioned.

18. That the defendant *William G. Egan*, in addition to the interest under said mortgage, has an interest in the above mentioned property under the will of his said father, which latter interest is subordinate to the lien of the mortgage above set forth.

19. That no action or proceeding, except as above stated, has been had, at law or otherwise, to the knowledge or belief of said plaintiff, for the recovery of the sum secured by said mortgage, or any part thereof.

Wherefore plaintiff demands that the said mortgage upon the premises hereinabove described may be adjudged to be foreclosed in this action; that the defendants, or one of them, and all persons claiming under them, or any of them, subsequent to the filing of a notice of the pendency of this action in the office of the clerk of the city and county of *New York*, may be barred and foreclosed of all right, claim, lien and equity of redemption in the said mortgaged premises; that the said premises may be decreed to be sold according to law; that the moneys arising from the sale may be brought into court; that plaintiff may be paid out of such proceeds of sale *nine thousand (\$9,000) dollars*, with interest thereon from the *1st day of May, 1883*, to the time of such payment, or so much thereof as the amount of said moneys properly applicable to plaintiff's share of said mortgage and will pay off the same, together with the expenses of the sale and the costs of this action; and that plaintiff may have such other and further relief as to the court shall seem equitable and proper.

*Glover, Sweezy & Glover, Attorneys for Plaintiff,
31 Nassau Street, New York City.*

City and County of New York, ss.:

Richard L. Sweezy, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in the above entitled action; that the foregoing complaint is true to his knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. That the grounds of his belief as to the matters not stated upon the knowledge of deponent are statements made to him by plaintiff, and an examination

made by deponent of the accounts presented to the surrogate by the defendant *Clara M. Egan*, as executrix of *John Egan*, deceased, and of the testimony and proceedings in the *Surrogate's Court* upon a motion to set aside the decree entered by said surrogate on the 27th day of *March*, 1883, and examinations which deponent has caused to be made of the records in the office of the register of the *city and county of New York* and of the surrogate aforesaid. That the reason this verification is not made by the plaintiff is that he, at the present time, is absent from the *city and county of New York*, where deponent resides and where his firm has its place of business.

Richard L. Sweezy.

Sworn to before me this 5th day of *February*, 1890.

Edwin R. Allen, Notary Public, *Kings Co.*

Cert. filed *N. Y. Co.*

II. ACTION BY FIRE INSURANCE COMPANY PAYING AMOUNT OF INSURANCE ON PROPERTY DESTROYED BY FIRE TO BE SUBROGATED TO THE RIGHTS OF INSURED AGAINST THIRD PERSON CAUSING FIRE.¹

Form No. 19437.²

(Precedent in *Lumbermen's Mut. Ins. Co. v. Kansas City, etc., R. Co.*, 149 Mo. 168.)³

[(Title of court and cause as in *Form No. 5921.*)]⁴

Plaintiff alleges that the *T. A. Miller Lumber Company* is, and at all times herein stated was, a corporation duly organized and existing by law. That plaintiff *Lumbermen's Mutual Insurance Company* is, and at all times herein stated was, a corporation duly organized and existing by virtue of the laws of the state of *Illinois* and engaged in the business of insuring property owners against loss or damage by fire. That defendant, *Kansas City, Fort Scott and Memphis Railroad Company*, is, and at all times hereinafter stated was, a corporation, and was engaged in operating a railroad through the town of *Ash Grove*, in the state of *Missouri*, and was using and operating thereon steam engines and locomotives.

That at the time of the issuing of the policy of insurance herein-after mentioned, and on the 6th day of *April*, 1894, the *T. A. Miller Lumber Company* was the owner of a certain stock of lumber, lath, shingles, sash, doors and other stock such as is usually kept for sale in country lumber yards, also of a certain brick office building and certain office furniture and fixtures therein contained, and also of certain lumber sheds, all situated on lots 2, 3, 4, 5, in *Brook and Ralph Watkin's Railroad Addition* to the town of *Ash Grove, Missouri*. That on the 13th day of *December*, 1893, in consideration of a certain premium to it paid by said *T. A. Miller Lumber Company*, the *Lumbermen's Mutual Insurance Company* issued to said *T. A. Miller Lum-*

1. For the formal parts of a complaint in a particular jurisdiction see the title *COMPLAINTS*, vol. 4, p. 1019.

2. *Missouri*.—Rev. Stat. (1899), § 1111.

3. There was a judgment for the plaintiff, which was affirmed.

4. The matter to be supplied within [] will not be found in the reported case.

ber Company a certain policy of insurance, insuring it against loss or damage by fire to the property hereinbefore specified, for the period of one year from said date, to the amounts and as follows: \$2,000 on said described stock of lumber; \$250 on said described brick office building and the furniture and fixtures therein contained, and \$250 on said described lumber sheds.

That on the 6th day of April, 1893, and while said policy of insurance was in full force and effect, the said stock of lumber, lath, shingles, sash, doors and other stock in trade, being of the reasonable cash value of \$2,517.24, was wholly destroyed by fire, and said brick office building was damaged by fire to the amount of \$150, and said lumber sheds, being at the time of the reasonable cash value of \$395.60, were wholly destroyed by fire.

That the fire which destroyed and damaged said property was communicated thereto by a locomotive engine being used by defendant upon its said railroad.

That by reason of said fire said *Lumbermen's Mutual Insurance Company* became liable to pay to said *T. A. Miller Lumber Company* the sum of \$2,400, and by virtue of the terms of said policy of insurance, which sum said *Lumbermen's Mutual Insurance Company* has long since paid. That upon the payment of said sum the said *Lumbermen's Mutual Insurance Company* became and was subrogated to all the rights of the said *T. A. Miller Lumber Company* against the defendant for the recovery of said sum of money, twenty-four hundred dollars, by reason of the destruction of said property by fire, communicated thereto by a locomotive engine of defendant as aforesaid.

That by reason of the premises aforesaid, an action has accrued to plaintiff against defendant, and plaintiff alleges that it has sustained damages in the sum of \$3,013.42, for which it asks judgment, and for costs.

[(Signature as in Form No. 5921.)]¹

III. PROCEEDING BY HEIR OF PROPERTY ON WHICH THERE WAS A JUDGMENT LIEN TO BE SUBROGATED TO THE RIGHTS OF THE JUDGMENT CREDITOR ON PAYMENT OF SUCH JUDGMENT.

1. Affidavit.²

Form No. 19438.³

Supreme Court, County of Westchester.

Albert Cole

against

John Crawford, Robert Malcolm and others. }

City and County of New York, ss.

Robert Malcolm, being duly sworn, deposes and says:

That he is one of the defendants in the above entitled action, and

1. The matter to be supplied within [] will not be found in the reported case.

2. For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

3. This is the affidavit in *Cole v. Malcolm*, 66 N. Y. 363, and is copied from the records. The motion for a subrogation was granted.

that judgment was rendered thereon on or about the 6th day of July, 1871, by the *Supreme Court* of the second judicial district.

That this action was brought to set aside certain conveyances from *John Crawford* to *Samuel J. Glassy*, and from *Glassy* to *Sarah E. Crawford*, "upon the ground that the same were without consideration and fraudulent towards the plaintiff who was one of the creditors of said *John Crawford*," and that the said property so conveyed shall be applied to the payment of judgment recovered by the plaintiff against the said *John Crawford*.

That judgment of this court setting aside the conveyances upon the above named ground was rendered on the day above mentioned.

That the said *Sarah E. Crawford* departed this life on the 7th day of August, 1870, and that the defendants in the above entitled action are her heirs-at-law, with the exception of the said *John Crawford*, who was her husband.

That by the conveyance made by said heirs-at-law, in or about the month of August, 1871, this deponent became vested with and the owner of *five-sevenths* of the premises in question, and this deponent is informed that of the other *two-sevenths* one part thereof belongs to *Fredlove E. O'Brien*, and the other portion thereof to *Joseph M. Taylor*, but that neither of said parties appeared in said action nor defended the same, and that the whole and only defense of said action was made by this deponent.

That subsequent to the affirmance by the *Commission of Appeals*, whence this cause was carried by this deponent, the plaintiff, as deponent is informed and believes, transferred and set over all his right, title and interest in the said judgment to one *Hiram K. Miller*; and that the said *Miller*, through his attorneys, has issued an execution under the said judgment, and is proceeding to sell the premises in question at public auction, the sale thereof being advertised for Tuesday, the 14th day of September, 1875, at the *Getty House, Yonkers*, a copy of the advertisement of said sale being hereto annexed, and that unless the said sale is stopped by the process of this honorable court, the same property will be disposed of on the day above mentioned at a very great sacrifice, as this deponent believes.

That this deponent is well acquainted with the defendant *John Crawford*, and with the history and facts of the above entitled action, and that during the entire progress of said cause there was no attempt whatever to show on the part of the plaintiff that directly or indirectly the said *Sarah E. Crawford* had any knowledge whatever that, at the time of the execution of the conveyance in question, the said *John Crawford* had any intention of defaulting his creditors, and that no such question was raised or suggested in the testimony of said cause, nor was there any evidence or suggestion that either of the heirs-at-law of said *Sarah E. Crawford* had any such knowledge whatever.

This deponent further says that the said *John Crawford* is at the present time extensively and largely engaged, in his own name, in the business of baker and confectioner, in the city of *New York*, and, as deponent is informed and has good reason to believe, the said *John Crawford* is entirely able to pay the amount of the judgment in this action, and that the said *Crawford* is reputed by many

persons who know him in business to be a man of sufficient means to pay a greater sum than \$10,000.

That the said *Miller*, the assignee of the judgment aforesaid, has caused an execution to be issued against the property of this deponent, and the sheriff of the *city and county of New York* has made a levy thereupon, and, unless restrained by this honorable court, will proceed to sell the property of this deponent for the sum of \$186.90, with interest and cost, being the amount of taxable costs entered against this defendant on appeal to the "*Commission of Appeals*" aforesaid, and that said *Miller* has also caused a suit to be instituted against *George W. Markham* and *Jacob Carpenter*, sureties of deponent on an undertaking given to secure certain costs of said appeal.

That on the *tenth* day of *September*, 1875, this deponent, about past *one o'clock* in the *afternoon* of that day, in company with Mr. *Quackenbush*, whose affidavit is submitted herewith, proceeded to the store of the said *Miller*, at the corner of *Duane* and *Washington* streets, in the *city of New York*, and saw the said *Miller*; that thereupon this deponent, through Mr. *Quackenbush*, produced, exhibited and tendered to said *Miller* the sum of \$7,560 in greenbacks, or legal tender notes of the United States, and requested and demanded that said *Miller* should assign to this deponent the said judgment or decree rendered in the above entitled action, as well as the original judgment of said *Cole* against said *Crawford*, and this deponent then and there produced *two* assignments fully drawn, as defendant is informed, and requested and demanded the said *Miller* to assign the said judgment to this deponent.

That said *Miller* at once and promptly refused to assign the same or either of them.

That deponent made a like request of said *Miller* a *second* time, to which the said *Miller* replied "that he positively refused," whereupon deponent and Mr. *Quackenbush* left his presence.

That this deponent verily believes that the said *Miller* is acting in the interest of the said *Crawford*, and that his object in and motive for refusing to accept the amount of the judgment in this action is based upon a desire and an attempt on his part to secure the said *Crawford* and his property from the payment of this judgment at the hands of this deponent or any other heirs-at-law of *Sarah E. Crawford*.

That this deponent respectfully refers this honorable court to all the papers and proceedings in the above entitled cause for a full and complete history of the same, and prays that they may be taken and considered as a part of his papers in this application.

And this deponent prays that the said *Miller* and his attorney be compelled to subrogate this deponent to the rights of said *Miller* under the said judgment or both of them, as the said court may direct, and he prays that the proceedings in this action be stayed until this court can determine the deponent's claim in this respect.

R. Malcolm.

Sworn to before me this *11th* day of *September*, 1875.

Henry Ormaines, Notary Public,
City and County of N. Y.

Form No. 19439.¹

New York Supreme Court, }
 County of Westchester. }

Albert Cole

against

John Crawford, Robert Malcolm and others. }

City and County of New York, ss.

Lambert S. Quackenbush, being duly sworn, deposes and says:

That he is acquainted with Mr. Robert Malcolm, of the city of New York, one of the defendants in the above entitled action.

That on the 10th day of September, 1875, at about half-past one P. M., he accompanied the said Malcolm to the store or place of business of one Hiram K. Miller, at the corner of Duane and Washington streets, in the city of New York.

That deponent is informed and believes that said Miller is the assignee of the judgment entered in the above entitled action, and that said Miller admitted that he was the owner of said judgment.

That in behalf and in the presence of said Malcolm, this deponent then and there produced, exhibited and tendered to the said Miller the sum of \$7,560, being the full amount of debt, interest and costs in the above matter, as deponent is informed by the said Malcolm, and that said Miller made no objection as to the amount of money tendered being the correct total amount which he was entitled to claim under said judgment.

That the said money consisted of legal tender notes of the United States.

That immediately upon seeing said Miller, and at the time of said tender, the said Malcolm, in the presence of this deponent, informed said Miller that his purpose in calling upon him was to tender the amount of the judgment, interest and costs in the above entitled action, which said Miller was entitled to receive as assignee, and that said Malcolm then and there presented and produced two assignments fully drawn, and requested the said Miller to assign the said judgment to the said Malcolm or any other person, or either of the said judgments.

That the said Malcolm again asked the said Miller if he would assign the said judgments, and the said Miller responded that he positively refused, whereupon this deponent and Malcolm immediately left said Miller's presence, and further deponent sayeth not.

Lambert S. Quackenbush.

Sworn to before me this 11th day of September, 1875.

Abraham C. Quackenbush, Notary Public,
 City and Co. N. Y.

2. Order to Show Cause.²

1. This is the affidavit in Cole v. Malcolm, 66 N. Y. 363, and is copied from the records. The motion for a subrogation was granted.

2. For the formal parts of an order to show cause in a particular jurisdiction see the title ORDERS, vol. 13, p. 356.

Form No. 19440.¹

Supreme Court,
County of Westchester. }

Albert Cole
against

John Crawford, William Henry Tyler and Harriet Tyler, his wife, James M. Tyler and Maria Tyler, his wife, John Tyler and Alice Tyler, his wife, Maria Gates and George Gates, her husband, Margaret Wunder and Edwin R. Wunder, her husband, Robert Malcolm and Amelia Malcolm, his wife, and Annie Dominick and James Dominick, her husband, Freelove E. O'Brien and Peter T. O'Brien, her husband.

At a *Special Term* of the *Supreme Court* of the *Second Judicial District*, held at the city of *Brooklyn*, in the county of *Kings*, in said city, on the *13th* day of *September*, 1875.

Present, Hon. *C. E. Pratt*, Justice.

Upon the judgment-roll and all papers and proceedings in this action, and upon the affidavits of *Robert Malcolm* and *Lambert S. Quackenbush*, herewith annexed, and upon such other affidavits and papers as may be served upon the plaintiff's attorneys within *two* days prior to the time of hearing mentioned, let *Hiram K. Miller*, the assignee of the judgment in the above entitled action, show cause before one of the justices of the *Supreme Court*, at a *special term* thereof to be held at the court-house, at the city of *Brooklyn*, county of *Kings*, on the *20th* day of *September*, 1875, at *ten o'clock* in the forenoon, or as soon thereafter as counsel can be heard, why, upon the payment of said *Miller*, or his attorneys herein, of the amount of said judgment, with the interest and costs thereon, the defendant, *Robert Malcolm*, should not be subrogated to the rights of the plaintiff in the above entitled action, or of his assignee, and why the said *Hiram K. Miller* should not execute and deliver to the said *Robt. Malcolm* assignments of the judgment herein and of the original judgment in the case of *Albert Cole* against *John Crawford*, recovered on the *11th* day of *November*, 1870, in the *Supreme Court* in and for the city and county of *New York*, or either of said judgments, and in the meantime and until the hearing and determination of this order to show cause, let the sale of premises herein, by *Ralph E. Prime*, Esq., receiver in this action, be stayed, also all the proceedings under the execution in the hands of the sheriff of the city and county of *New York*, to collect the sum of \$186.90 costs aforesaid, also, all proceedings in the action brought by said *Miller* against *Jacob Carpenter* and *George W. Markham*, to recover the amount of an undertaking given on said appeal, and all other acts or proceedings under the judgment recovered in this action, and let the said *Robert Malcolm* have such further or other relief as may be just and reasonable, with the costs of this motion.

C. E. Pratt, J. S. C.

1. This is the order to show cause in *Cole v. Malcolm*, 66 N. Y. 363, and is copied from the records.

IV. PROCEEDING BY SECOND MORTGAGEE IN AN ACTION BY FIRST MORTGAGEE FOR FORECLOSURE OF FIRST MORTGAGE TO BE SUBROGATED TO THE RIGHTS OF THE FIRST MORTGAGEE ON PAYMENT OF THE AMOUNT DUE ON FIRST MORTGAGE.

1. In General.

a. Affidavit.¹

Form No. 19441.²

Supreme Court, }
Rockland County. }

Julia M. De Forest
against

Theodore G. Peck and Kate L. Peck, his wife,
John Peck, Gordon H. Peck, Edith L. Hal-
sted and Jacob Halsted, her husband. }

County of *New York*, ss.

J. Harsen Halsted, named in the summons herein as *Jacob Halsted*, being duly sworn, says that he is a defendant herein; that the action was brought to foreclose a mortgage upon lands in *Haverstraw*, consisting principally of brick and clay land. There is due for principal \$10,000, besides interest and costs. Judgment of foreclosure and sale has been perfected and the premises are advertised to be sold on the 18th inst. That deponent is the owner and holder of a mortgage subsequent to that above mentioned, covering the equal undivided *one-fifth* part of said land owned by the defendant *John Peck*, which mortgage was given on the ——— day of ———, 1894, to secure the sum of \$3,000, and that the whole amount so secured is now due. That said premises cannot at this time be sold advantageously, for the reason that the business to which they are adapted is in a great depressed condition, and it will be difficult to find a purchaser therefor at a fair value unless some of the parties in interest should desire to purchase. That a sale at this time would operate to the prejudice of deponent as he believes. That deponent desires that the said *first* mortgage and judgment of foreclosure shall be assigned to him. That deponent has caused inquiry to be made of one of the attorneys for plaintiff as to whether an assignment would be made, and as deponent is informed and believes, said attorney declined to make such assignment. Deponent therefore prays an order of the court directing such assignment to deponent upon the payment in full of the amount due upon said mortgage and judgment, with interest and all costs and expenses which are properly chargeable, and which amount shall be fixed by said order. That a notice

1. For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. I, p. 548.

2. This is the affidavit in *De Forest v.*

Peck, 84 Hun (N. Y.) 299, and is copied from the records. The motion which it supported was granted.

of less than *eight* days is required for the reason that the sale of said premises is advertised for the *18th* instant.

J. Harsen Halsted.

Sworn to before me this *16th* day of *October*, 1894.

(SEAL)

Joseph H. Beal, Notary Public for *West. Co.*

Cert. filed in *N. Y. Co.*

b. Order to Show Cause.¹

Form No. 19442.²

Supreme Court, }
Rockland County. }
Julia M. De Forest }
 against }
Theodore G. Peck et al. }

On the annexed affidavit, and on all papers and proceedings herein, let the plaintiff or her attorneys show cause, at a *special* term of this court to be held at the court-house in the city of *Brooklyn*, *N. Y.*, on the *17th* day of *October*, 1894, at *ten* o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made directing the plaintiff to assign the bond and mortgage to foreclose which this action is brought, and the judgment of foreclosure and sale herein to *J. Harsen Halsted*, upon the payment in full to the plaintiff or her attorneys of the amount due upon said mortgage and judgment with interest, and all costs and expenses which have been incurred and all other proper charges, the aggregate amount of which shall be specified, and why such other and further relief shall not be granted as may be just.

Service of this order on the *16th* day of *October*, 1894, to be sufficient.

A. S. Tompkins, *Rockland Co.*, Justice.

c. Order Granting Motion.³

Form No. 19443.⁴

At a *Special Term* of the *Supreme Court*, held at the *Court-House* in *Brooklyn*, county of *Kings*, on the *30th* day of *October*, 1894.

Present, Hon. *William J. Gaynor*, Justice.

Julia M. De Forest }
 against }
Theodore G. Peck and Kate L. Peck, his wife, }
John Peck, Gordon H. Peck, Edith L. Halsted }
and Jacob Halsted, her husband. }

A motion having come on to be heard before Mr. Justice *Bartlett* herein on *October 17th*, 1894, and the defendants *J. Harsen Halsted*,

1. For the formal parts of an order to show cause in a particular jurisdiction see the title *ORDERS*, vol. 13, p. 356.

2. This the notice of motion in *De Forest v. Peck*, 84 Hun (N. Y.) 299, and is copied from the records. The motion was granted.

3. For the formal parts of an order in a particular jurisdiction see the title *ORDERS*, vol. 13, p. 356.

4. This is the order in *De Forest v. Peck*, 84 Hun (N. Y.) 299, and is copied from the records. This order was affirmed.

Edith L. Halsted and *John Peck* having appeared by *Irving Brown*, their attorney, and the plaintiff having appeared by *De Forest Brothers*, her attorneys (*Robert Thorn*, Esq., of counsel), and said justice having made an order directing that notice of the hearing of such motion be given to the attorney for the remaining defendants who have not appeared, and having adjourned such motion to *October 20th*, 1894, and such notice having been given, and on the last named day the said parties having appeared as before recited, and said remaining defendants having also appeared by *William C. Prime*, their counsel, and said motion having been heard by Mr Justice *Gaynor*, and having been denied on the grounds stated in the decision, and an order to show cause why the moving party should not have leave to renew such motion and for relief demanded in the moving papers having been granted, and the matter coming on to be heard on this day, the same parties appearing: Now, on reading and filing the affidavits of *J. Harsen Halsted* and *Irving Brown*, and of *Theodore G.* and *Gordon H. Peck*, Ordered that a motion for a rehearing be, and the same hereby is granted. And it is further ordered that the subrogation asked for be, and the same is hereby allowed, on condition that the foreclosure herein be stayed and the amount of the judgment and mortgage herein, with interest, costs and expenses, be paid out of the proceeds of partition sale; that upon payment by *J. Harsen Halsted* to the plaintiff, or her attorneys, of the amount due upon said mortgage and judgment, including interest, costs and expenses, the plaintiff is hereby directed to execute an assignment of the bond and mortgage and judgment to said *Halsted*, and deliver the same, with the bond and mortgage to which this suit relates, and all assignments thereof, to him; and upon such payment the advertisement of sale herein be discontinued.

Enter:

W. J. G.

2. Or for Discontinuance of Action.

a. Notice of Motion.¹

Form No. 19444.²

Supreme Court, Kings County.

Horatio M. Twombly }

against }

Patrick Cassidy and others. }

Take notice, on the affidavits and papers hereto annexed, and on all the papers, pleadings and proceedings in this action, a motion will be made at a *special* term of this court, to be held at the chambers thereof, in the Kings county court-house, *Brooklyn*, on *Saturday*, the *22d* day of *September*, 1879, at *ten* o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order compelling the plaintiff in this action to assign to the defendant, *Abraham Lott*.

1. For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

2. This is the notice of motion in which was affirmed.

the bond and mortgage in the complaint described, on the payment to him of the amount due thereon, or to discontinue this action on such terms as the court may prescribe, and for such further or other different order or relief in the premises as may be meet and consistent with the rules and practice of this court.

Dated *September 17th, 1879.*

Abraham Lott, Att'y in Person.

To *Pelton & Poucher, Esq'rs, Plaintiff's Attorneys.*

b. Order Granting Motion.¹

Form No. 19445.²

At a *Special Term* of the *Supreme Court* of the State of *New York*, held at the *Court-House* in the city of *Brooklyn, Kings County*, on the *1st day of December, 1879.*

Present — *Hon. J. W. Gilbert, Justice.*

Horatio N. Twombly }

against

Patrick Cassidy et al. }

Upon the pleadings and proceedings herein, and upon reading and filing the affidavit of the defendant *Abraham Lott*, verified *September 17th, 1879*, and the affidavit of *Jesse Johnson*, verified *September 17th, 1879*, and upon the notice of motion given by said *Lott* for an order requiring the plaintiff to discontinue this action, or to assign to him, said defendant *Lott*, the bond and mortgage mentioned and described in the complaint; and upon reading and filing the affidavits of *George W. Poucher, Horatio N. Twombly* and *Benjamin P. Smith*, in opposition.

And after hearing *Jesse Johnson, Esq.*, of counsel for the defendant *Lott*, in support of said motion, said *Johnson* also then appeared for defendant *Cassidy*, and *M. L. Townsend, Esq.*, of counsel for the plaintiff, opposed.

Ordered, that upon the payment by the defendant *Lott*, or by such person he, said *Lott*, may name, to the plaintiff, of the amount due to the plaintiff upon the bond and mortgage mentioned in the complaint for principal and interest, and the costs in this action to be taxed, the defendant *Lott*, or such person named by him, shall be subrogated to the rights of the plaintiff, and thereupon, and at the same time, the plaintiff shall execute, acknowledge and deliver to said *Lott*, or to said person to be named by him, a proper paper, to be prepared by said *Lott*, assigning and conveying the said bond and mortgage mentioned in the complaint, and also a consent substituting said *Lott* as plaintiff, or for the discontinuance of this action. It being the intent of this order that the payment, assignment and delivery of consent herein provided for shall be simultaneous, and that neither shall take place without the other; provided, that the said *Lott*, or

1. For the formal parts of an order in a particular jurisdiction see the title *Cassidy, 82 N. Y. 155*, and is copied from the records. This order was affirmed.

2. This is the order in *Twombly v.*

such person named by him, shall, at the same time, execute and deliver, under seal, to the *Gutta Percha and Rubber Manufacturing Company* an agreement that the said mortgage and the lien thereof shall be subordinate and subservient to the leases of said premises executed by the defendant *Patrick Cassidy* to said company, in the same manner and to the same extent that it would have been subordinate and subservient thereto had the leases to said company been made and recorded in the office of the register of the county of *Kings* before the mortgage so to be assigned had been made and recorded, and before the said company had notice of the same; but the execution and delivery of such last named agreement shall not be required, unless said company, in writing, request of said *Lott* that the same be given.

It is further ordered, that in the event the said parties cannot agree as to the amount due to the plaintiff for principal and interest and costs, and as to the form of the assignment of said bond and mortgage to said *Lott*, or to such person named by him, and as to the form of the agreement to be executed by said *Lott* to said *Gutta Percha and Rubber Manufacturing Company*, that the same may be settled before the judge granting this order, upon *two* days' notice by either party to the other.

But it is hereby expressly provided that if the plaintiff, within *thirty* days, shall make and serve on the defendant *Lott* a consent in writing to discontinue the action upon payment of his costs, as such costs may be taxed, that then and in that case the order herein made that he assign the bond and mortgage in suit shall be for no further force or effect.

In case the plaintiff or his attorney shall serve on said *Lott* a notice in writing, stating that he elects not to discontinue this action upon the terms and as herein allowed, then the mandate to assign the bond and mortgage hereinbefore contained shall then be in force, without regard to the right to discontinue as herein provided.

And it is further ordered that the said *Lott*, or the person to be named by him, shall not be compelled to make the tender hereinbefore provided for until the time for the plaintiff to elect to discontinue has elapsed, or until the plaintiff has waived, in writing, as hereinbefore provided, his right to such election.

And it is further ordered that after the time for the plaintiff to so elect shall have elapsed or been waived, as hereinbefore provided, the defendant shall have *thirty* days within which to make the tender and payment hereinbefore provided.

And it is further provided that such tender and payment shall be made at such place in the cities of *New York* and *Brooklyn* as the plaintiff may elect and designate by notice in writing on said *Lott*, and that in default of such notice given, that then and in that case such tender and payment shall be made at the office of the attorney for the plaintiff.

If plaintiff elects to assign the mortgage as herein provided, then this action shall be discontinued as to all the parties, without costs as against the plaintiff.

Enter:

J. W. G.

SUBSCRIPTIONS, ACTIONS ON.¹

BY HAROLD N. ELDRIDGE.

- I. MADE UPON CONDITION THAT GOVERNMENT WOULD ERECT BUILDING ON A CERTAIN LOT OF LAND, 976.
- II. TOWARD COMPLETION OF ACADEMY, 978.
- III. TOWARD PURCHASE OF LOT FOR DEPOT, 978.
- IV. TOWARD PURCHASE OF LOT AND ERECTION OF CHURCH THEREON, 979.

CROSS-REFERENCES.

For Forms in Actions on Subscriptions to Stock, see the title STOCKS AND STOCKHOLDERS, ante, p. 511.

1. **Requisites of Complaint, Declaration or Petition, Generally.**—For the formal parts of a complaint or declaration in a particular jurisdiction see the titles COMPLAINTS, vol. 4, p. 1019; DECLARATIONS, vol. 6, p. 244.

Compliance with Terms.—That there has been a substantial compliance with the terms of the subscription paper must be shown. *McCrimmin v. Cooper*, 27 Tex. 113.

Precedent.—In *Heller v. Elwood Board of Trade*, 18 Ind. App. 188, the complaint alleged in substance as follows: That plaintiff is a corporation, organized under the laws of the State of Indiana; that on the — day of March, 1893, the defendant, by his subscription to a certain contract, a copy of which is made a part of the complaint, promised to pay plaintiff the sum of two hundred and fifty dollars; that on the twenty-seventh day of February, 1893, the plaintiff had entered into a contract with the Akron Steam Forge Company, by the terms of which contract it was agreed between plaintiff and said company that if plaintiff would subscribe to and agree to pay to said company the sum of five thousand dollars, the said Akron Steam Forge Company would move its plant to the city of Elwood; that as an inducement to plaintiff to subscribe said sum for the location of said company's plant, subscriptions were solicited of private individuals to reimburse plaintiff for

its said five thousand dollars subscription; that the said Akron Steam Forge Company had complied with and performed all the conditions of said agreement to the acceptance of the plaintiff; that among the subscriptions obtained from individuals to reimburse plaintiff was the subscription of the defendant, who was, at the time he made the same, plaintiff's secretary; that defendant had full knowledge of the purpose for which said subscriptions were being given, and made his subscriptions thereto, which, together with other subscriptions, were made as an inducement to plaintiff to subscribe to said Akron Steam Forge Company the said sum of five thousand dollars for the location of the aforesaid plant; that the foundation of the said company's works had been completed; that their buildings were under roof, and that more than thirty days had elapsed since the first shipment of their manufactured product from said works; that defendant refused to pay said subscription, although the same was long past due, and payment thereof had been demanded. A copy of the contract entered into between plaintiff and said Akron Steam Forge Company was also filed with and made a part of the complaint. A demurrer to this complaint was overruled.

In *Fulton v. Sterling Land, etc., Co.*, 47 Kan. 621, the petition alleged the incorporation of the plaintiff under the

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laws of Kansas, recited the fact that in 1886 the people of Sterling, Rice county, Kansas, were desirous of securing the location and erection of a college at their city, to be called the Cooper Memorial College, of Sterling, Kas.; that for the purpose of raising money to aid in the construction of said college the instrument in writing, copied above, was created and the subscriptions therein contained were made; that at the time such subscriptions were made it was understood by the subscribers, including the defendant, Fulton, that the plaintiff, the Sterling Land and Investment Company, was to erect the college, and that said subscriptions were to be collected by said investment company and by it used in the construction of said college; that said subscription list was handed over to said company, and the subscriptions therein, except that of Fulton and one other, were paid to said company; that said company, relying upon said subscriptions to in part compensate them therefor, erected said college and turned it over to the trustees of the Cooper Memorial College; that the company tendered Fulton lots in its addition to the full value of his subscription, which he neglected and refused to take; and that he refused to pay the amount of his subscription, or any part thereof.

It was held that the petition stated a cause of action and that a demurrer thereto was properly overruled.

In *Comstock v. Howd*, 15 Mich. 237, the declaration, which was filed in the justice's court, was as follows: "*William W. Comstock*, plaintiff, complains of *John W. Howd*, defendant, who has been summoned to answer him in a plea of assumpsit, and says that about the middle of June last the said *John W. Howd*, *William W. Comstock* and divers other persons, desiring to celebrate the fourth day of July, A. D. 1865, and also on that day to serve a free dinner to the soldiers and their families of Gratiot county, and also desiring to raise a sum of money for the said purpose, did designate the said *William W. Comstock* as a proper person to raise such a sum of money, by subscription, as would be necessary to defray the expense of said celebration, and make all necessary disbursements; all of which was agreed to by said persons, and accepted by the said *William W. Comstock*.

And the said *William W. Comstock*

further says that the said *John W. Howd*, for the carrying on of said purpose, became indebted to the said *William W. Comstock* in the sum of ten dollars, and promised to pay the same when requested which will more fully appear from the instrument in writing, filed herewith. Yet the said *John W. Howd* has utterly refused to perform his said promise, though often requested so to do, to the damage of the said plaintiff fifty dollars, and for this he brings suit."

It was held that this declaration, under the liberal rules of pleading in justices' courts, set forth substantially all the facts necessary to a good cause of action.

In *Swain v. Hill*, 30 Mo. App. 436, the statement in the suit, which was begun before the justices of the peace, was as follows: "*Jesse T. Swain*, *Thos. J. Martin* and *Thos. T. Elliott*, suing herein for themselves and for all other persons having a common interest with them in the subject of this action, Plaintiffs, against *William E. Hill*, Defendant.

Jesse T. Swain, *Thos. J. Martin* and *Thos. T. Elliott* say that divers other persons have a common interest with them in the subject of this action whose names, by reason of their number, are for convenience omitted as plaintiffs, and that this suit is instituted by the plaintiffs for and on behalf of themselves and all other parties in interest. For cause of action plaintiffs state that on the — day of —, 1885, at *Keytesville*, *Chariton* county, *Missouri*, plaintiffs and defendant and numerous other citizens of said county, being desirous of associating themselves together for the purpose of constructing an elevated road across the *Muscle Fork* bottom, west of said town of *Keytesville*, extending from the iron bridge to the bluff opposite thereto, in consideration thereof and of the great public benefit to be derived therefrom, and of their mutual promises and undertakings each to the other then and there made, and of material aid of such enterprise, proffered and to be rendered by the county court of said county, did then and there make, subscribe and fully execute a certain agreement in writing, as follows, to-wit:

'Agreeably to a proposition of the county court of *Chariton* county, at the last May (1885) term, to pay one-half the cost of a high road across *Muscle*

SUBSCRIPTIONS, ACTIONS ON.

For the bottom, from the iron bridge to the bluff opposite, and believing that such a road would be of great public benefit, especially to citizens living north and west of said town, and believing, further, that the proffered assistance of said court will render such enterprise material aid and make the cost of it much less than by any other scheme, therefore, each of us whose names are subscribed hereto, promise and agree to punctually pay, when called upon, the amount set opposite our names, in money, as subscribed. It is understood by us that the cost of a road five feet high and twenty feet wide, with two trestle bridges seventy-five feet each in length, will be between one thousand dollars and fifteen hundred dollars; and whenever six hundred dollars shall have been subscribed, the matter shall be presented to the county court for immediate action.

Wm. E. Hill, \$50.

[Signed] *Martin & Appelgate, \$25.*

Thos. T. Elliott, \$5.

And divers others, as aforesaid, whose names and the amounts by them subscribed are not necessary to be stated.

That the said defendant, *Wm. E. Hill*, at the time of executing said agreement, set opposite his name thereto subscribed the sum of fifty dollars, as the amount of his subscription to said road, and induced many others to subscribe thereto.

That afterwards, at the August term, 1885, of the county court of Chariton county, at the special instance and request of said defendant, *Wm. E. Hill*, the said county court appropriated and ordered to be paid in aid of said road, and for the construction thereof, the sum of five hundred dollars out of the county revenue fund of said county, being the sum agreed to be paid by said court as mentioned in said contract.

That afterwards, to-wit, on the — day of —, 1885, said subscribers, relying upon their mutual promises and undertakings each to the other, as aforesaid, and upon the other considerations aforesaid, selected and appointed a committee, of which said *Wm. E. Hill* was a member, to survey and recommend to said subscribers the most convenient and cheapest route for said road; and that said committee, by virtue of said appointment, surveyed and recommended a route for said road, and performed other services in furtherance of said enterprise, and made report thereof.

That afterwards, to-wit, on the — day of —, 1885, the subscribers to said contract and a majority of said subscribers, at a meeting had and held, after due notice thereof, selected and appointed the said *Jesse T. Swain, Thos. J. Martin* and *Thos. T. Elliott* (plaintiffs herein), as a committee for and on behalf of said subscribers, to select the line of said proposed road, to locate and cause to be constructed, and to collect and apply for that purpose the subscriptions aforesaid. That by virtue of the order of appropriation, made by the county court, at the instance of defendant, as aforesaid, there was paid to said *Swain, Martin* and *Elliott*, as such committee, by the treasurer of said county, the sum of five hundred dollars, so appropriated by said court in aid of said road.

That relying on the promise and undertaking of defendant, as aforesaid, divers other parties to said agreement paid to said *Swain, Martin* and *Elliott*, as the committee aforesaid, the amount of their several subscriptions.

That by virtue of their appointment and authority as such committee, plaintiffs, for themselves and the other subscribers aforesaid, surveyed, located, constructed and fully completed said road, and in the construction thereof expended much time and labor, and invested all the money received by them as such committee, including the amount of their individual subscriptions.

That the amount so collected and invested by them in the construction of said road was and is sufficient to pay the cost and expenses of said construction.

That relying upon the promises and undertakings of said subscribers, and particularly relying upon the subscription of said defendant, said *Swain, Martin* and *Elliott*, as such committee, for themselves and the other subscribers aforesaid, paid out and advanced a large sum of money in the construction of said road over and above the amount by them collected."

There was a motion to dismiss the case, which motion was as follows:

"1. Because the statement filed in this case by plaintiffs does not state facts sufficient to constitute a cause of action against defendant in favor of plaintiffs.

2. Because the subscription paper referred to as the foundation of this action does not show any obligation

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or promise on the part of defendant to pay plaintiffs, or either of them or any person for their use, anything whatever.

3. Because the subscription paper referred to contains no payee, or the name of any person or corporation therein, and was without legal effect and void.

4. Because said subscription paper is void on its face."

The motion was overruled, the court holding that a cause of action was alleged in the statement.

In *Richmondville Union Seminary, etc., v. Brownell*, 37 Barb. (N. Y.), 535, the complaint alleged in substance, that previous to and on the first day of August, 1853, a building was being erected in Richmondville, Schoharie county, under and by the direction of the trustees of the plaintiff; that the defendant and numerous other persons were desirous that said building should be completed, and in pursuance of said object and for the purpose of completing said building, the defendant and various other persons mutually agreed to and with each other, by a subscription signed by them, on or about the first day of August, 1853, to pay to the trustees of said plaintiff, or to their successors in office, the sums affixed to their names, at such times and in such instalments as the trustees should require. That the said defendant, for the purpose of carrying out the common object of erecting said building, did on or about the first day of August, 1853, subscribe and mutually promise and agree as aforesaid to pay the sum of two hundred dollars to the trustees, etc., as aforesaid; that being the sum subscribed by him on or about the first day of August, 1853, as aforesaid, and being for eight shares of the capital stock of the Richmondville Union Seminary and Female Collegiate Institute. That upon the faith of said subscription, promise and agreement made by the defendant as aforesaid, the plaintiff, by its trustees, officers and agents, has paid, laid out and expended large sums of money in the erection and completion of said building, and that upon the faith thereof work has been performed and liabilities assumed and incurred by said plaintiff; and that said building, upon the faith thereof, has been completed by said plaintiff. The complaint then alleged that all of said outlay, expenses, liabilities and engagements had been incurred by said plaintiff, and all the work done had

been done to the defendant's knowledge and by his consent and approval. That the amount of subscription was due before the commencement of this suit. That the defendant, although often requested by the said trustees to pay said sum of two hundred dollars and interest, had not paid the same or any part thereof, and was justly indebted to the plaintiff therefore; wherefore the plaintiff demanded judgment for the sum of two hundred dollars and interest and costs. A general demurrer to this complaint was overruled.

In *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20, the petition is in substance as follows:

1. That plaintiff is a corporation for educational purposes, incorporated as a college, under the acts of April 9, 1852, and of March 11, 1853, and became so incorporated by compliance with the requirements of said statutes April 2, 1853, and by virtue of its corporate powers, did, at and prior to January 22, 1856, and ever since hath, and still does receive and educate female pupils, confer degrees, etc.; that the corporation is under the supervision of the Methodist Episcopal Church in Ohio, and is permanently located at Delaware, Ohio, and is accessible to all religious societies.

2. That from the time of its organization and on January 22, 1856, the plaintiff intended and took preparatory steps to repair its property and buildings on hand (worth over \$5,000), and to erect further buildings, procure suitable apparatus and furniture, etc., in furtherance of the objects of its organization, to wit, the establishing and maintaining of a first-class educational institution, all of which was on said day and prior thereto known to said Robert Love, then in full life. That for accomplishing this end plaintiff relied on the aid and contributions of money of its friends and the citizens of Ohio generally, especially of the members of said church; that, prior to and on said day, it received money and property and promises of money from divers persons, to be applied to said purposes, and held itself out to the public and to said Love as ready to receive contributions of money and promises and contracts to pay money for said purposes, and that it would faithfully apply such contributions, and the money arising from the payment and fulfillment of such promises

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and contracts, to said purposes; that said contributions of money and promises and agreements to pay money were in consideration that said corporation was and would be a benefit to the public, and thereby a benefit to them individually in respect to their persons and property; that others had made, were making, and would thereafter make, such contributions and agreements to pay money to said corporation; that each and all had an interest in said corporation and its success; and that by means of said contributions and agreements, a sufficient fund would be obtained for accomplishing the objects and purposes of said corporation according to plaintiff's said intent and desire; and that said plaintiff would hold and had held itself out to them and the public as ready to take upon itself the responsibility and risk and trouble of faithfully applying such contributions and moneys when paid, to said purposes and objects, and in further consideration of having good educational facilities, such as said parties desired; all which was well known to said Love at said time.

3. That on the 22d day of January, 1856, said Robert Love (being then of advanced age and expecting soon thereafter to depart this life), being also a member of said Methodist church, and resident in said county of Morrow, and interested in the success of said corporation, did, for the considerations aforesaid, and with the knowledge as aforesaid, and for the purpose and object aforesaid, execute and deliver to the plaintiff an agreement, of which the following is a copy:

"To all whom it may concern: I, *Robert Love*, agree to give *one thousand dollars* of my estate to the within-named objects; *seven hundred and fifty dollars* to the *Missionary Society of the Methodist Episcopal Church*; and *two hundred and fifty dollars* to the *Ohio Wesleyan Female College*; said sums to be paid out of my estate, as provided in my will.

(Signed) *Robert Love.*
Bloomfield, Morrow county, Ohio.

T. Ayres, witness.
January 22, 1856."

That said agreement or subscription was in a few days after its execution put down by said corporation among its other subscriptions and assets, to be applied, when collected and paid, to

the purposes aforesaid, in the faith of which agreements and subscriptions (this among others) said intended improvements were to be made, and, in fact, were afterward made.

4. That a sufficient amount having been paid and agreed to be paid to said corporation, in the manner, and for the purpose, and on the conditions aforesaid, it did, subsequently to said day, and shortly thereafter, and before suit brought, and before demand made upon the executor, faithfully apply all the moneys paid on such agreement, to the erection of commodious buildings, sufficient to receive and accommodate pupils, and did procure suitable apparatus and furniture, etc., fully complying with all the pledges made by the said corporation, to the public, and to other parties subscribing, and to said Love; and in making such improvements, it incurred debts and liabilities on the faith of such agreements and promises yet unfulfilled and unpaid (among others, that of said Love), and of the duty and liability of said John Higgins, as executor, to pay said sum so agreed by said Love in his lifetime to be paid; and that money enough has been promised, as aforesaid, to meet all such liabilities, on which promises it relied, and still relies, for the discharge of said liabilities.

5. That said Love, on the 6th day of October, 1858, made his last will in writing (of which a copy is set out in the petition); and which is in substance as follows: The first item which directs the payment of all testator's just debts and funeral expenses. Item 2 devises to his two daughters, Elizabeth Morris and Rebecca J. Sears, a house and lot of land, and all his homestead farm, to be equally divided between them; which gift, the will says, "is on this wise: that each of them pay the sum of *five hundred dollars*, as hereinafter directed." Items 3, 4, 5, 6, 7 and 8 give pecuniary legacies to other children and to a grand-daughter, amounting in the aggregate, to \$710. Item 9 provides that the one thousand dollars to be paid by his said daughters Elizabeth and Rebecca be paid within eighteen months from his decease, and that the legacies above stated be paid as soon after his decease as sufficient money for that purpose can be procured by his executor. Item 10 disposes of the residue of his personal property among his legal heirs, equally. And

I. MADE UPON CONDITION THAT GOVERNMENT WOULD ERECT BUILDING ON A CERTAIN LOT OF LAND.

Form No. 19446.

(Precedent in *Bryan v. Dyer*, 28 Ill. 189.)¹

[(*Commencement as in Form No. 6939.*)]² For that whereas the said defendant, and one *John Sollitt*, and one *Jacob Harris*, heretofore, to wit, on the 5th day of *January*, in the year 1855, to wit, at *Chicago*, in said county and state, made a certain agreement in writing to and with the said plaintiff, for a valuable consideration therein expressed, and then and there delivered the same to said plaintiff, which said agreement, subscribed by the said defendant and said *Sollitt* and *Harris*, in their own respective handwriting, is in the words and figures and characters following, viz.:

"We, the undersigned owners of real estate situate in the vicinity of the corner of *Monroe* and *Dearborn* streets, where the buildings of the United States are proposed to be located for a post-office, custom-house, and United States court room, do hereby promise and agree, for a valuable consideration to us in hand paid, to pay *Charles V. Dyer*, in the event the Government of the United States shall locate and erect the said buildings on said grounds, but not otherwise, the sums set opposite our respective names, as by us severally subscribed.

Dated *Chicago, January 5, 1855.*

<i>F. A. Bryan</i>	\$500 00
<i>John Sollitt</i>	200 00
<i>Jacob Harris</i>	50 00"

By reason whereof, the said defendant, *F. A. Bryan*, became liable to pay to said plaintiff the sum of \$500, so by him subscribed, whenever

the 11th, and last item, appoints the defendant, *John Higgins*, executor of the will, which bears date October 6, 1858.

6. The petition then states the death of said *Love* as occurring prior to the 18th day of *August*, 1859; the probate of said will on that day; the appointment and qualifying of *Higgins* as executor; that the estate is unsettled; that the daughters to whom the real estate was devised have, with their husbands, gone into possession of the premises devised under the will, and have accepted said devise. The petition alleges that the plaintiff's claim is one of the just debts due from said estate; that a sufficiency of assets have come into the hands of the executor, including the sum of \$1,000, named in the 2d and 9th items of the will, to pay each of the specified legacies, and also the plaintiff's claim and all other just demands against the estate; and that plaintiff's claim for \$250 is a valid

charge upon the real estate devised as aforesaid.

The petition further alleges the due presentation of plaintiff's claim to the executor, for allowance, and his refusal to allow the same, as also the due demand of payment thereof, and the refusal of the executor; that said claim remains wholly unpaid; that there is due thereon to the plaintiff the sum of two hundred and fifty dollars, with interest from *January 28, 1862*, for which judgment is asked. A demurrer to this petition was overruled.

1. The defendant pleaded the general issue of this declaration and gave notice that on the trial of the cause he would show that the writing obligatory or contract was made and entered into on the part of the defendant without any consideration. Issue was joined and there was a judgment for the plaintiff, which was affirmed.

2. The matter to be supplied within [] will not be found in the reported case.

the Government of the United States should have located and erected said buildings on said grounds referred to in said agreement. And the plaintiff avers that the Government of the United States heretofore, to wit, on the 1st day of May, A. D. 1860, has located and erected the said buildings for a post-office, custom-house, and United States court room, on said grounds referred to in said agreement, at the corner of *Monroe* and *Dearborn* streets, in *Chicago* aforesaid, of which the said defendant, to wit, on the day and year last aforesaid, at *Chicago*, in said county of *Cook*, had notice. By means of which said premises, the said defendant became liable to pay to said plaintiff the sum of \$500; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the said plaintiff whenever thereunto afterwards requested.

Also, for that whereas the said defendant afterwards, to wit, on the 5th day of *January*, A. D. 1855, at *Chicago* aforesaid, made and delivered to the said plaintiff a certain agreement in writing, subscribed by said defendant, of the same date, words, figures, characters, tenor and effect as that set forth in the foregoing count of this declaration, whereby, for the consideration therein stated, the said defendant promised to pay to said plaintiff, by the name of "*Chas. V. Dyer*," the sum of \$500, set opposite the said defendant's name (the words and letters "*F. A. Bryan*," subscribed to said agreement, meaning the said defendant, *Frederick A. Bryan*, and being his signature), in the event the Government of the United States should locate and erect the buildings of the United States for a post-office, custom-house, and United States court room, on grounds at the corner of *Monroe* and *Dearborn* streets, where said buildings were at the time proposed to be located. And the plaintiff avers that the Government of the United States, before the commencement of this suit, to wit, on the 1st day of May, 1860, had located and erected the said buildings for a post-office, custom-house, and United States court room, on said grounds, at the corner of *Monroe* and *Dearborn* streets, referred to in said agreement, whereof the said defendant, to wit, on the day and year last aforesaid, had notice. Whereby the said defendant became liable to pay to said plaintiff the said sum of \$500, in this count mentioned, whenever thereunto afterwards requested; and being so liable, the said defendant afterwards, to wit, on the day and year and at the place last aforesaid, undertook and faithfully promised the said plaintiff to pay to him the said last mentioned sum of \$500 whenever thereunto requested.

Yet the said defendant hath not paid the said several sums of money, or any or either of them, or any part thereof, to the said plaintiff, although often requested to do so, but hath hitherto wholly refused, and still refuses to do so, to the damage of plaintiff of \$500, and therefore he brings suit, etc.

[(Signature as in Form No. 6939.)]¹

1. The matter to be supplied within [] will not be found in the reported case.

II. TOWARD COMPLETION OF ACADEMY.

Form No. 19447.¹

(Conn. Prac. Act, p. 167, No. 296.)

(Commencement as in Form No. 5912.)

1. The plaintiff is a corporation, with power to establish and support an academy.

2. The plaintiff, in *July*, 1878, was erecting a building at *Danbury* for the purposes of an academy.

3. The defendants and others were desirous that the building should be completed, and requested that the plaintiff should complete the same, and for the purpose of enabling the plaintiff to do so, the defendants subscribed and agreed to pay the plaintiff \$1,000, in consideration of the premises, and of the like subscription and agreement of other persons (or *in consideration of which the defendants were to receive from the plaintiffs 10 shares of the capital stock of the plaintiff*).

4. Upon the faith of said subscription, the plaintiff proceeded with the erection of the building, and expended thereon large sums of money, and incurred large liabilities, and has completed said building.

5. The defendants' subscription has not been paid.

The plaintiff claims \$1,100 damages.

(Concluding as in Form No. 5912.)

III. TOWARD PURCHASE OF LOT FOR DEPOT.

Form No. 19448.

(Precedent in *Hale v. Ripp*, 32 Neb. 260.)²

*[[Commencing as in Form No. 5923]]*³ that on or about the *first* day of *June*, 1888, the citizens of *Humphrey*, *Platte* county, *Nebraska*, were desirous of having a depot on the *Fremont, Elkhorn and Missouri Valley Railroad Company* established at said *Humphrey*, and for that purpose were desirous of making a donation of certain grounds or lands to said company, then owned by one *Henry Gebecke*, situate near said village, and for the purpose of carrying into execution said purpose, the said defendant and *seventeen* other persons in and near said village of *Humphrey* made, executed and delivered unto said *Henry Gebecke* a written contract in the words and figures as follows, to-wit:

"Humphrey, Neb., Platte Co., June 1, 1888.

We, the undersigned, hereby agree to pay the several sums opposite our names as follows:

To deposit in the bank said sums, and it is to be paid over at the completion of a depot on the *F., E. & M. V. R. R.*, at *Humphrey*.

1. See, generally, *supra*, note 1, p. 971.

2. The defendant answered and on trial of the cause the district court directed a verdict for the defendant and dismissed the action. It was held, however, by the supreme court that

"the district court erred in directing a verdict, as the questions of fact should have been submitted to the jury."

3. The matter to be supplied within [] will not be found in the reported case.

The object is to pay for the east *forty* acres of land belonging to *Henry Gebecke*, and deeding same to said *R. R. Co.*

(Signed)

<i>Jacob Ripp</i>	\$200
<i>F. M. Cookingham</i>	100
<i>South Bros</i>	100
<i>D. A. Hale</i>	100
<i>Wm. Ripp</i>	100
<i>Jacob Stiffes</i>	50
<i>W. Eimers</i>	100
<i>W. Eschelbacher</i>	100
<i>Frank T. Klebba</i>	100
<i>C. D. Murphy</i>	100
<i>Wm. T. Sibley</i>	50
<i>M. Tlirhn</i>	50
<i>Wm. Duisman</i>	75
<i>G. W. Clark</i>	50
<i>H. Gitzel</i>	50
<i>Brenning Auslem</i>	50
<i>E. A. Stocklager</i>	50
<i>P. H. Fedderson</i>	50"

That pursuant to the request of said persons the said *Henry Gebecke* sold and conveyed said land unto the said *Fremont, Elkhorn & Missouri Valley Railroad*, and said railroad company promptly built thereon and now have in operation a depot at said village of *Humphrey*, and the said *Henry Gebecke* and said railroad company have in all respects fully kept and performed their part of the said contract; but the said defendant has hitherto wholly neglected and refused, and now neglects and refuses, to pay said sum by him subscribed, or any part thereof, though the same is long past due. That on or about the *10th* day of *July*, 1889, the said *Henry Gebecke*, for value, sold and assigned said contract to the plaintiff, and each and all the subscriptions thereto and thereon, and the said sum due from the said defendant is now the property of the plaintiff and wholly unpaid.

[Wherefore, (*concluding as in Form No. 5923*).]¹

IV. TOWARD PURCHASE OF LOT AND ERECTION OF CHURCH THEREON.

Form No. 19449.

(Precedent in *Petty v. Church of Christ*, 70 Ind. 292.)²

1. The matter enclosed by and to be supplied within [] will not be found in the reported case.

2. This was the third paragraph of a complaint containing three paragraphs. A demurrer to this paragraph was sustained for the reason that it counted upon a written instrument and professed to file a copy thereof, but no copy was filed.

Second Paragraph.—The second paragraph was as follows:

"And, as a second paragraph and further complaint, said plaintiffs say that said defendant did agree to solicit subscriptions for the above named purpose, and to head said subscription with his own name and subscription to the amount of \$200, and in compliance with said agreement subscribed

[(*Venue and title of court and cause as in Form No. 5915.*)]¹
 (Paragraphs one and two.)

The plaintiff, further complaining, says, that on the ——— day of April, 1875, the defendant executed an instrument in writing (of which a copy is filed herewith), and thereby promised to pay to the plaintiffs, by the description of "*The Trustees of the Church of Christ, in the city of Muncie, Indiana,*" two hundred dollars for the purchase of a lot in said city, and the erection of a house of worship thereon, for the use of said church, *one-half* on the first of June, 1875, and *one-half* on the first day of January, 1876; and the plaintiff further avers that, in part relying upon said subscription, the plaintiff afterward purchased for the purpose aforesaid lot No. 8, in Block No. 18, in *Jackson's Donation* to the city of *Muncie*, and proceeded to erect thereon a house of worship for the use of said church, and for that purpose incurred a large expense, to wit, \$1,500, of which \$500 remains unpaid. The plaintiff avers that no portion of said sum of \$200 has been paid by the defendant, but the same remains due and owing, though often demanded by the plaintiff, and plaintiff asks judgment for \$300 and other proper relief.

[(*Signature and verification as in Form No. 5915.*)]¹

under a heading in writing, as follows:

'We, the undersigned, agree to pay the sums set opposite our names to the Trustees of the *Church of Christ*, in the City of *Muncie, Indiana*, for the purchase of a lot and the erection of a house of worship for the use of said church. Size of said house to be 40x60 feet; said sums to be paid as follows: *one-half* on the first day of June, 1875, and *one-half* on the first day of January, 1876.

Names.	Amount.
John S. Petty	\$200 00

And, further, that said plaintiff did proceed to raise funds for the purchase of a suitable lot and did purchase the same in said city of *Muncie*; and, further, they did raise funds by subscription for the erection of a suitable house of worship thereon, and did notify said defendant, from time to time, of all meetings of the board for the settlement of questions of im-

portance, and did erect a house on said lot for the purpose above designated, and said house is now being used regularly by said church; and, further, defendant's said subscription has been demanded, and he refused payment thereof when due, and continues to refuse said payment, and the same is due and unpaid. They therefore ask judgment for

Subscription	\$200 00
Damage	100 00
Interest	11 00

Total \$311 00"

On demurrer, this paragraph was held bad because it did not allege that the defendant ever executed the written instrument relied on, but alleged merely that the defendant "subscribed, under a heading in writing, as follows," etc.

1. The matter to be supplied within [] will not be found in the reported case.

SUBSTITUTED SERVICE.

See the titles PUBLICATION, vol. 15, p. 1; *SERVICE OF WRIT AND PAPERS*, *ante*, p. 24.

SUBSTITUTION OF ATTORNEYS.

See the title ATTORNEYS, vol. 2, p. 969.

SUBSTITUTION OF PARTIES.

BY HAROLD N. ELDRIDGE.

I. NOTICE OF MOTION FOR SUBSTITUTION, 982.

1. *In General*, 982.
2. *Of Successor in Office*, 982.

II. AFFIDAVIT FOR SUBSTITUTION, 982.

1. *Of Assignee*, 982.
2. *Of Successor in Office*, 983.

III. ORDER OF SUBSTITUTION, 983.

1. *In General*, 983.
2. *Of Successor in Office*, 984.

CROSS-REFERENCES.

For Forms relating to the Interpleading of Parties, see the title INTERPLEADER, vol. 10, p. 391.

For Forms relating to the Intervention of Parties, see the title INTERVENTION, vol. 10, p. 438.

For Forms relating to Substitution of Parties Where One or More of the Original Parties are Deceased, see the titles REVIVOR AND ABATEMENT, vol. 16, p. 616; *SCIRE FACIAS*, vol. 16, p. 862.

See also the GENERAL INDEX to this work.

I. NOTICE OF MOTION FOR SUBSTITUTION.¹

1. In General.

Form No. 19450.²*(Venue and title of court and cause as in Form No. 5915.)*To *Richard Roe*:

You will please take notice that the undersigned will move the court, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the *forenoon*, or as soon thereafter as counsel can be heard, for an order to substitute *William West* as plaintiff in this action in the place of *John Doe*, the present plaintiff.

Dated *May 1*, 1902.

Jeremiah Mason,
Attorney for *William West*.

2. Of Successor in Office.

Form No. 19451.³*Supreme Court, Suffolk County.*

John Doe, plaintiff,
against

Richard Roe, as supervisor of the
town of *Riverhead*, defendant. }

Please take notice that on the pleadings herein and the affidavit (or *certificate*), of which a copy is herewith served, the undersigned will move the court, at a *special* term thereof to be held at the courthouse in *Riverhead*, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the *forenoon*, or as soon thereafter as counsel can be heard, to substitute *Jason Denslow*, supervisor of the town of *Riverhead* aforesaid (or *other official designation*), in the place of *Richard Roe*, as *defendant* in this action; or for such other relief as may be just.

*(Signature, office address and address as in Form No. 6954.)*II. AFFIDAVIT FOR SUBSTITUTION.⁴

1. Of Assignee.

Form No. 19452.⁵*(Title of court and cause and venue as in Form No. 814.)**William West*, being duly sworn, deposes and says:

1. That on or about the *first* day of *May*, A. D. 1902, an action was commenced in this court by *John Doe*, the above named plaintiff, against *Richard Roe*, the above named defendant, for the purpose

1. For the formal parts of a notice of motion in a particular jurisdiction see the title MOTIONS, vol. 12, p. 938.

2. *Indiana*. — Horner's Stat. (1901), § 271.

3. *New York*. — Code Civ. Proc., § 1930.

4. For the formal parts of an affidavit in a particular jurisdiction see the title AFFIDAVITS, vol. 1, p. 548.

5. *California*. — Code Civ. Proc. (1897), § 385.

of (*Here state briefly the cause of action*), and that issue has been joined and the case is now ready for trial.

2. That pending said action and after issue joined, to wit, on the *third* day of *June*, A. D. 1903, the above named plaintiff, for a valuable consideration, duly assigned and transferred the note in the complaint mentioned (*or state whatever was assigned and transferred*) to this affiant, who is now the lawful owner and holder thereof.

Wherefore this affiant prays that he may be substituted in place of the above named *John Doe*, as plaintiff in this action, that said action may be continued in his name, and that he may have such other relief as may seem just.

(*Signature and jurat as in Form No. 814.*)

2. Of Successor in Office.

Form No. 19453.¹

Supreme Court, Suffolk County.

John Doe, plaintiff,
against

Richard Roe, as supervisor of the town of
Riverhead, defendant. }
Suffolk County, ss.

Oliver Ellsworth, being duly sworn, says that he is the attorney of the plaintiff in this action; that on the *first* day of *May last* *James Kirby*, of *Riverhead*, in said county of *Suffolk*, was duly elected to the office of supervisor of said town of *Riverhead*, in the county of *Suffolk*, in place of the defendant *Richard Roe*, whose term of office on said *first* day of *May* expired; and that on the *second* day of *May last* the said *Richard Roe* duly qualified and entered upon the duties of said office, and still holds the same.

(*Signature and jurat as in Form No. 8805.*)

III. ORDER OF SUBSTITUTION.²

1. In General.

Form No. 19454.³

(*Title of court and cause as in Form No. 14688.*)

It is ordered that the said *William West* be and he hereby is substituted as plaintiff in the above entitled action in the place of the above named *John Doe*, the present plaintiff, and that this action be continued by and in the name of the said *William West*, the successor in interest of the said *John Doe*, without prejudice to the proceedings already had.

1. *New York*. — Code Civ. Proc., § a particular jurisdiction see the title
1930. ORDERS, vol. 13, p. 356.

2. For the formal parts of an order in 3. *Indiana*. — Horner's Stat. (1901), §
271.

2. Of Successor in Office.

Form No. 19455.¹

At the *special* term of the *Supreme* Court, held within and for the county of *Suffolk*, at the court-house in *Riverhead*, in said county, on the *twentieth* day of *September*, 1902.

Present, the Honorable *John Marshall*, Justice.

<i>John Doe</i> , plaintiff,	}
against	
<i>Richard Roe</i> , as supervisor of the town of <i>Riverhead</i> , defendant.	

Upon reading and filing (*Here enumerate the motion papers*), together with satisfactory proof of service of said notice of motion (*Here state, where the proceedings for substitution are without the consent of the successor, that he has had at least fourteen days' notice of the application for the substitution*), and after hearing *Jeremiah Mason*, attorney for the above plaintiff, in argument in support of said motion, and no one appearing in opposition;

Ordered, that *James Kirby*, of *Riverhead*, in said county of *Suffolk*, as supervisor of said town of *Riverhead*, be and he hereby is substituted as defendant herein in place of *Richard Roe*, whose term of office has expired, without prejudice to the proceedings already had in this action.

Enter:

John Marshall, J. S. C.

SUCCESSION TAX.

See the title TRANSFER TAX.

SUGGESTION.

See the GENERAL INDEX to this work.

SUICIDE.

BY HAROLD N. ELDRIDGE.

- I. INDICTMENT FOR ATTEMPTING TO COMMIT SUICIDE, 985.
- II. PLEA IN A CIVIL ACTION ON A LIFE INSURANCE POLICY THAT THE INSURED COMMITTED SUICIDE, 986.

CROSS-REFERENCES.

For Forms relating to Indictments Against Persons Aiding and Abetting the Commission of Suicide, see the title ACCESSORIES, AIDERS AND ABETTORS, vol. 1, Forms Nos. 292, 293, 294.

I. INDICTMENT FOR ATTEMPTING TO COMMIT SUICIDE.¹

Form No. 19456.²

(Whart. Prec. Ind. and Pl. (1857), No. 1060.)

(*Commencing as in Form No. 10678, and continuing down to **)
unlawfully and wilfully did cast and throw himself from and off a certain steamboat called the *Bee*, then and there being propelled along the waters of a certain river called the *Thames*, into the waters of the said river, with the wicked intent and purpose of then and there feloniously, wilfully and of his malice aforethought, choking, suffocating, drowning and murdering himself in and by the waters aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said *John Doe*, on the day and year aforesaid, at (*stating*

1. For the formal parts of an indictment in a particular jurisdiction see the title INDICTMENTS, vol. 9, p. 615. 2. This is substantially the form of indictment set out in 5 Cox's C. C. Appendix 92.

place) aforesaid, in the county aforesaid, unlawfully, wilfully and wickedly did attempt and endeavor feloniously, wilfully and of his malice aforethought, to kill and murder himself in the manner aforesaid; against the peace (*concluding as in Form No. 10678*).

II. PLEA IN A CIVIL ACTION ON A LIFE INSURANCE POLICY THAT THE INSURED COMMITTED SUICIDE.¹

Form No. 19457.

(Precedent in Connecticut Mut. L. Ins. Co. v. Smith, 39 Ill. App. 570.)²

[(*Venue and title of court and cause as in Form No. 15219.*)

(*First and second pleas.*)

And for a further plea in this behalf the defendant says that the plaintiff ought not to have his aforesaid action against it, the defendant, because it says,]³ that one of the provisions in said policy of insurance in the said declaration mentioned was that the self-destruction of the insured, whether voluntary or involuntary, and whether he should be sane or insane at the time thereof, was not a risk assumed by this company under its contract, but that in every such case the company should pay in manner and form as provided in the policy a certain sum constituting the so-called net reserve upon the policy, computed as therein stated, which should be deemed to be payment in full of all the liability by reason of said contract; and the said defendant avers that the said insured, *Conrad H. Smith*, did die by an act of self-destruction within the aforesaid provisions, to wit, by poisoning himself, by reason whereof the liability of said defendant upon the said policy of insurance in the declaration mentioned has become and is so far reduced that the said defendant is liable to said plaintiff thereon only to the amount of the net reserve already mentioned, which amount is readily ascertainable by a mathematical calculation upon the mortality tables named in said policy, and which amount the defendant is ready and willing and now offers to pay, and this the defendant is ready to verify, etc.

[*Jeremiah Mason, Attorney for Defendant.*]⁴

1. For the formal parts of a plea in a particular jurisdiction see the title PLEAS, vol. 13, p. 918.

2. The defendant in this case filed a plea of the general issue and two special pleas, the first of which relied upon a provision in the policy of insurance that death from any disease resulting from the use of alcoholic or narcotic stimulants rendered the policy null and void. The second plea is here set out. The plaintiff replied to this third plea, or second special plea, that the said Conrad H. Smith did not at the time, when, etc., purposely or intentionally poison himself and therefrom die by an act of self-destruction in manner and form as in said third

plea is alleged, and of this the said plaintiff puts herself upon the country, etc. There was a second replication to the third plea, that the said Conrad H. Smith did not come to his death by an act of self-destruction in manner and form as in said third plea alleged, and of this the said plaintiff puts herself upon the country, etc. To the first replication there was a demurrer, which was overruled, and to the second replication there was a similitur by the defendant.

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

4. The matter enclosed by [] will not be found in the reported case.

Form No. 19458.

(Precedent in *New Home L. Assoc. v. Hagler*, 29 Ill. App. 438.)¹[*(Venue and title of court and cause as in Form No. 15219.)*
(First and second pleas.)]²

And for further plea in this behalf the defendant, by its attorneys, comes and defends the wrong and injury complained of, as to all the supposed promises in plaintiff's declaration mentioned, except the sum of \$16.57, part of the sum of money in said declaration named, and says it did not promise in any manner and form as the plaintiffs have complained against it, and of this it puts itself upon the country. And as to the said sum of \$16.57, part of the sum in plaintiff's declaration named, the defendant says, that the plaintiffs ought not to have their aforesaid action against it to recover any greater sum, because it says that it was and is provided in and by the certificate of membership sued upon as follows: "If the holder of this certificate shall die by reason of any act of self-destruction whatever, this certificate shall become null and void and of no effect, except that the aggregate amount of money which shall have been paid the association on this certificate, and no more, shall, on the delivery of this certificate, properly receipted, be paid to the beneficiaries, as hereinbefore provided, within *ninety* days after receipt of proof of death." And the defendant avers that said *Abram Hagler*, the holder of said certificate, came to his death by reason of an act of self-destruction. And before the commencement of this suit the defendant was ready and willing, and then and there tendered and offered to pay to the plaintiffs, the said sum of \$16.57, which was the aggregate amount of money which said *Abram Hagler* had paid to the defendant association upon the certificate sued upon; to receive which from the defendant the plaintiffs then and there refused.

And defendant says that ever since the death of the said *Abram Hagler*, as to the said sum of \$16.57, it has been and still is ready to pay to the plaintiffs, and now brings the money into court, ready to pay to plaintiffs if they will accept the same; and this defendant is ready to verify.

[Wherefore, defendant prays judgment if the said plaintiffs ought to have and maintain their aforesaid action thereof against it.

Jeremiah Mason, Attorney for Defendant.]³

1. This is the third amended plea. To this plea the plaintiffs filed the following replication: "And for replication to the defendant's amended third plea herein, plaintiffs say *precludi non*, because they say that the said *Abram Hagler* did not come to his death by any act of self-destruction. And of this they put themselves upon the

country." The case was tried upon issue joined upon this replication and on the evidence submitted there was a judgment for the plaintiffs, which was affirmed.

2. The matter to be supplied within [] will not be found in the reported case.

3. The matter enclosed by [] will not be found in the reported case.

SUMMARY PROCEEDINGS.

See the titles *ATTORNEYS*, vol. 2, p. 969; *BONDS AND UNDERTAKINGS (ACTIONS ON)*, vol. 3, p. 528; *CONTEMPT*, vol. 5, p. 226; *LANDLORD AND TENANT*, vol. 11, p. 8; *PENALTIES, FORFEITURES, FINES AND AMERCEMENT*, vol. 13, p. 747; *PRINCIPAL AND SURETY, OR GUARANTOR*, vol. 14, p. 167; *PUBLIC OFFICERS*, vol. 15, p. 88; *RECEIVERS*, vol. 15, p. 585; *SHERIFFS, CONSTABLES AND CORONERS*, ante, p. 103.

See also the *GENERAL INDEX* to this work.

SUMMONS.

BY HAROLD N. ELDRIDGE.

I. SUMMONS, 989.

1. *In Civil Actions*, 989.
 - a. *In Justice's Court*, 989.
 - b. *In City, Mayor's, Municipal or Police Courts*, 1004.
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II. SERVICE OF SUMMONS, 1035.

1. *Affidavit of Service*, 1036.
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 - b. *Served by Delivering Copy of Summons or Copies of Summons and Complaint with Defendant Personally*, 1039.
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CROSS-REFERENCES.

For Forms of Summonses in Proceedings on Appeal, see the title *APPEALS*, vol. 1, p. 890.

For Forms of Summonses in Ejectment Proceedings, see the title *EJECTMENT*, vol. 7, p. 279.

For Forms of Summonses in Eminent Domain Proceedings, see the title EMINENT DOMAIN, vol. 7, p. 561.

For Forms of Summonses in Publication Proceedings, see the title PUBLICATION, vol. 15, p. 1.

For other Forms relating to Service of Summons, see the title SERVICE OF WRITS AND PAPERS, ante, p. 24.

I. SUMMONS.¹

1. In Civil Actions.

a. In Justice's Court.²

1. Requisites of Summons, Generally.—For other requisites of summonses see *infra*, note 2, this page; note 1, p. 1007.

Must Comply with Statutory Requirements.—The summons must comply with all statutory requirements. *Stanquist v. Hebbard*, 122 Cal. 268; *Lyman v. Milton*, 44 Cal. 630; *Smith v. Aurich*, 6 Colo. 388; *People v. Henckler*, 137 Ill. 580; *Ames v. Sankey*, 128 Ill. 523; *Sidwell v. Schumacher*, 99 Ill. 426; *Kellar v. Stanley*, 86 Ky. 240; *Craighead v. Martin*, 25 Minn. 41; *Black v. Clendenin*, 3 Mont. 44; *Osborn v. McCloskey*, (Supreme Ct. Spec. T.) 55 How. Pr. (N. Y.) 345; *Wallace v. Dummick*, 24 Hun (N. Y.) 635; *Streeter v. Frank*, 3 Pin. (Wis.) 386.

But a substantial compliance with such requirements is sufficient. *Stanquist v. Hebbard*, 122 Cal. 268; *Shinn v. Cummins*, 65 Cal. 97; *Welde v. Henderson*, (Supreme Ct. Gen. T.) 10 Civ. Proc. (N. Y.) 214; *Ralph v. Lomer*, 3 Wash. 401.

Style of Summons—In the Name of State—Generally.—Constitutional and statutory provisions that all writs and other process shall run in the name of the state or of the people of the state have in some states been held to apply to summonses. *Mitchell v. Conley*, 13 Ark. 414; *Gilbreath v. Kuykendall*, 1 Ark. 50; *Estill v. Bailey*, 1 Ark. 131; *Knott v. Pepperdine*, 63 Ill. 219; *Harris v. Jenks*, 3 Ill. 475; *Cleland v. Tavernier*, 11 Minn. 194; *Doan v. Boley*, 38 Mo. 449; *Davis v. Wood*, 7 Mo. 162; *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305; *Peaslee v. Haberstro*, 15 Blatchf. (U. S.) 472.

But see *contra*, that a summons is not a process within the meaning of constitutional and statutory provisions relating to process, as follows: *Comet Consol. Mun. Co. v. Frost*, 15 Colo. 310; *Whitewater First Nat. Bank v.*

Estenson, 68 Min. 28; *Hanna v. Russell*, 12 Minn. 80; *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311; *Whitney v. Blackburn*, 17 Oregon 564; *Bailey v. Williams*, 6 Oregon 71.

Under a constitutional provision that all process shall be "In the Name of the People of the State of Michigan," it has been held that a summons which runs as follows: "State of Michigan," is insufficient. *Forbes v. Darling*, 94 Mich. 621.

But see *Knott v. Pepperdine*, 63 Ill. 219, where it is held that a constitutional provision that the summons shall run "In the Name of the People of the State of Illinois," is sufficiently complied with where the summons runs as follows, "The People of the State of Illinois."

May Appear in Any Part of Summons.—It is immaterial in what part of the writ the words appear: if they appear in any part it is sufficient. *Harris v. Jenks*, 3 Ill. 475; *White v. Com.*, 6 Binn. (Pa.) 179.

Surplusage.—Unnecessary matter contained in the summons does not vitiate it. Such matter is surplusage, and will be disregarded. *Welde v. Henderson*, (Supreme Ct. Gen. T.) 10 Civ. Proc. (N. Y.) 214.

2. Statutes relating to summonses in civil actions in justices' courts exist as follows:

Alabama.—Civ. Code (1896), § 2666 *et seq.*

Arizona.—Rev. Stat. (1901), § 2067 *et seq.*

Arkansas.—Sand & H. Dig. (1894), § 4321 *et seq.*

California.—Code Civ. Proc. (1897), § 844.

Colorado.—Mills' Anno. Stat. (1891), § 2636.

Connecticut.—Gen. Stat. (1888), § 892.

District of Columbia.—Comp. Stat. (1894), c. 37, § 13.

Florida.—Rev. Stat. (1892), § 1612 *et seq.*

Georgia.—2 Code (1895), § 4116.

Idaho.—Code Civ. Proc. (1901), § 3607.

Illinois.—Starr & C. Anno. Stat. (1896), c. 79, par. 19.

Indiana.—Horner's Stat. (1901), § 1451.

Iowa.—Code (1897), § 4486.

Kansas.—Gen. Stat. (1897), c. 103, § 28.

Kentucky.—Bullitt's Civ. Code (1895), § 701.

Maine.—Rev. Stat. (1883), c. 81, § 1 *et seq.*

Maryland.—Pub. Gen. Laws (1888), art 52, § 20.

Massachusetts.—Rev. Laws (1902), c. 167, § 15.

Michigan.—Comp. Laws (1897), § 715.

Minnesota.—Stat. (1894), § 4966.

Mississippi.—Anno. Code (1892), § 2401.

Missouri.—Rev. Stat. (1899), § 3839.

Montana.—Code Civ. Proc. (1895), § 1500.

Nebraska.—Comp. Stat. (1899), § 6431.

Nevada.—Comp. Laws (1900), § 3611.

New Hampshire.—Pub. Stat. & Sess. L. (1901), c. 218, § 1 *et seq.*

New Jersey.—Gen. Stat. (1895), p. 1865, § 10 *et seq.*

New Mexico.—Comp. Laws (1897), § 3243.

New York.—Code Civ. Proc., § 2877.

North Dakota.—Rev. Codes (1895), § 6637.

Ohio.—Bates' Anno. Stat. (1897), § 6475.

Oklahoma.—Stat. (1893), § 4649.

Oregon.—Bellinger & C. Anno. Codes & Stat. (1902), § 2201.

Pennsylvania.—Bright. Pur. Dig. (1894), p. 1129, § 46.

South Dakota.—Stat. (1901), § 7292.

Tennessee.—Code (1896), §§ 4518 *et seq.*, 5958.

Texas.—Rev. Stat. (1895), art. 1598 *et seq.*

Utah.—Rev. Stat. (1898), § 3675.

Vermont.—Stat. (1894), § 1060 *et seq.*; Laws (1898), No. 137.

Washington.—Ballinger's Anno. Codes & Stat. (1897), § 6543.

West Virginia.—Code (1899), c. 50, § 26.

Wisconsin.—Stat. (1898), § 3594 *et seq.*

Wyoming.—Rev. Stat. (1887), § 3424.

Requisites of Summons, Generally.—See *supra*, note 1, p. 989.

Must be in Writing.—The summons must be in writing. 2 Ga. Code (1895), § 4116.

Name of Court.—The title of the court in which the action is commenced must be contained in the summons. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; Mont. Code Civ. Proc. (1895), § 1505; N. Dak. Rev. Codes (1895), § 6637; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 2201; S. Dak. Stat. (1901), § 7292.

Name of County.—The name of the county in which the action is commenced must be stated. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; N. Dak. Rev. Codes (1895), § 6637; Bates' Anno. Stat. Ohio (1897), § 6475; S. Dak. Stat. (1901), § 7292.

City or Township and Precinct.—In a few states, the name of the city or township, and the precinct, if any, in which the action is commenced, must be stated. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; Mont. Code Civ. Proc. (1895), § 1505.

Names of Parties—Generally.—The names of the parties to the action must be contained in the summons. Cal. Code Civ. Proc. (1897), § 844; Conn. Gen. Stat. (1888), § 892; Idaho Code Civ. Proc. (1901), § 3607; Mont. Code Civ. Proc. (1895), § 1505; N. Dak. Rev. Codes (1895), § 6637; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 2201; S. Dak. Stat. (1901), § 7292; Tex. Rev. Stat. (1895), art. 1600.

Defendants.—The summons must contain the name or names of the defendant or defendants, if known, and if unknown a description of him or them. Kan. Gen. Stat. (1897), c. 103, § 28; Neb. Comp. Stat. (1899), § 6431; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649.

Address—In General.—In *New Hampshire*, the summons must be directed to the sheriff of the county or his deputy, or to any constable of any town in the county, or to either of said officers. Pub. Stat. & Sess. L. (1901), c. 218, § 11.

In *Tennessee*, the summons must be directed to the sheriff or other proper officer. Code (1896), § 4519.

To Sheriff or Constable.—In some states, the summons must be directed to

the sheriff or any constable of the proper county. Minn. Stat. (1894), § 4966; Neb. Comp. Stat. (1899), § 6431; N. Mex. Comp. Laws (1897), § 3243; Tex. Rev. Stat. (1895), art. 1598; Wis. Stat. (1898), § 3594; Wyo. Rev. Stat. (1887), § 3424.

To Constable.—In some states, the summons must be directed to any lawful constable of the proper county, township, ward or district. 2 Ga. Code (1895), § 4116; Mich. Comp. Laws (1897), § 715; Mo. Rev. Stat. (1899), § 3859; N. Y. Code Civ. Proc., § 2877; Bright. Pur. Dig. Pa. (1894), p. 1129, § 46.

To Constable or Third Person.—In a few states, the summons may be addressed to the constable or to a person not a constable, in which case it shall be directed to such person. Kan. Gen. Stat. (1897), c. 103, § 28; Neb. Comp. Stat. (1899), § 6431; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649.

To Defendant.—In some jurisdictions, the summons must be directed to the defendant in the action. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; Iowa Code (1897), § 4488; Mont. Code Civ. Proc. (1895), § 1505; Nev. Comp. Laws (1900), § 3611; N. Dak. Rev. Codes (1895), § 6637; Ballinger & C. Anno. Codes & Stat. Oregon (1902), § 2201; S. Dak. Stat. (1901), § 7292.

In *Iowa*, the summons must be addressed to the defendant by name, but if his name is unknown, a description of him will be sufficient. Code (1897), § 4488.

In *Nevada*, the summons shall be addressed to the defendant by name, or, if his name be unknown, by a fictitious name. Comp. Laws (1900), § 3611.

Place of Appearance.—The place where the defendant is required to appear and answer must be stated. Mills' Anno. Stat. Colo. (1891), § 2636; Conn. Gen. Stat. (1888), § 892; 2 Ga. Code (1895), § 4116; Starr & C. Anno. Stat. Ill. (1896), c. 79, par. 19; Horner's Stat. Ind. (1901), § 1451; Iowa Code (1897), § 4489; Kan. Gen. Stat. (1897), c. 103, § 28; Mich. Comp. Laws (1897), § 715; Minn. Stat. (1894), § 4967; Mo. Rev. Stat. (1899), § 3859; Neb. Comp. Stat. (1899), § 6431; Nev. Comp. Laws (1900), § 3611; N. Mex. Comp. Laws (1897), § 3244; N. Y. Code Civ. Proc., § 2877; N. Dak. Rev. Codes (1895), § 6637; Tex. Rev. Stat. (1895), art. 1600; Ballinger's Anno. Codes & Stat. Wash.

(1897), § 6543; Wis. Stat. (1898), § 3595; Wyo. Rev. Stat. (1887), § 3424.

Time of Appearance.—The time when the defendant is required to appear and the answer must be stated. Cal. Code Civ. Proc. (1897), § 844; Mills' Anno. Stat. Colo. (1891), § 2636; Conn. Gen. Stat. (1888), § 892; 2 Ga. Code (1895), § 4116; Idaho Code Civ. Proc. (1901), § 3607; Starr & C. Anno. Stat. Ill. (1896), c. 79, par. 19; Horner's Stat. Ind. (1901), § 1451; Iowa Code (1897), § 4489; Kan. Gen. Stat. (1897), c. 103, § 28; Mich. Comp. Laws (1897), § 715; Minn. Stat. (1894), § 4967; Mo. Rev. Stat. (1899), § 3859; Mont. Code Civ. Proc. (1895), § 1506; Neb. Comp. Stat. (1899), § 6431; Nev. Comp. Laws (1900), § 3611; N. Mex. Comp. Laws (1897), § 3244; N. Dak. Rev. Codes, (1895), § 6637; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649; Ballinger & C. Anno. Codes & Stat. Oregon (1902), § 2201; Bright. Pur. Dig. Pa. (1894), p. 1129, § 46; S. Dak. Stat. (1901), § 7292; Tex. Rev. Stat. (1895), art. 1600; Ballinger & C. Anno. Codes & Stat. Wash. (1897), § 6543; Wis. Stat. (1898), § 3595; Wyo. Rev. Stat. (1887), § 3424.

Command.—The summons must command the defendant to appear and answer at the place and time mentioned. Cal. Code Civ. Proc. (1897), § 844; Mills' Anno. Stat. Colo. (1891), § 2636; 2 Ga. Code (1895), § 4116; Idaho Code Civ. Proc. (1901), § 3607; Kan. Gen. Stat. (1897), c. 103, § 28; Mich. Comp. Laws (1897), § 715; Minn. Stat. (1894), § 4967; Mo. Rev. Stat. (1899), § 3859; Mont. Code Civ. Proc. (1895), § 1505; Neb. Comp. Stat. (1899), § 6431; Nev. Comp. Laws (1897), § 3611; N. Mex. Comp. Laws (1897), § 3244; N. Y. Code Civ. Proc. § 2877; N. Dak. Rev. Codes (1895), § 6637; Okla. Stat. (1893), § 4649; Bright. Pur. Dig. Pa. (1894), p. 1129, § 46; S. Dak. Stat. (1901), § 7292; Tenn. Code (1896), § 4519; Tex. Rev. Stat. (1895), art. 1600; Wis. Stat. (1898), § 3595; Wyo. Rev. Stat. (1887), § 3424.

Cause of Action.—In many states, the summons must contain a sufficient statement of the cause of action in general terms to notify the defendant of the nature of the claim against him. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; Iowa Code (1897), § 4487; Kan. Gen. Stat. (1897), c. 103, § 28; Md. Pub. Gen. Laws (1888), art. 52, § 20; Mo. Rev. Stat. (1899), § 3859; Mont. Code Civ.

Proc. (1895), § 1505; Neb. Comp. Stat. (1899), § 6431; Nev. Comp. Laws (1900), § 3611; N. Mex. Comp. Laws (1897), § 3244; N. Dak. Rev. Codes (1895), § 6637; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649; S. Dak. Stat. (1901), § 7292; Tenn. Code (1896), § 4521; Tex. Rev. Stat. (1895), art. 1600; Wyo. Rev. Stat. (1887), § 3424.

Penalty for Failure to Appear — *Judgment According to Complaint.* — In *Montana*, the summons must notify the defendant that for failure to appear and answer as required judgment will be taken against him according to the complaint. Mont. Code Civ. Proc. (1895), § 1505.

Judgment for Relief Demanded. — In a few states, the summons must contain a notice that unless the defendant appear and answer as required plaintiff will apply to the court for the relief demanded in his complaint. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; S. Dak. Stat. (1901), § 7292.

Judgment for Sum Claimed. — Where the action is one arising on a contract for the recovery of money or damages only, the summons must contain a notice that unless the defendant appear and answer as required plaintiff will take judgment for the sum claimed by him (stating it). Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; S. Dak. Stat. (1901), § 7292.

In *Iowa* and *Nevada*, it is provided that the summons shall state the amount for which the plaintiff will take judgment if the defendant fail to appear and answer as required. Iowa Code (1897), § 4489; Nev. Comp. Laws (1900), § 3611.

Signature — *Generally.* — The summons must be signed by the justice who issues it. Cal. Code Civ. Proc. (1897), § 844; Conn. Gen. Stat. (1888), § 892; 2 Ga. Code (1895), § 4116; Idaho Code Civ. Proc. (1901), § 3607; Kan. Gen. Stat. (1897), c. 103, § 28; Minn. Stat. (1894), § 4966; Mont. Code Civ. Proc. (1895), § 1505; Neb. Comp. Stat. (1899), § 6431; Nev. Comp. Laws (1900), § 3611; N. H. Pub. Stat. & Sess. L. (1901), c. 218, § 2; N. J. Gen. Stat. (1895), p. 1865, § 10; N. Mex. Comp. Laws (1897), § 3243; N. Dak. Rev. Codes (1895), § 6637; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 2201; S. Dak. Stat.

(1901), § 7292; Tenn. Code (1896), § 4519; Tex. Rev. Stat. (1895), art. 1598; Wis. Stat. (1898), § 3594; Wyo. Rev. Stat. (1887), § 3424.

In *Iowa*, the summons must be subscribed by the plaintiff, his attorney or the justice before whom it is returnable. Code (1897), § 4488.

Sufficiency of Signature. — Where a writ was issued in the name of the justice of the peace, and the name of the justice was signed by the attorney of the plaintiff, with the consent of the justice, derived from a special authority to sign the writ, and a general permission to sign writs in his name, but the justice was not present when the writ was signed, it was held that the signing was sufficient. *Kidder v. Prescott*, 24 N. H. 263.

Date of Issue. — The summons must be dated the day it is issued. Kan. Gen. Stat. (1897), c. 103, § 28; Minn. Stat. (1894), § 4966; Neb. Comp. Stat. (1899), § 6431; N. J. Gen. Stat. (1895), p. 1865, § 10; N. Mex. Comp. Laws (1897), § 3243; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649; Tex. Rev. Stat. (1895), art. 1598; Wis. Stat. (1898), § 3594; Wyo. Rev. Stat. (1887), § 3424.

Seal. — In *New Hampshire* and *New Jersey*, statutes relating to summons provide that they must be under seal. N. H. Pub. Stat. & Sess. L. (1901), c. 218, § 11; N. J. Gen. Stat. (1895), p. 1865, § 10.

In *Wisconsin*, it is provided that the summons may be with or without a seal. Wis. Stat. (1898), § 3594.

Indorsement of Attorneys. — In several states, it is provided that if the plaintiff has appeared by attorney the name of the attorney must be indorsed upon the summons. Cal. Code Civ. Proc. (1897), § 844; Idaho Code Civ. Proc. (1901), § 3607; S. Dak. Stat. (1901), § 7292.

Indorsement of Amount for Which Judgment will be Taken. — In several states, there shall be indorsed on the writ of summons the amount for which the plaintiff will take judgment if the defendant fail to appear. Neb. Comp. Stat. (1899), § 6431; Bates' Anno. Stat. Ohio (1897), § 6475; Okla. Stat. (1893), § 4649; Wyo. Rev. Stat. (1887), § 3424.

Blanks. — The summons shall be entirely filled up and have no blanks, either in date or otherwise, at the time of its delivery to an officer to be executed. Minn. Stat. (1894), § 4966.

Form No. 19459.¹

(Ala. Civ. Code (1896), § 2667.)

The State of Alabama, }
 Jefferson County. }

To any lawful officer of the county of *Jefferson*:

Summon *John Doe* to appear before me on the *tenth* day of *May* next at (*designating the place*), to answer the complaint of *Richard Roe*, and there make return of this summons.

Witness my hand this the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19460.²

State of Arkansas, }
 County of *Pulaski*. } ss.

The State of *Arkansas* to any Constable of *Pulaski* County, Greeting:

You are hereby commanded to summon *Richard Roe* to appear before me, *Abraham Kent*, a justice of the peace in and for the township of *Big Rock*, in the county of *Pulaski*, at my office, in said township, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the forenoon of said day, to answer the claim of *John Doe* for (*stating nature of the claim according to the facts*), amounting to *forty-five* dollars, and notify the said *Richard Roe* of the time and place of trial, and have then and there this writ with due return upon it.

Witness my hand as such justice this *first* day of *May*, A. D. 1902.

Abraham Kent, J. P.

Form No. 19461.³

State of *California*.

In *Justices'* Court of the *City and County of San Francisco*. *New City Hall*.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

Action brought in the *Justices'* Court in the *city and county of San Francisco*, and complaint filed in the office of clerk of said court.

The People of the State of *California* to *Richard Roe*, Defendant, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff in the *Justices'* Court in the *city and county of San Francisco*, and to answer to the complaint filed therein, within *five* days (exclusive of the day of service) after the service on you of this summons, if served within this county, otherwise within *twenty* days.

The said action is brought to recover \$25 alleged to be due (*Here*

1. *Alabama*. — Civ. Code (1896), § 2666 *et seq.*

See also, generally, *supra*, note 2, p. 989.

2. *Arkansas*. — Sand. & H. Dig. (1894), § 4321 *et seq.*

See also, generally, *supra*, note 2, p. 989.

This is substantially the form in Sand. & H. Dig. Ark. (1894), p. 1617.

3. *California*. — Code Civ. Proc. (1897), § 844.

See also, generally, *supra*, note 2, p. 989.

state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him), as more fully appears by the complaint on file herein, to which you are referred.

And you are hereby notified that if you fail to appear and answer to said complaint as above required, the plaintiff will take judgment against you for said amount, \$25, and interest due, together with costs.

This action has been assigned, and you are requested to appear for trial before *Freeman D. Dearth*, Esq., one of the justices of said court, at his office, *New City Hall*, in said city and county.

Make legal service and due return hereon.*

Given under my hand this 10th day of May, 1895.

By order of the presiding justice of the peace of the city and county of *San Francisco*.

E. W. Williams, Justices' Clerk.

Jeremiah Mason, Esq., Attorney for Plaintiff.

Form No. 19462.¹

(Mills' Anno. Stat. Colo. (1891), § 2636.)

State of *Colorado*, }
County of *Arapahoe*. } ss.

The People of the State of *Colorado* to any Constable of said County, Greeting:

You are hereby commanded to summon *Richard Roe* to appear before me, at my office, in *Denver*, on the tenth day of May, A. D. 1902, at ten o'clock A. M., to answer the complaint of *John Doe* for a failure to pay him a certain demand not exceeding three hundred dollars, and hereof make due return as the law directs.

Given under my hand and seal this first day of May, A. D. 1902.

Abraham Kent, Justice of the Peace. (SEAL)

Form No. 19463.²

(Conn. Gen. Stat. (1888), § 902.)

To the Sheriff of the County of *Litchfield*, his Deputy, or either Constable of the Town of *Litchfield*, in said County, Greeting:

By authority of the state of *Connecticut* you are hereby commanded to summon *Richard Roe*, of *Litchfield* aforesaid, to appear before *Abraham Kent*, Esquire, justice of the peace for the county of *Litchfield*, at his office in *Litchfield*, in said county, on the tenth day of May, 1902, at ten o'clock in the forenoon, then and there to answer unto *John Doe*, of said *Litchfield*, in a civil action, wherein the plaintiff complains and says: (*Here state the complaint*). The plaintiff claims \$50 damages.

Of this writ with your doings thereon make due return.

Dated at *Litchfield* the fourth day of May, A. D. 1902.

Abraham Kent, Justice of the Peace.

1. *Colorado*. — Mills' Anno. Stat. 2. *Connecticut*. — Gen. Stat. (1888), § (1891), § 2636. 892.

See also, generally, *supra*, note 2, p. 989. See also, generally, *supra*, note 2, p. 989.

Form No. 19464.¹

District of Columbia, to wit:

The President of the United States to *Charles Hatch*, or any qualified Constable, Greeting:

Summon *Richard Roe* to be and appear before me, the subscriber, a justice of the peace in and for the district aforesaid, at (*stating place*), on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer unto the complaint of *John Doe* in a plea of debt of \$75.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, J. P. (SEAL)

Form No. 19465.²

(Fla. Rev. Stat. (1892), § 1634, No. 1.)

State of *Florida*, }
Duval County. }

In the Name of the State of *Florida*, to the Sheriff or any Constable of said County:

You are hereby commanded to summon *Richard Roe* to appear before me, at my office in *Jacksonville*, in said county, on the *tenth* day of *May*, A. D. 1902, to answer *John Doe* upon a claim in the sum of *forty* dollars and *fifty* cents. Herein fail not or judgment will be given against him by default.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace. (SEAL)

Form No. 19466.³

Georgia — *Bibb* County, (*stating*) District, G. M.

To all lawful Constables of said County — Greeting:

The defendant, *Richard Roe*, of said district, is hereby required to be and appear at the next *Justice's* Court to be held in and for said district and county, at (*stating place*), on the *tenth* day of *May*, 1902, at *ten* o'clock A. M., to answer the complaint of *John Doe* in an action upon a note (or *account* or other cause of action), a copy of which note (or *account* or other cause of action) is hereby attached, or in default the court will proceed as to justice shall appertain. Herein fail not.

Given under my hand and seal this *first* day of *February*, 1902.

Abraham Kent, J. P. (SEAL)

Form No. 19467.⁴

In the *Justice's* Court of (*stating it*) Precinct, County of *Boise*, State of *Idaho*.

Before *Abraham Kent*, Justice of the Peace.

1. *District of Columbia*. — Comp. Stat. (1894), c. 37, § 13.

See also, generally, *supra*, note 2, p. 989.

2. *Florida*. — Rev. Stat. (1892), § 1612. See also, generally, *supra*, note 2, p. 989.

3. *Georgia*. — 2 Code (1895), § 4116.

See also, generally, *supra*, note 2, p. 989.

4. *Idaho*. — Code Civ. Proc. (1901), § 3607.

See also, generally, *supra*, note 2, p. 989.

John Doe, plaintiff,
 against
Richard Roe, defendant. } Summons.

The State of *Idaho* sends Greeting to *Richard Roe*, Defendant.

You are hereby summoned to appear before me, at my office in *Idaho City*, in the county of *Boise*, on the *tenth* day of *May*, 1902, at *ten o'clock A. M.*, in an action brought against you by said plaintiff, to answer the complaint of the above named plaintiff. Said action is brought to recover from you (*Here set out a sufficient statement of the cause of action in general terms, to apprise the defendant of the nature of the claim against him*) or plaintiff will apply to the court for the relief demanded (or judgment will be taken against you for fifty dollars), together with costs of this suit, if you fail to appear and answer.

To the Sheriff or any Constable of said County, Greeting:

Make legal service and due return hereof.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent,
 Justice of the Peace of (*stating it*)
 Precinct, in said County.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 19468.¹

(Starr & C. Anno. Stat. Ill. (1896), c. 79, par. 19.)

State of *Illinois*, }
Macon County. } ss.

The People of the State of *Illinois* to any Constable of said County,
 Greeting:

You are hereby commanded to summon *Richard Roe* to appear before me, at my office in *Decatur*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.*, to answer the complaint of *John Doe* for a failure to pay him a certain demand not exceeding *two hundred* dollars; and hereof make due return as the law directs.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace. (SEAL)

Form No. 19469.²

The State of *Indiana*, *Allen County*, ss.

To any Constable of *Fort Wayne Township*:

You are hereby commanded to summon *Richard Roe* to appear before me, at my office in said township, on the *tenth* day of *May*, 1902, at *ten o'clock* in the *forenoon*, to answer *John Doe* in a complaint wherein he claims the sum of *fifty* dollars and *fifty* cents; and return then and there this writ.

Witness my hand and seal this *first* day of *May*, 1902.

Abraham Kent, J. P. (SEAL)

1. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 79, par. 19.

See also, generally, *supra*, note 2, p. 989.

2. *Indiana*. — Horner's Stat. (1901), § 1451.

See also, generally, *supra*, note 2, p. 989.

Form No. 19470.¹State of *Iowa*, *Crawford* County, ss.

<i>John Doe</i> , plaintiff,	} In Justice's Court.
against	
<i>Richard Roe</i> , defendant.	} Before <i>Abraham Kent</i> , Esq.

To *Richard Roe*, Defendant:

You are hereby notified that *John Doe*, the plaintiff above named, claims of you the sum of *seventy-five* dollars as justly due (*Here state the cause of action in general terms, sufficient to apprise the defendant of the nature of the claim against him*), and that unless you appear before the said *Abraham Kent*, Esq., a justice of the peace, at his office in *Charter Oak* township, in said county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon of that day, and make defense to said claim, judgment will be rendered against you for that amount and costs.

Dated at *Charter Oak, Iowa*, the *first* day of *May*, 1902.*Abraham Kent*, Justice of the Peace.Form No. 19471.²State of *Kansas*, *Greenwood* County, ss.The State of *Kansas* to *Charles Hatch*, Constable of *Madison* Township, in said County:

You are commanded to summon *Richard Roe* to appear before me, the undersigned justice of the peace, at my office in *Madison* township, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M., to answer the action of *John Doe* for (*Here describe plaintiff's cause of action in such general terms as to apprise defendant of the nature of the claim against him*); and then and there return this writ.

Witness my hand at *Madison*, in said county, this *first* day of *May*, 1902.*Abraham Kent*, Justice of the Peace.(Indorsement.)³Form No. 19472.⁴*Frederick*, Sct.

Debt, \$30.00.

The State of *Maryland* to *Charles Hatch*, Constable of said County, Greeting:

You are hereby commanded to summon *Richard Roe*, if he shall be found in your bailiwick, to appear before me, the subscriber, a justice of the peace of the said state in and for the county aforesaid at (*stating place*), on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer unto *John Doe* in a plea of debt. Hereof fail not, and have you then and there this summons.

1. *Iowa*. — Code (1897), § 4487 *et seq.* judgment for *thirty* dollars, with interest thereon at the rate of *six* per cent. per annum, from the *tenth* day of p. 989.

2. *Kansas*. — Gen. Stat. (1897), c. 103, § 28. *April*, 1899, and costs of suit.

See also, generally, *supra*, note 2, Justice of the Peace."

3. Indorsement. — The indorsement may be as follows: "If the defendant fail to appear, the plaintiff will take p. 989.

4. *Maryland*. — Pub. Gen. Laws (1888), art. 52, § 20.

See also, generally, *supra*, note 2,

Witness, the subscriber, a justice of the peace of the said state in and for the county aforesaid, who hath hereto set his hand and seal, this *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Abraham Kent. (SEAL)

Form No. 19473.¹

(Bullitt's Civ. Code Ky. (1895), p. 694, No. 154.)

Court of *Abraham Kent*, a Justice of the Peace for *Kenton* County. The Commonwealth of *Kentucky* to any constable of *Kenton* county (or to *Charles Hatch*, a special agent appointed by said justice):

You are commanded to summon *Richard Roe* to answer, within (*stating number of*) days after the service hereof, a petition (or a claim), filed by *John Doe* in our Justice's Court aforesaid, under the penalty of the petition being taken for confessed, or of his being proceeded against for contempt of court on his failure to do so; and to make due return hereof.

Witness, *Abraham Kent*, justice of the peace of *Kenton* county.

Abraham Kent, J. P.

Form No. 19474.²

State of *Michigan*, }
County of *Barry*. } ss.

To any Constable of said County, Greeting:

In the name of the people of the state of *Michigan*, you are hereby commanded to summon *Richard Roe*, if he shall be found in your county, to appear before me, one of the justices of the peace in and for said county, at my office in *Nashville*, in said county, on the *tenth* day of *May*, A. D. 1902, at ten o'clock in the forenoon, then and there to answer to *John Doe* in a plea of trespass on the case upon promises, to his damages *three hundred* dollars or under.

Hereof fail not, but of this writ, with your doings, make return according to law.

Given under my hand, at *Nashville*, this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19475.³

State of *Minnesota*, }
County of *Sibley*. } ss.

In Justice Court.
Before *Abraham Kent*, Justice of the Peace.
The State of *Minnesota* to the Sheriff or any Constable of said County:

You are hereby commanded to summon *Richard Roe*, if he shall be found in your county, to be and appear before the undersigned, one of the justices of the peace in and for said county, on the *tenth* day

1. *Kentucky*. — Bullitt's Civ. Code (1895), § 701.

See also, generally, *supra*, note 2, p. 989.

2. *Michigan*. — Comp. Laws (1897), § 715.

See also, generally, *supra*, note 2, p. 989.

3. *Minnesota*. — Stat. (1894), § 4966.

See also, generally, *supra*, note 2, p. 989.

This is substantially the form set out

in Minn. Stat. (1894), § 5092.

of *May*, A. D. 1902, at *ten* o'clock in the forenoon of said day, at (*stating place*), in said county, to answer to the complaint of *John Doe* in a civil action, in which complaint said plaintiff claims the sum of *forty* dollars and *fifty* cents; and have you then and there this writ.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace,
Sibley County, Minnesota.

Form No. 19476.¹

The State of *Mississippi* to the Constable of the (*stating it*) District in *Hinds* County:

You are hereby commanded to summon *Richard Roe* to appear before me, the undersigned justice of the peace of said county, at the office of said justice in *Jackson*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer the suit of *John Doe* to which he is defendant; and have there then this writ.

Given under my hand (there being no seal of said court), and issued this the *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace, (*stating it*) District.

Form No. 19477.²

(Mo. Rev. Stat. (1899), § 3861.)

The State of *Missouri* to the Constable of *Fairfax* Township, in *Atchison* County, Greeting:

We command you to summon *Richard Roe* to appear before the undersigned, one of the justices of the peace of *Fairfax* township, in *Atchison* county, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon, at his office in the same township, to answer the complaint of *John Doe*, founded upon an instrument of writing (or note or account or for a trespass or injury to property, or any similar statement, as the case may be), and wherein he demands *forty* dollars.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19478.³

State of <i>Montana</i> ,	}	ss. In Justice Court,
County of <i>Lewis and Clarke</i> .		
Before <i>Abraham Kent</i> ,	}	Summons.
<i>John Doe</i> , plaintiff,		
against		
<i>Richard Roe</i> , defendant.		

The State of *Montana* to the above named Defendant, Greeting:

You are hereby summoned to be and appear before me, *Abraham Kent*, justice of the peace in and for the county of *Lewis and Clarke*, at

1. *Mississippi*.—Anno. Code (1892), § 2401. See also, generally, *supra*, note 2, p. 989.

2. *Montana*.—Code Civ. Proc. (1895), § 1505. See also, generally, *supra*, note 2, p. 989.

3. *Missouri*.—Rev. Stat. (1899), § 3859.

my office in *Marystville*, on *Monday*, the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M. of said day, then and there to make answer to the complaint of *John Doe*, the above named plaintiff, in a civil action to recover the sum of *forty* dollars for (*Here set out a sufficient statement of the cause of action in general terms, to apprise the defendant of the nature of the claim against him*), and in default thereof judgment will be rendered against you, the above named defendant, for the sum of *forty* dollars and cost of suit in this behalf expended.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19479.¹

State of *Nebraska*, }
County of *Boone*. } ss.

To the Sheriff or any Constable of said County:

You are hereby commanded to summon *Richard Roe* to appear before me, the undersigned, a justice of the peace, at my office in *Albion*, in said county of *Boone*, on the *tenth* day of *May*, 1902, at *ten* o'clock, standard time, in the *forenoon* of said day, to answer the action of *Richard Roe*, who sues to recover the sum of *forty* dollars, with interest thereon at *six* per cent. per annum from the *first* day of *January*, 1900, for (*Here describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him*).

You will make return of this writ on the *fifth* day of *May*, 1902.

Witness my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19480.²

State of *New Jersey*, }
County of *Camden*. } ss.

The State of *New Jersey* to any Constable of said County:

(SEAL) Summon *Richard Roe* personally to be and appear before me, the subscriber, one of the justices of the peace of the county of *Camden*, at a court *for the trial of small causes* to be holden at my office, No. *10* *State* street, in the city of *Camden*, in the county aforesaid, on *Monday*, the *tenth* day of *May*, A. D. one thousand nine hundred and *two*, at *ten* o'clock in the *forenoon*, to answer unto *John Doe* in a plea upon (*stating action*), for *forty* dollars, and this you are not to omit.

Given under my hand and seal this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19481.³

The State of *North Dakota*, } In *Justice* Court. Before *Abraham*
County of *Cavalier*. } ss. *Kent*, Justice of the Peace.

1. *Nebraska*. — Comp. Stat. (1899), § 6431. See also, generally, *supra*, note 2, p. 989.

2. *New Jersey*. — Gen. Stat. (1895), p. 1865, § 10 *et seq.* See also, generally, *supra*, note 2, p. 989.

3. *North Dakota*. — Rev. Codes (1895), § 6637. See also, generally, *supra*, note 2, p. 989.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

The State of *North Dakota* sends Greeting to *Richard Roe*,
 Defendant:

You are hereby summoned to appear before me, at my office, in the town of *Alma*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.*, to answer to the complaint of the above named plaintiff, who claims (*Here set out a sufficient statement of the cause of action to apprise the defendant of the nature thereof*), and you are hereby notified that if you fail to appear and answer said complaint as above required said plaintiff will apply to the court for the relief specified in this summons (*or you are hereby notified that if you fail to appear and answer said complaint, said plaintiff will take judgment against you for the sum of forty dollars and fifty cents, with interest from and since the first day of June, A. D. 1900, at the rate of six per cent. per annum, and the costs of this action*).

Given under my hand this *first* day of *May*, A. D. 1902.
 To the Sheriff or any Constable of said *Cavalier* County, Greeting:
 Make legal service hereof and due return.

Abraham Kent,

Justice of the Peace within and for *Cavalier* County, *N. D.*

Form No. 19482.¹

The State of *Ohio*, }
Hardin County. } ss.

To any Constable of *Ada* Township, in said County, Greeting:

You are hereby commanded to summon *Richard Roe* to appear before me, the undersigned, a justice of the peace of said township, at my office therein, on the *tenth* day of *May*, A. D. 1902, at *ten o'clock A. M.*, to answer the action of *John Doe*, who claims of the defendant the sum of \$40.00, with interest thereon at *six* per cent. from the *second* day of *June*, A. D. 1902, for amount due on (*Here describe the plaintiff's cause of action in such general terms as to apprise the defendant of the nature of the claim against him*). The plaintiff asks a judgment for the amount indorsed thereon, and for costs.

You will make due return of this summons on the *first* day of *May*, A. D. 1902.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19483.²

(Bellinger & C. Anno. Codes & Stat. Oregon (1902), p. 779.)

Justice's Court for District No. 1, *Baker* County, *Oregon*.
 State of *Oregon*, County of *Baker*.

John Doe }
 vs. } Civil action to recover money (or a penalty or per-
Richard Roe. } sonal property, as the case may be).

1. *Ohio*. — Bates' Anno. Stat. (1897), § 6475.

See also, generally, *supra*, note 2, p. 989.

2. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 2201.

See also, generally, *supra*, note 2, p. 989.

To *Richard Roe*, the above named defendant:

In the name of the State of *Oregon*, you are hereby required to appear before the undersigned, a justice of the peace for the district aforesaid, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon of said day, at the office of said justice, in said district, to answer the above named plaintiff in a civil action.

The defendant will take notice that if he fail to answer the complaint herein the plaintiff will take judgment against him for *forty* dollars (or for such other relief as is demanded in the complaint, as the case may be)

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

Form No. 19484.¹

State of *South Dakota*, } In Justice Court,
County of *Clay*. } Before *Abraham Kent*, Justice of the Peace.
John Doe, plaintiff, }
against }
Richard Roe, defendant. }

The State of *South Dakota* sends Greeting to *Richard Roe*, Defendant:

You are hereby summoned to appear before me, at my office in the city of *Vermillion*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer the complaint of the above named plaintiff, *John Doe*, who claims to recover of you the sum of *forty* dollars, being for (*Here set out a sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim*), and you are hereby notified that if you fail to appear and answer said complaint as above required, said plaintiff will take judgment against you by default for the said amount of *forty* dollars and interest at *six* per cent. from *April 2*, 1900, together with costs and attorney's fees.

Given under my hand this *first* day of *May*, A. D. 1902.

Abraham Kent,

Justice of the Peace in and for *Clay* County.

Form No. 19485.²

State of *Tennessee*, *Hamilton* County.

To any lawful Officer within said County:

You are hereby commanded to summon *Richard Roe* to personally appear before me, or some other acting justice of the peace for said county, to answer the complaint of *John Doe* in a civil action by note (or upon an account, or otherwise, as the case may be), under *twenty* dollars.

Given under my hand and seal this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace. (SEAL)

1. *South Dakota*. — Stat. (1901), § 7292. See also, generally, *supra*, note 2, p. 989.
See also, generally, *supra*, note 2, p. 989.

2. *Tennessee*. — Code (1896), §§ 4518, 5958. This is substantially the form set out in Tenn. Code (1896), § 5958.

Form No. 19486.¹

The State of *Texas* to the Sheriff or any Constable of *Freestone* County, Greeting:

You are hereby commanded to summon *Richard Roe*, if to be found in your county, to appear before me at a regular term of justice court to be held at *Fairfield*, in precinct No. (*stating it*), of *Freestone* county, *Texas*, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M., to answer the complaint of *John Doe* for the sum of *forty* dollars, principal due on (*Here state nature of plaintiff's demand*).

Herein fail not, but execute this writ and due return make, as the law directs.

Given under my hand this the *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace,
Precinct No. (*stating it*), *Freestone* Co., *Texas*.

Form No. 19487.²

(Vt. Stat. (1894), § 5417, No. 19.)

State of *Vermont*,
Chittenden County, ss. }

To any Sheriff or Constable in the State, or to *Charles Hatch*, an indifferent person, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded to summon *Richard Roe*, of *Burlington*, in the county of *Chittenden*, to appear before me, at my office in *Burlington* aforesaid, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the forenoon, then and there to answer to *John Doe*, of said *Burlington*, in a plea of (*Here insert the declaration, concluding "to the damage," etc.*).

Fail not, but service and return make according to law.

Dated at *Burlington*, in the county of *Chittenden*, the *first* day of *May*, A. D. 1902.

Abraham Kent, Justice of the Peace.

Form No. 19488.³

(Ballinger's Anno. Codes & Stat. Wash. (1897), § 6543.)

The State of *Washington*,
Chehalis County, } ss.

To the Sheriff or any Constable of said County:

In the name of the State of *Washington*, you are hereby commanded to summon *Richard Roe*, if he (or *they*) be found in your county, to be and appear before me, at my office in *Aberdeen*, in said county, on the *tenth* day of *May*, at *two* o'clock P. M., to answer the complaint of *John Doe* for a failure to pay him a certain demand, amounting to *thirty* dollars and *fifty* cents, upon (*Here state briefly the nature of the claim*), and of this writ make due service and return.

Given under my hand this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

1. *Texas*. — Rev. Stat. (1895), arts. 1598, 1600.

See also, generally, *supra*, note 2, p. 989.

2. *Vermont*. — Stat. (1894), § 1060 et seq.

See also, generally, *supra*, note 2, p. 989.

3. *Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 6543.

See also, generally, *supra*, note 2, p. 989.

Form No. 19489.¹

(W. Va. Code (1899), c. 50, § 26.)

Jefferson County, to-wit:

To any constable in said county:

You are hereby commanded, in the name of the state of *West Virginia*, to summon *Richard Roe* to appear before me, at my office in the district of (*stating it*), in the said county, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M. (or P. M., as the case may be), to answer the complaint of *John Doe* in a civil action for the recovery of money due on contract (or *for damages for a wrong*, as the case may be), in which the plaintiff will claim judgment for \$40.

Given under my hand this *first* day of *May*, nineteen hundred and *two*.

Abraham Kent, Justice of the Peace.Form No. 19490.²

(Wis. Stat. (1898), § 3609.)

Grant County,
Town of Cassville. } ss.

The State of *Wisconsin* to the Sheriff or any Constable of said County:

You are hereby commanded to summon *Richard Roe*, if he shall be found within your county, to appear before the undersigned, one of the justices of the peace in and for said county, at my office in said town, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock in the forenoon, to answer to *John Doe*, plaintiff, to his damage *two hundred* dollars or under. Hereof fail not at your peril.

Given under my hand at *Cassville*, this *first* day of *May*, 1902.

Abraham Kent, Justice of the Peace.

b. In City, Mayor's, Municipal or Police Courts.

Form No. 19491.³

State of Illinois,
County of Union, } ss.
Village of Cobden. }

The People of the State of *Illinois* to any Constable of said County, Greeting:

You are hereby commanded to summon *Richard Roe* to appear before me, at my office in the village of *Cobden*, in said county, on the *tenth* day of *May*, A. D. 1902, at *ten* o'clock A. M., to answer the com-

1. *West Virginia*.—Code (1899), c. 50, § 26.

See also, generally, *supra*, note 1, p. 989.

Recovery of Possession of Personal Property.—If the cause of action be to recover the possession of personal property, the cause of action may be stated in the summons as follows: "For the recovery of the possession of one horse (or one cow, according to the

fact) of the value of \$40.00 and \$10.00 damages for the detention thereof." W. Va. Code (1899), c. 50, § 26.

2. *Wisconsin*.—Stat. (1898), § 3594.

See also, generally, *supra*, note 1, p. 989.

3. *Illinois*.—Starr & C. Anno. Stat. (1896), c. 79, § 19.

See also, generally, *supra*, note 1, p. 989.

plaint of *John Doe*, for a failure to pay him a certain demand not exceeding *two hundred* dollars; and hereof make due return, as the law directs.

Given under my hand and seal this *first* day of *May*, A. D. 1902.
Samuel Smith, Police Magistrate. (SEAL)

Form No. 19492.¹

State of *Indiana*, } Mayor's Office.
Monroe County. } ss. City of *Bloomington*.

To the Marshal of the City of *Bloomington*, Greeting:

You are hereby commanded to summon *Richard Roe* personally to be and appear before me, at my office in the city of *Bloomington*, on the *tenth* day of *May*, 1902, at *ten* o'clock A. M. of said day, to answer the complaint of *John Doe*, wherein he claims *forty* dollars and *fifty* cents; and of this writ make due return.

Given under my hand and official seal this *first* day of *May*, 1902.
 (SEAL) *William White*, Mayor.

Form No. 19493.²

State of *Maine*.

(SEAL)³ *Kennebec*, ss. To *Richard Roe*, Greeting:

We command you that you appear before our judge of our *Municipal* Court for the city of *Augusta*, in the county of *Kennebec*, to be holden at the *Municipal Court room* in said *Augusta*, on the *first Monday* of *January*, 1902, at *nine* o'clock in the forenoon, then and there to answer to *John Doe* in the plea of the case; which plea the said plaintiff has commenced against you, to be heard and tried at the said court; and your goods or estate are attached to the value of *twenty* dollars for security to satisfy the judgment which said plaintiff may recover upon the aforesaid trial.

Fail not of appearance at your peril.

Witness, *A. G. Andrews*, our said judge, at *Augusta* aforesaid, this *tenth* day of *December*, in the year of our Lord one thousand nine hundred and *two*.⁴

A. G. Andrews, Judge.

Form No. 19494.⁵

Commonwealth of *Massachusetts*.

Suffolk, ss.

(SEAL) To *Richard Roe*, of *Boston*, in the County of *Suffolk*,
 Greeting:

We command you to appear before our justices of the *Municipal* Court of the *Charlestown* district, to be holden in said *Charlestown* district, in the city of *Boston*, within and for said county of *Suffolk*,

1. *Indiana*. — Horner's Stat. (1896), under seal. Me. Rev. Stat. (1883), c. 81, § 3.

§§ 1451, 3062.
 See also, generally, *supra*, note 1, p. 989.

2. *Maine*. — Rev. Stat. (1883), c. 81, § 1 *et seq.*

See also, generally, *supra*, note 1, p. 989.

3. *Seal*. — The summons must be 989.

4. *Signature*. — The summons must be signed by the judge. Me. Rev. Stat. (1883), c. 81, § 3.

5. *Massachusetts*. — Rev. Laws (1902), c. 167, § 22.

See also, generally, *supra*, note 1, p.

for civil business, on *Saturday*, the *tenth* day of *May*, 1902, at *nine* of the clock in the forenoon, to answer unto *John Doe*, plaintiff, in an action of (*stating action*), which action the said plaintiff hath commenced, to be heard and tried before our said court. And your goods or estate are attached to the value of *one hundred* dollars for security to satisfy the judgment which the said plaintiff may recover upon the aforesaid trial. Fail not of appearance, at your peril.

Witness, *Henry W. Bragg*, Esquire, at *Boston*, in said *Charlestown* district, this *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19495.¹

Municipal Court, City of *St. Paul*.

State of *Minnesota*, }
County of *Ramsey*. }

John Doe, plaintiff, }
against } Summons.
Richard Roe, defendant. }

The State of *Minnesota* to the above named Defendant:

You, *Richard Roe*, are hereby summoned and required to answer the complaint of the plaintiff in the action above entitled, which complaint is hereto attached and herewith served upon you (or is on file in the office of the clerk of said court in the city of *St. Paul*, county of *Ramsey* and state of *Minnesota*), and to serve a copy of your answer to said complaint on the subscriber at his office, in the said city of *St. Paul*, within *ten* days after the service of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will (*Here state the judgment plaintiff will take or the relief he will ask for*), together with the costs and disbursements herein.

Dated *May 1*, A. D. 1902.

Jeremiah Mason, Plaintiff's Attorney,
St. Paul, Minn.

Form No. 19496.²

(N. Y. Laws (1893), c. 631, § 4.)

In the *City Court of Schenectady*, }
City and County of Schenectady. } ss.
To *Richard Roe*, Defendant:

You are hereby summoned to appear in and before the *City Court of Schenectady*, at the *city hall*, in the city of *Schenectady*, on the *tenth* day of *May*, 1902, at *ten* o'clock in the forenoon, to answer the complaint of *John Doe* in a civil action.

Witness, Hon. *Samuel Smith*, city judge of *Schenectady*, this *first* day of *May*, A. D. 1902.

Samuel Smith, City Judge.

1. *Minnesota*. — Stat. (1894), § 1389.

See also, generally, *supra*, note 1.
p. 989.

2. *New York*. — Laws (1893), c. 631.

See also, generally, *supra*, note 1,
p. 989.

c. In Courts of Record.¹

1. Statutes relating to summons in civil cases in courts of record exist as follows:

- Alabama*.—Civ. Code (1896), § 3268.
Arizona.—Rev. Stat. (1901), § 1314 *et seq.*
Arkansas.—Sand. & H. Dig. (1894), § 5658 *et seq.*
California.—Code Civ. Proc. (1897), § 406 *et seq.*
Colorado.—Mills' Anno. Code (1896), § 34 *et seq.*
Connecticut.—Gen. Stat. (1888), § 892.
Delaware.—Rev. Stat. (1893), p. 775, c. 102, § 1 *et seq.*
District of Columbia.—Supreme Ct. Com. L. Rules, No. 11.
Florida.—Rev. Stat. (1892), § 1007 *et seq.*
Georgia.—2 Code (1895), § 4974.
Idaho.—Code Civ. Proc. (1901), § 3191.
Illinois.—Starr & C. Anno. Stat. (1896), c. 110, par. 1.
Indiana.—Horner's Stat. (1901), § 314.
Iowa.—Code (1897), § 3514.
Kansas.—Gen. Stat. (1897), c. 95, § 54.
Kentucky.—Bullitt's Civ. Code (1895), §§ 39, 40.
Maine.—Rev. Stat. (1883), c. 81, § 1 *et seq.*
Maryland.—Pub. Gen. Law (1888), art. 75, § 129.
Massachusetts.—Rev. Laws (1902) c. 167, § 15 *et seq.*
Michigan.—Comp. Laws (1897), § 9989 *et seq.*
Minnesota.—Stat. (1894), § 5194.
Mississippi.—Anno. Code (1892), § 3413 *et seq.*
Missouri.—Rev. Stat. (1899), § 562 *et seq.*
Montana.—Code Civ. Proc. (1895), § 632 *et seq.*
Nebraska.—Comp. Stat. (1899), § 5656.
Nevada.—Comp. Laws (1900), § 3117.
New Hampshire.—Pub. Stat. & Sess. L. (1901), c. 218, § 1 *et seq.*
New Jersey.—Gen. Stat. (1895), p. 2540, § 41 *et seq.*
New Mexico.—Comp. Laws (1897), § 2685, subs. 19.
New York.—Code Civ. Proc., § 417.
North Carolina.—Clark's Code Civ. Proc. (1900), § 199.
North Dakota.—Rev. Codes (1895), § 5246 *et seq.*
Ohio.—Bates' Anno. Stat. (1897), § 5037.
Oklahoma.—Stat. (1893), § 3933.

- Oregon*.—Bellinger & C. Anno. Codes & Stat. (1902), § 52.
Pennsylvania.—Bright. Pur. Dig. (1894), p. 60, § 1 *et seq.*
Rhode Island.—Gen. Laws (1896), c. 252, § 1 *et seq.*
South Carolina.—Code Civ. Proc. (1902), § 148 *et seq.*
South Dakota.—Stat. (1901), § 6093.
Tennessee.—Code (1896), § 4518.
Texas.—Rev. Stat. (1895), art. 1214.
Utah.—Rev. Stat. (1898), § 2938 *et seq.*
Vermont.—Stat. (1894), § 1060 *et seq.*; Laws (1898), No. 137.
Virginia.—Code (1887), § 3223.
Washington.—Ballinger's Anno. Codes & Stat. (1897), § 4871.
West Virginia.—Code (1899), c. 124, § 5.
Wisconsin.—Stat. (1898), § 2630.
Wyoming.—Rev. Stat. (1887), § 2424.
United States.—Rev. Stat. (1878), § 911.

Requisites of Summons, Generally.—See *supra*, note 1, p. 989.

Name of Court.—The court in which the action is brought must be stated. Ariz. Rev. Stat. (1901), § 1316; Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 34; Conn. Gen. Stat. (1888), § 892; Idaho Code Civ. Proc. (1901), § 3191; Horner's Stat. Ind. (1901), § 314; Mont. Code Civ. Proc. (1895), § 632; Nev. Comp. Laws (1900), § 3119; N. Mex. Comp. Laws (1897), § 2685, subs. 19; N. Y. Code Civ. Proc., § 417; N. Dak. Rev. Codes (1895), § 5247; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 52; Vt. Laws (1898), No. 137; Ballinger's Anno. Codes & Stat. Wash. (1897), § 4871; Wis. Stat. (1898), § 2630.

Name of County.—In Which Complaint is Filed.—The county in which the complaint is filed must be stated. Ariz. Rev. Stat. (1901), § 1316; Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 34; Idaho Code Civ. Proc. (1901), § 3191; Mont. Code Civ. Proc. (1895), § 632; Nev. Comp. Laws (1900), § 3119; N. Mex. Comp. Laws (1897), § 2685, subs. 19; Bates' Anno. Stat. Ohio (1897), § 5037; Wis. Stat. (1898), § 2630.

In Which Trial is Desired.—The county in which the plaintiff desires trial must be stated. N. Dak. Rev. Codes (1895), § 5247; Ballinger's Anno. Codes & Stat. Wash. (1897), § 4871.

(1) IN GENERAL.

In *New York*, the summons must, if the action is brought in the supreme court, name the county in which the plaintiff desires trial. Code Civ. Proc., § 417.

Parties to Action.—The parties to the action must be stated. Ariz. Rev. Stat. (1901), § 1316; Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 34; Conn. Gen. Stat. (1888), § 892; Idaho Code Civ. Proc. (1901), § 3191; Horner's Stat. Ind. (1901), § 314; Iowa Code (1897), § 3514; Kan. Gen. Stat. (1897), c. 95, § 54; Mont. Code Civ. Proc. (1895), § 632; Neb. Comp. Stat. (1899), § 5656; Nev. Comp. Laws (1900), § 3119; N. Mex. Comp. Laws (1897), § 2685, subs. 19; N. Y. Code Civ. Proc., § 417; N. Dak. Rev. Codes (1895), § 5247; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 52; Tex. Rev. Stat. (1895), art. 1214; Ballinger's Anno. Codes & Stat. Wash. (1897), § 4871; Wis. Stat. (1898), § 2630.

Address—*In General.*—In *Missouri*, the summons shall be directed to the officer to be charged with its execution. Mo. Rev. Stat. (1899), § 569.

To Sheriff.—In other states, the summons must be directed to the sheriff. Sand. & H. Dig. Ark. (1894), § 5658; Horner's Stat. Ind. (1901), § 314; Kan. Gen. Stat. (1897), c. 95, § 54; Neb. Comp. Stat. (1899), § 5656; Bates' Anno. Stat. Ohio (1897), § 5037; Wyo. Rev. Stat. (1887), § 2424. Or to the sheriff or his deputy. 2 Ga. Code (1895), § 4974. Or to the sheriff or constable. Tex. Rev. Stat. (1895), art. 1214. Or to the sheriff or other proper officer. Clark's Code Civ. Proc. N. Car. (1900), § 200; Tenn. Code (1896), § 4519. Or to the sheriff (or, if he be interested in the suit, to the coroner of the county). Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 1; N. H. Pub. Stat. & Sess. L. (1901), c. 218, § 3.

To Defendant.—In some states, the summons must be directed to the defendant in the action. Cal. Code Civ. Proc. (1897), § 407; Idaho Code Civ. Proc. (1901), § 3191; Minn. Stat. (1894), § 5194; Mont. Code Civ. Proc. (1895), § 632; N. Mex. Comp. Laws (1897), § 2685, subs. 19; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 52; S. Car. Code Civ. Proc. (1902), § 149; S. Dak. Stat. (1901), § 6093.

Place of Appearance.—The place where the defendant is required to

appear must be stated. Conn. Gen. Stat. (1888), § 892; Mo. Rev. Stat. (1899), § 569; Tex. Rev. Stat. (1895), art. 1214; Vt. Laws (1898), No. 137.

Time of Appearance.—The time when the defendant is required to appear must be stated. Ariz. Rev. Stat. (1901), § 1316; Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 34; 2 Ga. Code (1895), § 4974; Idaho Code Civ. Proc. (1901), § 3191; Kan. Gen. Stat. (1897), c. 95, § 54; Mo. Rev. Stat. (1899), § 569; Neb. Comp. Stat. (1899), § 5656; Nev. Comp. Laws (1900), § 3119; N. Mex. Comp. Laws (1897), § 2685, subs. 19; Tex. Rev. Stat. (1895), art. 1214; Vt. Laws (1898), No. 137.

Command.—The command of the summons is substantially to appear and answer the action or complaint within the time and at the place specified, or merely within the time specified. Ariz. Rev. Stat. (1901), § 1316; Sand. & H. Dig. Ark. (1894), § 5658; Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 34; 2 Ga. Code (1895), § 4974; Kan. Gen. Stat. (1897), c. 95, § 54; Idaho Code Civ. Proc. (1901), § 3191; Mo. Rev. Stat. (1899), § 569; Neb. Comp. Stat. (1899), § 5656; Nev. Comp. Laws (1900), § 3119; N. Mex. Comp. Laws (1897), § 2685, subs. 19; Clark's Code Civ. Proc. N. Car. (1900), § 200; Bates' Anno. Stat. Ohio (1897), § 5037; Okla. Stat. (1893), § 3933; Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 52; Tenn. Code (1896), § 4519; Tex. Rev. Stat. (1895), art. 1214; Ballinger's Anno. Codes & Stat. Wash. (1897), § 4871; Wis. Stat. (1898), § 2630; Wyo. Rev. Stat. (1887), § 2424.

In a few states, the command of the summons must be for defendant to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified, in which there is a post-office, within a certain number of days specified, after the service of the summons, exclusive of the day of the service. Minn. Stat. (1894), § 5194; S. Car. Code Civ. Proc. (1902), § 149; S. Dak. Stat. (1901), § 6093.

In *Colorado* and *Nevada*, the defendant must answer according to the prayer of the complaint. Mills' Anno. Code Colo. (1896), § 34; Nev. Comp. Laws (1900), § 3119.

Nature of Action.—The nature of the

action against the defendant must be stated in the summons briefly and in general terms. *Mills' Anno. Code Colo.* (1896), § 34; *Idaho Code Civ. Proc.* (1901), § 3191; *Horne's Stat. Ind.* (1901), § 314; *Iowa Code* (1897), § 3514, *Md. Pub. Gen. Laws* (1888), art. 75, § 129; *Nev. Comp. Laws* (1900), § 3119; *Tenn. Code* (1896), § 4521; *Tex. Rev. Stat.* (1895), art. 1214. And, if the action is for the recovery of money, the amount thereof. *Mills' Anno. Code Colo.* (1896), § 34; *Iowa Code* (1897), § 3514.

In *Vermont*, the summons must contain the declaration setting forth the cause of action in due form of law. *Laws* (1898), No. 137.

Filing of Complaint or Petition — Generally. — Where a copy of the complaint or petition is not served with the summons, the summons must state where the complaint or petition is or will be filed. *S. Car. Code Civ. Proc.* (1902), § 151; *S. Dak. Stat.* (1901), § 6095; *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4873.

In *Iowa*, the summons must inform the defendant that a petition is, or on or about the date named therein will be, filed in the office of the clerk of the court wherein the action is brought, naming it. *Code* (1897), § 3514.

Date of Filing. — In *Texas* the date of filing the petition must be stated. *Rev. Stat.* (1895), art. 1214.

File Number of Suit. — In *Texas*, the file number of the suit must be stated. *Rev. Stat.* (1895), art. 1214; *Durham v. Betterton*, 79 Tex. 223.

Penalty for Failure to Appear — Generally. — In some states, statutes provide in substance that the summons shall state that if the defendant fail to appear as commanded his default will be entered and judgment rendered against him. *Ariz. Rev. Stat.* (1901), § 1316; *Mills' Anno. Code Colo.* (1896), § 34; *Iowa Code* (1897), § 3514; *Kan. Gen. Stat.* (1897), c. 95, § 54; *Neb. Comp. Stat.* (1899), § 5656; *Bates' Anno. Stat. Ohio* (1897), § 5037; *Okl. Stat.* (1893), § 3933; *Bellinger & C. Anno. Codes & Stat. Oregon* (1902), § 52; *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4871; *Wis. Stat.* (1898), § 2630; *Wyo. Rev. Stat.* (1887), § 2424.

In *Arkansas*, a statute provides that the summons must command the defendant to answer the complaint under the penalty of the complaint being taken for confessed, or of the defendant being proceeded against for

contempt of court on his failure to do so. *Sand. & H. Dig.* (1894), § 5658.

In *Washington* and *Wisconsin*, statutes provide that the summons shall state that judgment rendered will be according to the demand of the complaint. *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4871; *Wis. Stat.* (1898), § 2630.

Relief Demanded in Complaint. — In several states, the summons must contain a notice that unless the defendant appear and answer as commanded the plaintiff will apply to the court for the relief demanded in the complaint. *Cal. Code Civ. Proc.* (1897), § 407; *Idaho Code Civ. Proc.* (1901), § 3191; *Minn. Stat.* (1894), § 5195; *N. Mex. Comp. Laws* (1897), § 2685, subs. 19; *Bellinger & C. Anno. Codes & Stat. Oregon* (1902), § 53; *S. Car. Code Civ. Proc.* (1902), § 150; *S. Dak. Stat.* (1901), § 6094.

In Action on Contract. — Where the action is on contract for the recovery of money or damages only, the summons must contain a notice that unless the defendant appear and answer as commanded the plaintiff will take judgment for the sum demanded in the complaint, stating it. *Cal. Code Civ. Proc.* (1897), § 407; *Idaho Code Civ. Proc.* (1901), § 3191; *N. Mex. Comp. Laws* (1897), § 2685, subs. 19; *Bellinger & C. Anno. Codes & Stat. Oregon* (1902), § 53; *S. Dak. Stat.* (1901), § 6094.

In Actions for the Recovery of Money Only. — In *Minnesota*, in an action arising on contract for payment of money only, the summons shall contain a notice that plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint; and in other actions for recovery of money only it shall contain a notice that the plaintiff will, upon such failure, have the amount he is entitled to recover ascertained by the court or under its direction, and take judgment for the amount so ascertained. *Stat.* (1894), § 5195.

In *Washington* and *Wisconsin*, it is provided that there may, at the option of the plaintiff, be added at the foot of the summons when the complaint is not served with the summons, and the only relief sought is the recovery of money, whether upon tort or contract, a brief notice specifying the sum to be demanded by the complaint. *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4871; *Wis. Stat.* (1898), § 2630.

Teste.—In *Illinois* and *Texas*, statutes provide that the summons shall bear teste in the name of the clerk issuing it. *Starr & C. Anno. Stat. Ill.* (1896), c. 110, par. 1; *Tex. Rev. Stat.* (1895), art. 1447.

In *Florida*, the summons may bear teste in the name of the clerk or judge issuing it. *Rev. Stat.* (1892), § 1008.

In *Georgia*, *Michigan* and *New Hampshire*, the teste must be in the name of the judge. 2 *Ga. Code* (1895), § 4974; *Mich. Comp. Laws* (1897), § 9984; *N. H. Pub. Stat. & Sess. L.* (1901), c. 218, § 2.

In *Mississippi*, it is not necessary that the summons bear teste in the name of any judge or of any term of court. *Anno. Code* (1892), § 3413.

Signature — Of Clerk. — In many states, statutes provide that the summons must be signed by the clerk of the court from which it issues. *Sand. & H. Dig. Ark.* (1894), § 5658; *Cal. Code Civ. Proc.* (1897), § 407; *Conn. Gen. Stat.* (1888), § 802; 2 *Ga. Code* (1895), § 4974; *Idaho Code Civ. Proc.* (1901), § 3191; *Starr & C. Anno. Stat. Ill.* (1896), c. 110, par. 1; *Horner's Stat. Ind.* (1901), § 314; *Kan. Gen. Stat.* (1897), c. 95, § 54; *Bullitt's Civ. Code Ky.* (1895), § 40; *Miss. Anno. Code* (1892), § 3413; *Mont. Code Civ. Proc.* (1895), § 632; *Neb. Comp. Stat.* (1899), § 5656; *N. H. Pub. Stat. & Sess. L.* (1901), c. 218, § 2; *N. J. Gen. Stat.* (1895), p. 2540, § 45; *N. Mex. Comp. Laws* (1897), § 2685, subs. 19; *Clark's Code Civ. Proc. N. Car.* (1900), § 200; *Bates' Anno. Stat. Ohio* (1897), § 5037; *Okla. Stat.* (1893), § 3933; *R. I. Gen. Laws* (1896), c. 252, § 1; *Tenn. Code* (1896), § 4519; *Wyo. Rev. Stat.* (1887), § 2424.

Where a writ is tested by the clerk of the court, but is signed by a deputy clerk, the summons is sufficient, although it would technically be more correct for the deputy to sign for his principal. *Walk v. Circleville Bank*, 15 *Ohio* 288.

In *Calender v. Olcott*, 1 *Mich.* 344, it was held that a statutory provision requiring the clerk to sign a summons was sufficiently complied with by the signature of the deputy clerk as follows: "*Walter Martin, Deputy Clerk, and in the absence of the clerk.*"

Where a summons is prepared and the name of the clerk subscribed thereto by one who is not in fact a deputy, and the clerk appears, before its delivery

to the sheriff, and sends the process out thus signed as his own act, it must be so regarded, and the summons is sufficient. *Louisville, etc., R. Co. v. Banks*, (Ky. 1896) 33 *S. W. Rep.* 627.

The signature of the clerk to the summons by using the initial of his christian name is sufficient. *Bishop Hill Colony v. Edgerton*, 26 *Ill.* 54.

Where the clerk affixes the seal of the court to a summons to which is appended his printed name, there is a sufficient adoption by the clerk of the printed signature. *Ligare v. California, etc., R. Co.*, 76 *Cal.* 610.

Of Clerk or Judge. — In *Florida*, the summons may be signed by the clerk or by the judge. *Rev. Stat.* (1892), § 1008.

Of Clerk or Attorney. — In *Colorado*, the summons may be signed by the clerk, or it may be signed and issued by the attorney for the plaintiff. *Mills' Anno. Code* (1896), § 33.

By Plaintiff's Attorney. — In some states, the summons must be signed by the plaintiff or his attorney. *Iowa Code* (1897), § 3514; *Minn. Stat.* (1894), § 5194; *N. Y. Code Civ. Proc.*, § 417; *N. Dak. Rev. Codes* (1895), § 5247; *Bellinger & C. Anno. Codes & Stat. Oregon* (1902), § 52; *S. Car. Code Civ. Proc.* (1902), § 149; *S. Dak. Stat.* (1901), § 6093; *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4871; *Wis. Stat.* (1898), § 2630.

But a summons subscribed by a third person in the name of and in the presence of the plaintiff is sufficient. *Hotchkiss v. Cutting*, 14 *Minn.* 537.

And so is a summons subscribed by the printed signature of the plaintiff or his attorney. *Herrick v. Morrill*, 37 *Minn.* 250, *overruling Ames v. Schurmeier*, 9 *Minn.* 221; *New York v. Eisler*, (C. Pl. Gen. T.) 2 *Civ. Proc. (N. Y.)* 125; *Hunter v. Lester*, (*Supreme Ct. Spec. T.*) 10 *Abb. Pr. (N. Y.)* 260, note; *Barnard v. Heydrick*, 49 *Barb. (N. Y.)* 62; *Mezchen v. More*, 54 *Wis.* 214.

Address of Plaintiff or Attorney. — In several states, where the summons must be signed by the plaintiff or his attorney, it must contain the address of such plaintiff or attorney, specifying a place within the state where there is a post-office. *N. Y. Code Civ. Proc.*, § 417; *N. Dak. Rev. Codes* (1895), § 5247; *Ballinger's Anno. Codes & Stat. Wash.* (1897), § 4871; *Wis. Stat.* (1898), § 2630.

And in *New York* the plaintiff's attorney must add to his signature, provided

Form No. 19497.¹

(Bullitt's Civ. Code Ky. (1895), p. 692, No. 154.)

*Kenton Circuit Court.*The Commonwealth of *Kentucky* to the Sheriff of *Kenton* County:

You are commanded to summon *Richard Roe* to answer, on the *first* day of our *next October* term (naming the next term which will not begin within ten days from the date of the summons), a petition (or a petition in equity) filed by *John Doe* against him in our *Kenton Circuit Court*, under the penalty of the petition being taken for confessed or of his being proceeded against for contempt of court, on his failure to do so; and to make return hereof on the day aforesaid.

Witness, *Calvin Clark*, clerk of said court, this *tenth* day of *September*,
A. D. 1902.

*Calvin Clark, Clerk.**By William White, D. C.*

(2) IN COURTS OF LAW.

Form No. 19498.²

(Ala. Civ. Code (1896), § 3270.)

The State of *Alabama*, } To any Sheriff of the State of *Alabama*:
Jefferson County. }

his address is a city one, the street and street number, if any, or other suitable designation of the particular locality in the city. N. Y. Code Civ. Proc., § 417.

Date of Issue.—In some states, the summons must bear the date when issued. Sand. & H. Dig. Ark. (1894), § 5658; Fla. Rev. Stat. (1892), § 1008; Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 1; Kan. Gen. Stat. (1897), c. 95, § 54; Bullitt's Civ. Code Ky. (1895), § 40; Miss. Anno. Code (1892), § 3413; Neb. Comp. Stat. (1899), § 5656; N. J. Gen. Stat. (1895), p. 2540, § 45; Clark's Code Civ. Proc. N. Car. (1900), § 200; Bates' Anno. Stat. Ohio (1897), § 5037; Okla. Stat. (1893), § 3933; Tex. Rev. Stat. (1895), art. 1447; Wyo. Rev. Stat. (1887), § 2424.

Indorsement of Attorney or Party.—The name of the plaintiff's attorney must, in some states, be indorsed on the summons. Idaho Code Civ. Proc. (1901), § 3191; Mich. Comp. Laws (1897), § 9984; Mont. Code Civ. Proc. (1895), § 632; Nev. Comp. Laws (1900), § 3119; N. J. Gen. Stat. (1895), p. 2540, § 45; N. Mex. Comp. Laws (1897), § 2685; subs. 19.

In *New Mexico*, the address of the attorney must be added to his name. N. Mex. Comp. Laws (1897), § 2685, subs. 19.

Indorsement of Amount for Which Judgment will be Taken.—In several states, it is provided that where the action is

on contract for recovery of money only there shall be indorsed on the writ or summons the amount for which, with interest, judgment will be taken if the defendant fail to answer. Kan. Gen. Stat. (1897), c. 95, § 54; Neb. Comp. Stat. (1899), § 5656; Bates' Anno. Stat. Ohio (1897), § 5037; Okla. Stat. (1893), § 3933; Wyo. Rev. Stat. (1887), § 2424.

Seal.—In some states, the statutes relating to summons provide that they shall be issued under the seal of the court. Cal. Code Civ. Proc. (1897), § 407; Mills' Anno. Code Colo. (1896), § 33; Idaho Code Civ. Proc. (1901), § 3191; Starr & C. Anno. Stat. Ill. (1896), c. 110, par. 1; Kan. Gen. Stat. (1897), c. 95, § 54; Horner's Stat. Ind. (1901), § 314; Mich. Comp. Laws (1897), § 9984; Miss. Anno. Code (1892), § 3413; Mont. Code Civ. Proc. (1895), § 632; Neb. Comp. Stat. (1899), § 5656; N. H. Pub. Stat. & Sess. L. (1901), c. 218, § 2; N. J. Gen. Stat. (1895), p. 2540, § 45; N. Mex. Comp. Laws (1897), § 2685, subs. 19; Bates' Anno. Stat. Ohio (1897), § 5037; Okla. Stat. (1893), § 3933; R. I. Gen. Laws (1896), c. 252, § 1; Tex. Rev. Stat. (1895), art. 1447; Wyo. Rev. Stat. (1887), § 2424.

1. *Kentucky.*—Bullitt's Civ. Code (1895), §§ 39, 40.

See also, generally, *supra*, note 1, p. 1007.

2. *Alabama.*—Civ. Code (1896), § 3268 *et seq.*

You are hereby commanded to summon *John Doe* to appear at the next term of the *Circuit* Court, to be held for said county at the place of holding the same, then and there to answer the complaint of *Richard Roe*.

Witness my hand this *tenth* day of *May*, 1902.

Calvin Clark, Clerk.

Form No. 19499.¹

(Sand. & H. Dig. Ark. (1894), p. 1617.)

The State of *Arkansas* to the Sheriff of *Van Buren* County:

You are commanded to summon *Richard Roe* to answer on the first day of the next *June* term of the *Van Buren Circuit* Court a complaint filed against him in said court by *John Doe*, and warn him that upon his failure to answer the complaint will be taken for confessed. And you will make due return of this summons on the first day of the next *June* term of said court.

Witness my hand and the seal of said court this *fifteenth* day of *May*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19500.²

In the *Superior* Court, *City and County of California*, State of *California*. Department No. 2.

<i>John Doe</i>, plaintiff, against <i>Richard Roe</i>, defendant,	}	Action brought in the <i>Superior</i> Court, <i>City and County of San Francisco</i>, State of <i>California</i>, and the Complaint filed in said <i>City and County of San Francisco</i>, in the office of the Clerk of said <i>Superior</i> Court.
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The People of the State of *California* send Greeting to *Richard Roe*, Defendant.

You are hereby required to appear in an action brought against you by the above named plaintiff in the *Superior* Court, *city and county of San Francisco*, state of *California*, and to answer the complaint filed therein within *ten* days (exclusive of the day of service) after the service on you of this summons—if served within this county; or if served elsewhere, within *thirty* days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to (*Here state for what action is brought*).

And you are hereby notified that if you fail to so appear and answer

See also, generally, *supra*, note 1, p. 1007.

Indorsement on Branch Summons.—In *Lewis v. Grace*, 44 Ala. 307, the indorsement on a branch summons was as follows:

"I certify this summons and complaint is a branch of an original suit, issued this day by me, against *Harriet Lewis*, *Enoch Benson* and *Richard Hudson*, in favor of *Baylis E. Grace*, and returnable to the next term of the *circuit* court of this county, and that they both

constitute but one and the same cause of action. *J. M. Ware*, Clerk."

No objection was made to this indorsement.

1. *Arkansas*.—Sand. & H. Dig. (1894), § 5656.

See also, generally, *supra*, note 1, p. 1007.

2. *California*.—Code Civ. Proc. (1897), § 407.

See also, generally, *supra*, note 1, p. 1007.

said complaint as above required said plaintiff will (*Here state the judgment or relief plaintiff will take if defendant fails to appear and answer*).

Given under my hand, and seal of the said *Superior Court*, at the city and county of *San Francisco*, state of *California*, this *tenth* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

(SEAL)

Calvin Clark, Clerk.

Form No. 19501.¹

In the *District Court*.

State of *Colorado*,
County of *Arapahoe*. } ss.

John Doe, plaintiff,
against
Richard Roe, defendant. } Summons.

The People of the State of *Colorado* to *Richard Roe*, the Defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff in the *District Court of Arapahoe* county, state of *Colorado*, and answer the complaint therein within *twenty* days after the service hereof, if served within this county; or if served out of this county, or by publication, within *thirty* days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint; and if a copy of the complaint in the above entitled action be not served with this summons, or if the service hereof be made out of this state, then *ten* days additional to the time hereinabove specified for appearance and answer will be allowed before the taking of judgment by default as aforesaid.

The said action is brought (*Here state briefly the sum of money or other relief demanded in the action*), as will more fully appear from the complaint in said action, to which reference is here made.

And you are hereby notified that if you fail to appear, and to answer the said complaint as above required, the said plaintiff will (*stating relief or judgment plaintiff will take*).

Given under my hand, and the seal of said *District Court*, at *Denver*, in said county, this *tenth* day of *May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19502.²

Kent County, ss.

The State of *Delaware* to the Sheriff of *Kent County*, Greeting:

(SEAL) We command you that you summon *Richard Roe*, late of *Kent* county, if he be found within your bailiwick, so that he be and appear before our judges, at *Dover*, at our *Superior Court*, there to be held on *Monday*, the *tenth* day of *May next*, to answer to *John Doe* of a plea of (*stating plea*); and have you then there this writ.

1. *Colorado*. — Mills' Anno. Code (1896), § 34.

See also, generally, *supra*, note 1, p. 1007.

2. *Delaware*. — Rev. Stat. (1893), p. 775, c. 102, § 1 et seq.

See also, generally, *supra*, note 1, p. 1007.

Witness, the Honorable *Charles B. Lore*, our chief justice, at *Dover*, the *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Issued *May 1*, 1902.

Calvin Clark, Prothonotary.

Jeremiah Mason, Attorney.

Form No. 19503.¹

(Dist. of Col. Supreme Ct. Com. L. Rules, No. 11.)

In the *Supreme Court* of the *District of Columbia*.

John Doe, plaintiff,

v.

Richard Roe, defendant.

} At Law, No. 400.

The President of the United States to the defendant *Richard Roe*,
Greeting:

You are hereby commanded to appear in this court on or before the *twentieth* day, exclusive of Sundays and legal holidays, after the day of the service of this writ on you, to answer the plaintiff's suit and show why he should not have judgment against you for the cause of action stated in his declaration.

Witness, the Honorable *Samuel Short*, chief justice of said court, the *tenth* day of *May*, A. D. 1902.

Calvin Clark, Clerk.

By *Charles Sweet*, Assistant Clerk.

Form No. 19504.²

The State of *Florida* to the Sheriff of *Duval* County, Greeting:

You are hereby commanded to summon *Richard Roe*, if he be found in your county, to be and appear before the judge of our *Circuit Court* for the *fourth* judicial circuit of the state of *Florida*, at the clerk's office in *Jacksonville*, on the *first Monday* of *May next*, at a court to be held on that day, in and for the county of *Duval*, then and there to answer *John Doe* in an action of (*stating action*). Damages, *four hundred* dollars. And have then and there this writ.

Witness, *Calvin Clark*, clerk of our said court, and the seal of the said court, at the court-house at *Jacksonville* aforesaid, this *twenty-second* day of *February*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19505.³

Georgia — *Bibb* County.

John Doe, plaintiff,

against

Richard Roe, defendant.

} Complaint.

To the Sheriff of said County, Greeting:

The defendant, *Richard Roe*, is hereby required, personally or by

1. *District of Columbia*. — Supreme Ct. Com. L. Rules, No. 11.

See also, generally, *supra*, note 1, p. 1007.

2. *Florida*. — Rev. Stat. (1892), §§ 1008, 1009.

See also, generally, *supra*, note 1, p. 1007.

3. *Georgia*. — 2 Code (1895), § 4974. See also, generally, *supra*, note 1, p. 1007.

attorney, to be and appear at the *Superior* Court to be held in and for said county on the *first Monday* in *January*, A. D. 1903, then and there to answer the plaintiff's complaint, as in default thereof said court will proceed as to justice shall appertain. Hereof fail not.

Witness, the Honorable *Samuel Smith*, judge of said court, this *first* day of *December*, 1902.

Calvin Clark, Clerk.

Form No. 19506.¹

In the *District* Court of the *Third* Judicial District, State of *Idaho*, in and for the County of *Boise*.

John Doe, plaintiff, }
against } Summons.
Richard Roe, defendant. }

The People of the State of *Idaho* send Greeting to the above named Defendant:

You are hereby required to appear in an action brought against you by the above named plaintiff in the *District* Court of the *third* judicial district, state of *Idaho*, in and for the county of *Boise*, and to answer the complaint filed therein within *ten* days (exclusive of the day of service) after the service on you of this summons, if served within this county; or if served out of this county, but in this district, within *twenty* days; otherwise within *forty* days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action brought to (*Here state nature of action in general terms*).

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will (*Here state the judgment or relief the plaintiff will take or demand*).

Given under my hand, and the seal of the *District* Court of the *third* judicial district of the state of *Idaho*, in and for the county of *Boise*, this *tenth* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

(SEAL)

Jeremiah Mason, Plaintiff's Attorney.

Calvin Clark, Clerk.

Form No. 19507.²

State of *Illinois*, }
Macon County. } ss.

The People of the State of *Illinois* to the Sheriff of said County, Greeting:

We command you to summon *Richard Roe*, if he shall be found in your county, personally to be and appear before the *Circuit* Court of said county, on the *first* day of the *next* term thereof, to be holden at the court-house in *Decatur*, in said *Macon* county, on the *second* day of *May*, 1902, to answer unto *John Doe* in a plea of (*stating nature*

1. *Idaho*. — Code Civ. Proc. (1901), § 3191.

See also, generally, *supra*, note 1, p. 1007.

2. *Illinois*. — Starr & C. Anno. Stat. (1896), c. 110, par. 1.

See also, generally, *supra*, note 1, p. 1007.

of action), to the damage of said plaintiff, as it is said, in the sum of *five hundred* dollars.

And have you then and there this writ, with an indorsement thereon in what manner you shall have executed the same.

Witness, *Calvin Clark*, clerk of said court, and the seal thereof, at *Decatur* aforesaid, this *twentieth* day of *February*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19508.¹

In the *District* Court of the State of *Iowa* in and for *Des Moines* County, *June* Term, A. D. 1902.

John Doe, plaintiff, }

against

Richard Roe, defendant. }

To *Richard Roe*:

You are hereby notified that on or before the *tenth* day of *May*, A. D. 1902, the petition of plaintiff in the above entitled cause will be filed in the office of the clerk of the *District* Court of the state of *Iowa* in and for *Des Moines* county, claiming of you the sum of *five hundred* dollars, money as justly due from you, and interest thereon at *six* per cent. from the *first* day of *April*, A. D. 1896. And that unless you appear thereto and defend before *noon* of the *second* day of the next term, being the *June* term of the said court, which will commence at *Burlington*, in said county, on the *fourth* day of *June*, 1902, default will be entered against you and judgment and decree rendered thereon as provided by law.

Dated this *tenth* day of *May*, A. D. 1902.

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19509.²

Commonwealth of *Massachusetts*.

Suffolk, ss.

(SEAL) To *Richard Roe*, of *Boston*, in said County, Greeting:

We command you that you appear at our *Superior* Court next to be holden at *Boston*, within and for our county of *Suffolk*, aforesaid, on the *first Monday* of *April* next; then and there to answer to *John Doe*, of said *Boston*, in an action of contract, which action the said plaintiff has commenced against you, to be heard and tried at our said court; and your goods or estate are attached to the value of *three hundred* dollars, for security to satisfy the judgment which the said plaintiff may recover upon the aforesaid trial. Fail not of appearance, at your peril.

Witness, *Albert Mason*, Esquire, at *Boston*, the *first* day of *March*, in the year of our Lord one thousand eight hundred and *ninety-three*.

J. A. Willard, Clerk.

From the office of *Robert M. Morse*.

1. *Iowa*. — Code (1897), § 3514.

See also, generally, *supra*, note 1.

p. 1007.

2. *Massachusetts*. — Rev. Laws (1902),

c. 167, § 15 *et seq.*

See also, generally, *supra*, note 1, p. 1007.

This is the form of an original summons used in *Massachusetts* and is copied from *Buswell and Walcott's Massachusetts Practice*, 3d ed., p. 41.

found in your county, to appear before our *Circuit Court*, to be holden within and for the county of *Barton*, at the *court-house* in the city of *Lamar*, in said county, on the *first Thursday in March*, A. D. 1886, then and there before the judge of our said court to answer the petition of the *Nevada and Minden Railway Company*, a certified copy of which said petition is hereto annexed. And have you then and there this writ with the return of your action thereupon.

Witness my hand as clerk of said court and the seal thereof. Done at office in *Lamar, Missouri*, in the county aforesaid, on the *thirteenth day of February*, A. D. 1886.

(SEAL)

W. L. Mack, Circuit Clerk.

Form No. 19513.¹

(Mont. Code Civ. Proc. (1895), § 632.)

In the *District Court* of the *First Judicial District* of the *State of Montana*, in and for the County of *Lewis and Clarke*.

<i>John Doe</i> , plaintiff,	} Summons.
against	
<i>Richard Roe</i> , defendant.	}

To the above named Defendant:

You are hereby summoned to answer the complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney within *twenty* days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness my hand, and the seal of said court, this *first day of May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19514.²

State of Nebraska, }
County of *Boone*. } ss.

To the Sheriff of said County:

You are hereby commanded to notify the defendant, *Richard Roe*, that he has been sued by *John Doe* in the *District Court* for said county, that unless he answers on or before the *tenth day of May*, A. D. 1902, the petition of the said plaintiff against him filed in the clerk's office of said court, such petition will be taken as true, and judgment rendered accordingly.

You will make due return of this summons on the *ninth day of May*, A. D. 1902.

Witness my signature, and the seal of said court, this *first day of May*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk.

1. *Montana*. — Code Civ. Proc. (1895), § 632.

See also, generally, *supra*, note 1, p. 1007.

2. *Nebraska*. — Comp. Stat. (1899), § 5656.

See also, generally, *supra*, note 1, p. 1007.

Form No. 19515.¹

(N. H. Pub. Stat. & Sess. L. (1901), c. 218, § 16.)

The State of *New Hampshire*.*Merrimack*, ss.

To the Sheriff of any County or his Deputy:

(SEAL) We command you to summon *Richard Roe*, of *Concord*, in said county of *Merrimack*, if to be found in your precinct, to appear at the *Superior Court* to be holden at *Concord*, in said county, on the *first Tuesday of April next*, to answer to *John Doe*, of *Concord*, in said county of *Merrimack*, in a plea of (*stating plea*), to the damage of the plaintiff, as he says, the sum of *one thousand* dollars, and make return of this writ, with your doings therein.

Witness, *Samuel Smith*, Esquire, the *first day of February*, A. D. 1902.

Calvin Clark, Clerk.Form No. 19516.²*Camden County*, ss.

(SEAL) The State of *New Jersey* to the Sheriff of the County of *Camden* aforesaid, Greeting:

You are hereby commanded to summon *Richard Roe*, if in your county he may be found, so that he be and appear before our *Circuit Court* to be holden at *Camden*, in and for the said county of *Camden*, on the *tenth day of May*, A. D. 1902, to answer unto *Richard Roe* in an action of (*Here state action*), as is said: And have you then there this writ.

Witness, *Samuel Smith*, Esquire, a judge of our said *Circuit Court*, at *Camden* aforesaid, the *twentieth day of April*, in the year one thousand nine hundred and *two*.

Calvin Clark, Clerk.*Jeremiah Mason*, Attorney.Form No. 19517.³

(N. Y. Code Civ. Proc., § 418.)

Supreme Court, County of *Suffolk*.

John Doe, plaintiff,
against

Richard Roe, defendant. } Summons.

To the above named Defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within *twenty* days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment

1. *New Hampshire*. — Pub. Stat. & Sess. L. (1901), c. 218, § 1 *et seq.*

See also, generally, *supra*, note 1, p. 1007.

2. *New Jersey*. — Gen. Stat. (1895), p. 2540, § 41 *et seq.*

See also, generally, *supra*, note 1, p. 1007.

3. *New York*. — Code Civ. Proc., § 417.

See also, generally, *supra*, note 1, p. 1007.

will be taken against you by default for the relief demanded in the complaint.

Dated *May 1, 1902.*

Jeremiah Mason, Plaintiff's Attorney.

Office and Post-office Address, No. 20 Wall street,
Northport, New York.

(Where a notice is required to be served with the summons, it is put here.)¹

Form No. 19518.²

Greene County — In the Superior Court.

John Doe, plaintiff,

against

Richard Roe, defendant.

} Summons for Relief.

The State of *North Carolina* to the Sheriff of *Greene County*, Greeting:

You are hereby commanded to summon *Richard Roe*, the defendant above named, if he be found within your county, to be and appear before the judge of our *Superior Court*, at a court to be held for the county of *Greene*, at the court-house in *Snow Hill*, in said county, on the *fourth Monday* after the *first Monday of March*, it being the *second* day of *April, 1902*, and answer the complaint which will be deposited in the office of the clerk of the *Superior Court* of said county, within the first *three* days of said term, and let the said defendant take notice that if he fail to answer the said complaint within the time required by law the plaintiff will apply to the court for the relief demanded in the complaint. Hereof fail not, and of this summons make due return.

Given under my hand, and seal of said court, this *tenth* day of *February, 1902.*

(SEAL)

Calvin Clark, Clerk Superior Court.

1. Notice with Summons. — It is provided by section 419 of the Code of Civil Procedure that where a copy of the complaint is not served with the summons the plaintiff cannot take judgment by default without application to the court, unless either the defendant appears or by a notice is served with the summons, stating the sum of money for which judgment will be taken and that the case is one embraced in section 420. Where the notice is required, it may be as follows:

Notice.

Notice is hereby given to you that, upon your default to appear or answer the above summons, judgment will be taken against you for the sum of \$500.00, with interest from the *tenth* day of *April, 1901*, and with the costs of this action.

Jeremiah Mason,

Plaintiff's Attorney.

Precedent. — The following summons is copied from the records in *People v. North River Sugar Refining Co.*, 121 N. Y. 552:

"Supreme Court of the State *New York.*
The People of the State of } Place of
New York, plaintiff, } Trial,
against } County of
North River Sugar Refin- } *New York.*
ing Company, defendant. } Summons.

To the above named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on plaintiff's attorney within *twenty* days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated *New York, August 7th, 1888.*

Chas. F. Taor, Attorney-General,
Plaintiff's Attorney.

Office address for the purpose of this action:

At the offices of
Roger A. Pryor, No. 11 Wall Street,
New York City."

2. North Carolina. — Clark's Code Civ. Proc. (1900), § 200.

Form No. 19519.¹

(N. Dak. Rev. Codes (1895), § 5248.)

State of *North Dakota*, } ss. In *District Court*,
 County of *McIntosh*. } *Fourth Judicial District*.
John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

The State of *North Dakota* to the above named Defendant:

You are hereby summoned to answer the complaint in the above entitled action, of which a copy is hereunto annexed and herewith served upon you, (or *which is filed in the office of the clerk of the District Court of the fourth judicial district in and for the county of McIntosh and state of North Dakota*), and to serve a copy of your answer to the said complaint on the subscriber, at his office in *Ashley*, in said county and state, within *thirty* days after the service of this summons upon you, exclusive of the day of such service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated *May 1, 1902*.

Jeremiah Mason,
 Plaintiff's Attorney, *Ashley, N. D.*

Form No. 19520.²

In the *Circuit Court* of the State of *Oregon* for the County of *Linn*, ss.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }
 To *Richard Roe*, Defendant:

In the name of the state of *Oregon*, you are hereby required to appear and answer the complaint filed against you in the above entitled action within *ten* days from the date of the service of this summons upon you, if served within this county; or, if served in any other county of this state, then within *twenty* days from the date of the service of this summons upon you; and if you fail so to answer, for want thereof the plaintiff will take judgment against you for the sum of *four hundred* dollars (or *will apply to the court for the relief demanded in said complaint*).

Jeremiah Mason, Attorney for Plaintiff.

Form No. 19521.³

(Bright. Pur. Dig. Pa. (1894), p. 60, § 1.)

(SEAL) The Commonwealth of *Pennsylvania*, *Lehigh* County, ss.
 To the Sheriff of said County, Greeting:

See also, generally, *supra*, note 1, p. 1007.

1. *North Dakota*. — Rev. Codes (1895), § 5247.

See also, generally, *supra*, note 1, p. 1007.

2. *Oregon*. — Bellinger & C. Anno. Codes & Stat. (1902), § 52.

See also, generally, *supra*, note 1, p. 1007.

3. *Pennsylvania*. — Bright. Pur. Dig. (1894), p. 60, § 1 *et seq.*

We command you that you summon *Richard Roe*, so that he be and appear before our court of (*stating court*), to be holden at *Allentown*, in and for said county, on the *tenth* day of *May next*, there to answer *John Doe* of a plea (*setting forth briefly the cause of action or complaint*), and have you then there this writ.

Witness, *Samuel Smith*, president (*or as the case may be*), judge of our said court, the *tenth* day of *April*, A. D. 1902.

Calvin Clark, Prothonotary.

Form No. 19522.¹

(R. I. Gen. Laws (1896), c. 252, § 9.)

The State of *Rhode Island and Providence Plantations*.

Providence, Sc.

(SEAL) To the Sheriffs of our several Counties, or to their Deputies, Greeting:

We command you to summon *Richard Roe*, of *Providence*, in the county of *Providence* (if to be found in your precinct), to answer the complaint of *John Doe*, of said *Providence*, on the return day hereof (said return day being the *second* day of *May*, A. D. 1902), in the *Common Pleas Division of the Supreme Court* to be holden at the court-house in *Providence*, within and for our county of *Providence*, in an action of (*stating action*), as by declaration to be filed in court will be fully set forth; to the damage of the plaintiff *five hundred* dollars. Hereof fail not, and make true return of this writ with your doings thereon.

Witness, Hon. *Charles Matteson*, chief justice of our *Supreme Court*, at *Providence*, this *seventh* day of *April*, in the year 1902.

Calvin Clark, Clerk.

Form No. 19523.²

The State of *South Carolina*, }
County of *Charleston*. } Court of *Common Pleas*.

John Doe, plaintiff, }
against } Summons.
Richard Roe, defendant. }

To the Defendant, *Richard Roe*:

You are hereby summoned and required to answer the complaint in this action, which is filed in the office of the clerk of the Court of *Common Pleas* for the said county (or of which a copy is herewith served upon you), and to serve a copy of your answer to the said complaint on the subscriber, at his office in *Charleston*, in said county of *Charleston*, within *twenty* days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated the *first* day of *May*, A. D. 1902.

Jeremiah Mason, Plaintiff's Attorney.

See also, generally, *supra*, note 1, p. 1007.

1. *Rhode Island*. — Gen. Laws (1896), c. 252, § 1 *et seq.*

See also, generally, *supra*, note 1, p. 1007.

2. *South Carolina*. — Code Civ. Proc. (1902), § 149.

Form No. 19524.¹

State of *South Dakota*, } In *Circuit Court*,
 County of *Clay*. } *First Judicial Circuit*.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

The State of *South Dakota* sends Greeting to the above named Defendant:

You are hereby summoned and required to answer the complaint of the above named plaintiff, a copy of which is herewith served upon you (or *which will be filed in the office of the clerk of the Circuit Court within and for said Clay county, at Vermillion, South Dakota*), and to serve a copy of your answer on the subscriber, at his office in *Vermillion, South Dakota*, within *thirty* days after the service of this summons, exclusive of the day of service,* or the plaintiff will take judgment against you for *four hundred* dollars and *fifty* cents, with interest at *six* per cent. from (*stating time*), besides the costs of this action.

Dated the *first* day of *May*, 1902.

Jeremiah Mason, Plaintiff's Attorney.

Form No. 19525.²

State of *Tennessee*, *Hamilton County*.

To the Sheriff of *Hamilton County*, Greeting:

You are hereby commanded to summon *Richard Roe*, if to be found in your county, to appear before the judge of our *Circuit Court*, to be held for the county of *Hamilton*, at the *court-house* in the city of *Chattanooga*, on the *first Monday of April next*, then and there to answer *John Doe* in an action of (*Here state briefly in general terms the cause of action*). Herein fail not, and have you then and there this writ.

Witness, *Calvin Clark*, clerk of our said court, at office, the *first Monday in October*, A. D. 1902.

Calvin Clark, Clerk.

Form No. 19526.³

The State of *Texas* to the Sheriff or any Constable of *Travis County*, Greeting:

You are hereby commanded to summon *Richard Roe* to be and appear before the honorable *District Court* of *Travis county, Texas*, at the next regular term thereof, to be holden at the *court-house* of

See also, generally, *supra*, note 1, p. 1007.

1. *South Dakota*. — Stat. (1901), §§ 6093, 6094.

See also, generally, *supra*, note 1, p. 1007.

Action Not on Contract. — Where the action is not one arising on contract for the recovery of money only, a proper conclusion from the star is as follows: "If you fail to answer the complaint

within that time, the plaintiff will apply to the court for the relief demanded in the complaint, besides costs."

2. *Tennessee*. — Code (1896), § 4520.

See also, generally, *supra*, note 1, p. 1007.

3. *Texas*. — Rev. Stat. (1895), art. 1214.

See also, generally, *supra*, note 1, p. 1007.

said county, in *Austin*, on the *first Monday* in *March*, 1902, then and there to answer the plaintiff's petition, filed in a suit in said court on the *twentieth* day of *January*, 1902, wherein *John Doe* is plaintiff and *Richard Roe* is defendant; file number of said suit being No. 450. The nature of the plaintiff's demand is as follows, to wit: (*Here state nature of plaintiff's demand*). And you will deliver to said defendant, in person, a true copy of this citation. Herein fail not, but of this writ make due return, showing how you have executed the same.

Witness my hand and seal of office at *Austin*, this *twentieth* day of *January*, 1902.

(SEAL)

Calvin Clark, Clerk District Court,
Travis County, Texas.

Form No. 19527.¹

(Utah Rev. Stat. (1898), § 2939.)

In the *District Court* of *Salt Lake County*, State of *Utah*.

John Doe, plaintiff,

vs.

Richard Roe, defendant.

} Summons.

The State of *Utah* to the said defendant:

You are hereby summoned to appear within *twenty* days after the service of this summons upon you, if served within the county in which this action is brought, otherwise within *thirty* days after service, and defend the above entitled action; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you (or *which, within ten days after service of this summons upon you, will be filed with the clerk of said court*).

John Doe, Plaintiff (or
Jeremiah Mason, Plaintiff's Attorney).

P. O. Address: (*giving street number, if any*), *Salt Lake City, Utah*.

Form No. 19528.²

(Vt. Laws (1898), No. 137.)

State of *Vermont*,

Chittenden County, ss. }

To any Sheriff or Constable in the State, or to *Charles Hatch*, an indifferent person, Greeting:

By authority of the state of *Vermont*, you are hereby commanded to summon *Richard Roe*, of *Burlington*, in the county of *Chittenden*, to appear before the *Chittenden County Court* at *Burlington*, within and for said county of *Chittenden*, and also to notify *Richard Roe* to cause his appearance herein to be entered with the clerk of said court on or before the expiration of *forty-two* days from the date hereof, then and there in said court to answer to *John Doe*, of *Bur-*

1. *Utah*. — Rev. Stat. (1898), § 2938
et seq.

See also, generally, *supra*, note 1, p. 1007.

2. *Vermont*. — Stat. (1894), § 1060.

See also, generally, *supra*, note 1, p.

lington, in the county of *Chittenden*, in a plea of (*Here insert the declaration*). To the damage of the plaintiff *five hundred* dollars, for the recovery of which, with just costs, the plaintiff brings suit.

Fail not, but service and return make within *twenty-one* days from the date hereof.

Dated at *Burlington*, in the county of *Chittenden*, the *first* day of *May*, A. D. 1902.

Calvin Clark, Clerk.

Form No. 19529.¹

The Commonwealth of *Virginia* to the Sheriff of the County of *Albemarle*, Greeting:

We command you to summon *Richard Roe* to appear at the clerk's office of our *Circuit Court* of the county of *Albemarle*, at the *court-house* thereof, at the rules to be holden for said court, on the *first Monday* in *May next*, to answer *John Doe* of a plea of (*stating plea*). Damage, *three hundred* dollars. And have then there this writ.

Witness, *Calvin Clark*, clerk of our said court, at the *court-house*, the *first* day of *April*, 1902, and in the one hundred and *twenty-sixth* year of the commonwealth.

Calvin Clark, Clerk.

Form No. 19530.²

(Ballinger's Anno. Codes & Stat. Wash. (1897), § 4872.)

Superior Court, King County.

John Doe, plaintiff, }

vs. }

Richard Roe, defendant. }

The State of *Washington* to the said *Richard Roe*, Defendant:

You are hereby summoned to appear within *twenty* days after service of this summons, exclusive of the day of service, and defend the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint, which will be filed with the clerk of said court (or a copy of which is herewith served upon you).

Jeremiah Mason, Plaintiff's Attorney.

P. O. Address, *Seattle, King County, Wash.*

Form No. 19531.³

(Wis. Stat. (1898), § 2631.)

Circuit Court, Rock County.

John Doe, plaintiff, }

against }

Richard Roe, defendant. }

The State of *Wisconsin* to the said Defendant:

You are hereby summoned to appear within *twenty* days after service of this summons, exclusive of the day of service, and defend

1. *Virginia*. — Code (1887), § 3223.

See also, generally, *supra*, note 1, p.

See also, generally, *supra*, note 1, p. 1007.

3. *Wisconsin*. — Stat. (1898), § 2630.

2. *Washington*. — Ballinger's Anno. Codes & Stat. (1897), § 4871.

See also, generally, *supra*, note 1, p. 1007.

the above entitled action in the court aforesaid; and in case of your failure so to do judgment will be rendered against you, according to the demand of the complaint, of which a copy is herewith served upon you.¹

Jeremiah Mason, Plaintiff's Attorney.
P. O. Address, *Janesville, Rock County, Wis.*

(3) IN COURTS OF CHANCERY.

Form No. 19532.²

The State of *Alabama*, } In Chancery, at *Birmingham, Ala., Sixteenth*
Jefferson County. } District, *Northwestern Chancery Division*.
To any Sheriff of the State of *Alabama*, Greeting:

You are hereby commanded³ to summon *John Doe* to appear and plead, answer or demur, within *thirty* days from the service hereof, to the bill of complaint, filed in the Chancery Court of the *Sixteenth* District, *Northwestern Chancery Division* of *Alabama*, at *Birmingham, Ala.*, by *Richard Roe*, complainant, against *John Doe*, defendant. Herein fail not, and make due return of this writ as the law directs.

Witness my hand this the *tenth* day of *May*, 1902.

Calvin Clark, Register.

Form No. 19533.⁴

(Sand. & H. Dig. Ark. (1894), p. 1617.)

The State of *Arkansas* to the Sheriff of *Pulaski* County, Greeting:

You are commanded to summon *Richard Roe* to answer in *twenty* days after the service of this summons upon him a complaint in equity, filed against him in the *Pulaski Circuit* Court by *John Doe*, and warn him that upon his failure to answer the complaint will be taken for confessed. And you will make due return of the summons on the *first* day of the *next March* term of said court.

Witness my hand, and the seal of said court, this *tenth* day of *December*, 1902.

(SEAL)

Calvin Clark, Clerk.

Form No. 19534.⁵

(Fla. Rev. Stat. (1892), § 1411.)

The State of *Florida* to *Richard Roe*, Greeting:

You are hereby commanded and strictly enjoined that, laying all other business aside, and notwithstanding any excuse, you personally be and appear before the judge of our court for the county of *Duval*, on the *tenth* day of *May*, A. D. 1902, at the court-house of said county, to answer to a bill of complaint exhibited against you in our

1. If the complaint be not served with the summons, the words "of which a copy is herewith served upon you" may be omitted or erased. Wis. Stat. (1898), § 2631.

2. *Alabama*. — Civ. Code (1896), § 681.

3. Command of Summons. — The sum-

mons must require the defendant to appear and demur, plead to or answer the bill within thirty days after service. Ala. Civ. Code (1896), § 681.

4. *Arkansas*. — Sand. & H. Dig. (1894), § 5661.

5. *Florida*. — Rev. Stat. (1892), § 1409.

said court by *John Doe*, and to do further and receive what our said court shall have considered in that behalf.

And this you are not to omit, under a penalty of *five hundred* dollars.

Witness, the Honorable *Samuel Smith*, judge of said court, the *tenth* day of *April*, in the year of our Lord one thousand nine hundred and *two* (1902).

(SEAL)

Calvin Clark, Clerk.

Form No. 19535.¹

(Me. Ch. Ct. Rules Appendix.)

(SEAL)

State of *Maine*.

Penobscot, ss.

To *Richard Roe*, of *Dexter*, in said County, Greeting:

We command you to appear before our *Supreme Judicial* Court, at *Bangor*, in the county of *Penobscot*, on *October* Rules, viz., *Tuesday*, the *third* day of *October next* (or *instant*), then and there to answer to a bill of complaint there exhibited against you by *John Doe*, of said *Dexter*, and abide the judgment of said court thereon.

And we further command you to file with the clerk of said court for said county of *Penobscot*, within (*stating number*) days after the day above named for your appearance, your demurrer, plea or answer to said bill, if any you have.

Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness, *Andrew Peters Wiswell*, justice of our said court, at *Bangor*, the *tenth* day of *September*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.⁵

Form No. 19536.²

(Mass. Ch. Ct. Rules, No. 1.)

Commonwealth of *Massachusetts*.

Middlesex, ss.

To *Richard Roe*, of *Cambridge*, in the County of *Middlesex*, Greeting:

(SEAL)³ We command you that you appear before our *Superior* Court within and for the county of *Middlesex*, on the *second* day of *October next*, then and there to answer to a bill of complaint exhibited against you in our said court by *Richard Roe*, of said *Cambridge* (addition), and to do and receive what our said court shall then and there consider in that behalf. Hereof fail not, under the pains and penalties of the law in that behalf provided.

Witness,⁴ *Lincoln F. Brigham*, Esquire, the *tenth* day of *September*, in the year of our Lord one thousand nine hundred and *two*.

Joseph A. Willard, Clerk.⁵

1. *Maine*. — Rev. Stat. (1883), c. 77, § 11; Ch. Ct. Rules, No. 6.

2. *Massachusetts*. — Rev. Laws (1902), c. 159, § 8; c. 167, § 20.

3. *Seal*. — The summons shall be under the seal of the court. Mass. Rev. Laws (1902), c. 167, § 20.

4. *Teste*. — The summons shall bear teste of the first justice of the court who is not a party to the suit. Mass. Rev. Laws (1902), c. 167, § 20.

5. *Signature*. — The summons shall be signed by the clerk. Mass. Rev. Laws (1902), c. 167, § 20.

Form No. 19537.¹

(Mich. Ch. Ct. Rules, No. 4.)

State of *Michigan*.

(SEAL)² The *Circuit* Court for the County of *Wayne*. In *Chancery*.
In the Name of the People of the State of *Michigan*, to *Richard Roe*,
Samuel Short and *William West*,³ Greeting:

You are hereby notified that a bill of complaint has been filed against you in the *Circuit* Court for the county of *Wayne*, in *chancery*, by *John Doe*, as complainant, and that if you desire to defend the same, you are required⁴ to have your appearance filed or entered in the cause, in accordance with the rules and practice of the court, in person or by solicitor, within *fifteen* days after service of this subpoena upon you. Hereof fail not, under the penalty of having said bill taken as confessed against you.

The return day of this writ is the *twelfth* day of *May*, A. D. 1902.⁵

Witness, the Honorable *Samuel Smith*, *circuit* judge, at the city of *Detroit*, in said county, this *first* day of *May*, A. D. 1902.

Calvin Clark, Register.

Underwriting:⁶ A personal decree is here sought against the defendants *Richard Roe* and *Samuel Short*, and the bill is filed to reach interests in property, and not to obtain any further relief against the remainder of the defendants.

Jeremiah Mason, Solicitor for Complainant.

Business address, No. 400 *Main* street, *Detroit, Mich.*⁷

Form No. 19538.⁸

The State of *Mississippi* to the Sheriff of the County of *Washington*, in said State:

You are hereby commanded to summon *Richard Roe*, if to be found in your county, to appear before the clerk of the *Chancery* Court of the county of *Washington*, in the state of *Mississippi*, on a rule day of said court, to be held at the office of said clerk, on the *second Monday* of *May*, A. D. 1902, in the city of *Greenville, Mississippi* (or at a term of said court to be held on the *first Monday* of *June*, A. D. 1902, at

1. *Michigan*. — Ch. Ct. Rules, No. 4.

2. *Seal*. — The summons must be under the seal of the court. Mich. Ch. Ct. Rules, No. 4.

3. *Names of Defendants*. — The names of all the defendants in the cause shall be inserted in the summons. Mich. Ch. Ct. Rules, No. 4.

4. *Command*. — The defendant shall be notified that a bill of complaint has been filed against him by the complainant, naming him, and that if he desires to defend the same he is required to cause his appearance to be filed or entered in the cause, in accordance with the rules and practice of the court, in person or by solicitor, within fifteen days after service of the summons upon him. Mich. Ch. Ct. Rules, No. 4.

5. *Return Day*. — The return day of the summons shall be indicated at the foot of the same. The summons shall be made returnable on a day certain (except Sunday), either in vacation or in term, not less than ten days from the issuing thereof. Mich. Ch. Ct. Rules, No. 4.

6. *Underwriting*. — The summons shall contain an underwriting designating against what defendant, if any, a personal decree is asked. Mich. Ch. Ct. Rules, No. 4.

7. *Solicitor's Address*. — The business address of the complainant's solicitor shall appear upon the summons. Mich. Ch. Ct. Rules, No. 4.

8. *Mississippi*. — Anno. Code (1892), § 3414 et seq.

the court-house in the city of *Greenville, Mississippi*), then and there to plead, answer or demur to the bill of complaint of *John Doe*, to which the said *Richard Roe* is defendant.

And have there then this writ.

Given under my hand, and the seal of said court, and issued this the *twentieth* day of *April*, A. D. 1902.

(SEAL)

Calvin Clark, Clerk of the *Chancery Court*.

Form No. 19539.¹

(SEAL)² *New Jersey*, to wit:

The State of *New Jersey* to *Richard Roe*,³ Greeting:

We command you that you personally appear before our chancellor, in our Court of *Chancery*, on the *tenth* day of *May*, A. D. 1902, at *Trenton*, to answer to a bill of complaint exhibited against you in our said court by *John Doe*, and to do further and receive what our said court shall have considered in that behalf. And this you are not to omit, under the penalty of *five hundred* dollars.

Witness, his honor *Samuel Smith*, chancellor of our said state, at *Trenton*, the *fifteenth* day of *April*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.⁴

Jeremiah Mason, Solicitor.⁵

Notice.⁶—The defendant is not required to appear at *Trenton* in person at the return day, but if he intends to make a defense it is only necessary for him to answer, plead or demur to the bill within the time required by law.

Form No. 19540.¹

(R. I. Eq. Ct. Rules, No. 1.)

The State of *Rhode Island and Providence Plantations*.
Providence, Sc.

(SEAL)² To *Richard Roe*, Greeting:

We command that you appear before the *Appellate Division* of our *Supreme Court* within and for the county of *Providence*, on the *tenth* day of *May next*, then and there to answer to a bill of complaint exhibited against you in our said court by *John Doe*, of said *Provi-*

1. *New Jersey*. — Gen. Stat. (1895), p. 374, § 5 *et seq.*

2. *Seal*. — The summons must be sealed by the clerk. N. J. Gen. Stat. (1895), p. 374, § 6.

3. *Names of Defendants*. — The names of all the defendants in the suit who are residents of the same county must be inserted in the summons. N. J. Gen. Stat. (1895), p. 374, § 7.

4. *Signature*. — The summons must be signed by the clerk. N. J. Gen. Stat. (1895), p. 374, § 6.

5. *Indorsement*. — The summons must be subscribed or indorsed with the

name of the solicitor or party. N. J. Gen. Stat. (1895), p. 374, § 6.

6. *Notice Added*. — To every summons a notice shall be added that the defendant is not required to appear at *Trenton* in person at the return day, but if he intends to make a defense it is only necessary for him to answer, plead or demur to the bill within the time required by law. N. J. Gen. Stat. (1895), p. 374, § 8.

7. *Rhode Island*. — Eq. Ct. Rules, No. 1.

8. *Seal*. — The summons shall be under the seal of the court. R. I. Eq. Ct. Rules, No. 1.

dence, and to do and to receive what our said court shall then and there consider in that behalf.

Hereof fail not, under the pains and penalty of the law in that behalf provided. And the sheriff of said county of *Providence*, or his deputy, or the sheriffs or their deputies of other counties, are hereby commanded to make service of this writ by reading the same to the said respondent, *Richard Roe*, or by leaving a true and attested copy thereof at his last and usual place of abode. Hereof make true return on or before said *tenth day of May next*.

Witness,¹ Hon. *Charles Matteson*, our chief justice, at *Providence*, this *second day of April*, A. D. 1902.

Calvin Clark, Clerk.²

Form No. 19541.³

(Tenn. Code (1896), § 6150.)

State of *Tennessee*, }
Hamilton County. } To the Sheriff of *Hamilton County*:

Summon *Richard Roe* to appear on or before the *tenth day of May next*, before the *Chancery Court* at *Chattanooga*, to answer the bill of *John Doe*, and have you then and there this writ.

This *second day of April*, 1902.

Calvin Clark, C. and M.

Form No. 19542.⁴

(Vt. Ch. Ct. Rules, No. 9, § 2.)

State of *Vermont*,)
Chittenden County, ss. }

To *Richard Roe*, of *Burlington*, in the County of *Chittenden*, Greeting:

By the authority of the state of *Vermont*, you are hereby commanded⁵ to appear before the Court of *Chancery*, to be held at *Burlington*, in the county of *Chittenden*, on the *tenth day of May*, A. D. 1902, to answer the foregoing bill of complaint of *John Doe*, and to stand to and abide such order, direction and decree therein as to the court shall seem meet.

And you are required to cause your appearance therein to be entered with the clerk of said court on the return day hereof, otherwise said bill will be taken as confessed.

To any sheriff or constable in the state to serve and return.

Given under my hand at *Burlington*, in the county of *Chittenden*, this *second day of April*, A. D. 1902.

Calvin Clark, Clerk.

1. **Teste.**—The summons shall bear teste of the chief justice or of the senior associate justice who is not a party to the suit. R. I. Eq. Ct. Rules, No. 1.

2. **Signature.**—The summons shall be signed by the clerk. R. I. Eq. Ct. Rules, No. 1.

3. *Tennessee.*—Code (1896), § 6149 et seq.

4. *Vermont.*—Stat. (1894). § 918 et seq.; Ch. Ct. Rules, No. 9.

5. **Command of Summons.**—The summons shall require the appearance of the defendant on the first day of the next stated term that shall occur, at least twelve days after service of the process; and shall contain an order on the defendant to enter an appearance with the clerk on the return day thereof, and that otherwise the bill will be taken as confessed. Vt. Ch. Ct. Rules, No. 9.

Form No. 19543.

The Commonwealth of *Virginia* to the Sheriff of the County of *Albemarle*, Greeting:

We command you that you summon *Richard Roe* to appear at the clerk's office of the *Circuit* Court of the county of *Albemarle*, at the rules to be held for the said court on the *first Monday* in *May*, 1902, to answer a bill in chancery, exhibited against you in our said court by *John Doe*, and have then there this writ.

Witness, *Calvin Clark*, clerk of our said court, at the court-house, the *tenth* day of *April*, 1902, and in the one hundred and *twenty-sixth* year of the commonwealth.

Calvin Clark, Clerk.

Form No. 19544.¹

Circuit Court of the United States of America for the *Sixth* Circuit and *Eastern* District of *Michigan*, sitting in *Chancery*.

(SEAL). The President of the United States of America to *Richard Roe*, who is a citizen of this state and resident of the *eastern* district of *Michigan*:

You are hereby commanded to be and appear in the *Circuit Court of the United States of America* for the *sixth* circuit and *eastern* district of *Michigan*, sitting in *Chancery*, before the judges thereof, at the *District Court room*, in the city of *Detroit*, on the *first Monday* of *May* next ensuing, then and there to answer unto a bill of complaint exhibited against you as defendant by *John Doe* as complainant, and this you shall in nowise omit, under the penalty of *one thousand* dollars.

Witness, the Hon. *Morrison R. Waite*, chief justice of the *Supreme Court of the United States*, this *second* day of *April*, in the year of our Lord one thousand nine hundred and *two*, and of the independence of the United States the one hundred and *twenty-sixth*.

Calvin Clark, Clerk.

Memorandum. — The above named defendant is required to enter his appearance in this suit with the clerk of this court at his office, in the city of *Detroit*, on or before the day on which this writ of subpoena is returnable, otherwise the bill of complaint in this cause will be taken pro confesso against said defendant.

Calvin Clark, Clerk.

Form No. 19545.¹

United States of America, }
District of *Nebraska*. } ss.

The President of the United States of America to *Solomon C. Maple*, *Phebe A. Maple*, *W. D. Galbraith*, *Thayer County Bank of Hebron, Nebraska*; *First National Bank of Hebron, Nebraska*; *H. J. Bemis*, first name unknown; *Susie Bemis*, *A. G. Collins*, first name unknown (impleaded with others), Greeting:

We command you and each of you to appear before the judges of the *Circuit Court of the United States*, for the district of *Nebraska*, at *Omaha*, on the *first Monday* in *March* next, it being the *first* day of

March, A. D. 1897, to answer to the bill of complaint of *Etna Life Insurance Company*, of *Hartford, Connecticut*, this day filed in the office of the clerk of said court, and then and there to receive and abide by such order and decree as shall then or hereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

(SEAL) Witness, the Hon. *Melville W. Fuller*, chief justice of the *Supreme Court of the United States*, at *Omaha*, this 5th day of *February*, A. D. 1897, and of the independence the 121st year.

Oscar B. Hillis, Clerk.

By *R. R. Bittinger*, Deputy.

Memorandum.—The above named defendants are notified that unless they enter their appearance in the clerk's office of said court, at *Omaha*, aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against them as confessed and a decree entered thereon accordingly.

Oscar B. Hillis, Clerk.

By *R. R. Bittinger*, Deputy.

2. In Criminal Prosecutions.

a. In General.

Form No. 19546.¹

(Sand. & H. Dig. Ark. (1894), § 2108.)

Pulaski Circuit Court, State of *Arkansas*.

To any sheriff, coroner, jailer, constable, marshal or policeman in this state:

You are hereby commanded to summon *Richard Roe* to appear in the *Pulaski Circuit Court* on the first day of its next (*June*) term, to answer an indictment for misdemeanor found against him in that court.

Given under my hand the *twentieth* day of *May*, 1902.

Calvin Clark, Clerk *Pulaski Circuit Court*.

Form No. 19547.²

Commonwealth of *Massachusetts*.

Suffolk, ss.

The *Municipal Court* of the *Charlestown District* in the City of *Boston*.

To the Sheriff of the County of *Suffolk*, his Deputies, the Constables and Police Officers of the City of *Boston*, in said County of *Suffolk*, and to any Officer of the District Police of said Commonwealth, Greeting:

(SEAL) We command you and each of you, in the name of the commonwealth of *Massachusetts*, forthwith to serve the annexed summons, by giving an attested copy thereof in hand to *Richard Roe*,

1. *Arkansas*. — Sand. & H. Dig. 2. *Massachusetts*. — Rev. Laws (1902),
(1894), § 2108. c. 217, § 24.

of said *Boston*, the person to whom the same is addressed, or by leaving an attested copy thereof at the last and usual place of abode of said *Richard Roe*, not less than *twenty-four* hours before the return hour named in said summons.

Hereof fail not, and make due return of this precept with your doings thereon.

Witness, *Henry W. Bragg*, Esquire, at *Boston* aforesaid, this *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.

(Attach to Form No. 19547.)

Form No. 19548.

Commonwealth of *Massachusetts*.

Suffolk, ss.

The *Municipal* Court of the *Charlestown* District in the City of *Boston*, holden at said *Boston*, within said Judicial District, for the transaction of *criminal* business.

(SEAL) To *Richard Roe*, of *Boston*, in said County of *Suffolk*:

You are hereby summoned, in the name of the commonwealth of *Massachusetts*, to appear before said court, to be holden as aforesaid, on the *tenth* day of *May*, in the year of our Lord one thousand nine hundred and *two*, at *nine* o'clock in the *forenoon*, then and there in said court to answer to a complaint this day made on oath before said court, charging you with (*Here state charge*).

Hereof fail not, at your peril.

Witness, *Henry W. Bragg*, Esquire, at said *Boston*, this *first* day of *May*, in the year of our Lord one thousand nine hundred and *two*.

Calvin Clark, Clerk.

Form No. 19549.¹

The Commonwealth of *Virginia* to the Sheriff of *Albemarle* County, Greeting:

We command you that you summon *Richard Roe* to appear before the judge of our County Court of *Albemarle* county, at the *court-house*, on the *tenth* day of *May*, 1902, to answer an indictment of the grand jury made against him on the *first* day of *May*, 1902, for (*stating offense*), and have then there this writ.

Witness, *Calvin Clark*, clerk of our said court, at the *court-house*, this *first* day of *May*, 1902, in the one hundred and *twenty-sixth* year of the commonwealth.

Calvin Clark.

b. Against Corporation.²

1. *Virginia*.—Code (1887), § 4003.

2. Statutes relating to summons against corporations in criminal cases exist as follows:

Alabama.—Crim. Code (1896), § 5316.

Arizona.—Pen. Code (1901), § 1164.

California.—Pen. Code (1901), § 1390.

Georgia.—3 Code (1895), § 938.

Idaho.—Pen. Code (1901), § 5679.

Minnesota.—Laws (1895), c. 217.

Mississippi.—Anno. Code (1892), § 1367.

Montana.—Pen. Code (1895), § 2570.

New Jersey.—Gen. Stat. (1895), p. 1136, § 79.

(1) IN GENERAL.

Form No. 19550.¹

(Ariz. Pen. Code (1901), § 1165.)

County of *Yuma*.Territory of *Arizona* to the (*naming the corporation*):

You are hereby summoned to appear before me at (*naming the place*), on (*specifying the day and hour*), to answer to a charge made against you upon the complaint of *John Doe* (or *the indictment of the grand jury of the county*, as the case may be), for (*designating the offense generally*).

Dated at *Yuma*, this *tenth* day of *May*, nineteen hundred and *two*.

Abraham Kent, Justice of the Peace
(or as the case may be).

Form No. 19551.²

(Cal. Pen. Code (1901), § 1391.)

County of *Alameda*.The People of the State of *California* to (*naming the corporation*):

You are hereby summoned to appear before me at (*naming the place*), on (*specifying the day and hour*), to answer a charge made against you upon the information of *William West* (or *the presentment of the grand jury of the county*, as the case may be), for (*designating the offense generally*).

Dated at the city (or *township*) of (*stating it*), this *tenth* day of *May*, nineteen hundred and *two*.

Abraham Kent, Justice of the Peace
(or as the case may be).

Form No. 19552.³

(N. Dak. Rev. Codes (1895), § 8414.)

State of *North Dakota*, }
County of *McIntosh*. } ss.

In the Name of the State of *North Dakota*, to the (*naming the corporation*):

You are hereby summoned to appear before me at (*naming the place*), on (*specifying the day and hour*), to answer to the charge made against you, upon the complaint of *William West* (or *the presentment of the grand jury of the county of McIntosh*), for (*designating the offense generally*).

Dated at the city (or *town*) of (*naming place*), the *tenth* day of *May*, 1902.

Abraham Kent, Justice of the Peace
(or as the case may be).

North Dakota. — Rev. Codes (1895), § 8413. See also list of statutes cited *supra*, note 2, p. 1033.

Oklahoma. — Stat. (1893), § 5522.

South Dakota. — Stat. (1901), § 8848.

Utah. — Rev. Stat. (1898), § 5071.

Virginia. — Code (1887), § 4015.

1. *Arizona*. — Pen. Code (1901), § 1164 *et seq.*

2. *California*. — Pen. Code (1901), § 1390 *et seq.*

See also list of statutes cited *supra*, note 2, p. 1033.

3. *North Dakota*. — Rev. Codes (1895), § 8413 *et seq.*

(2) TO ANSWER INDICTMENT.

Form No. 19553.¹

(Cook's Code Crim. Proc. N. Y. (1901), § 681.)

Supreme Court, County of ———, (state the proper county or court,
as the case may be).

The People of the State of *New York* }

vs.

The *William West* Company. }

In the Name of the People of the State of *New York*, to the (naming
the corporation):

You are hereby summoned to appear in this court and by demurrer or plea in writing, duly verified, answer an indictment filed against you by the grand jury of this county, on the *tenth* day of *May*, A. D. 1902, charging you with the crime of (designating the offense generally), at a term of the *Supreme* Court (or as the case may be) of this county, at (naming the place), on (stating the day and hour), and in case of your failure to so appear and answer, judgment will be pronounced against you.

Dated at the city (or town) of (stating it), the *eleventh* day of *May*, 1902.

Andrew Jackson, District Attorney.

(or By order of the court, *Calvin Clark*, Clerk, as the case may be).

(3) TO ANSWER CHARGE MADE UPON INFORMATION.

Form No. 19554.²

(Cook's Code Crim. Proc. N. Y. (1901), § 676.)

County of *Albany* (or as the case may be).

In the Name of the People of the State of *New York*, to the (naming
the corporation):

You are hereby summoned to appear before me at (naming the place), on (specifying the day and hour), to answer a charge made against you, upon the information of *William West*, for (designating the offense generally).

Dated at the city (or town) of (stating it), the *tenth* day of *May*, 1902.

Abraham Kent, Justice of the Peace
(or as the case may be).

II. SERVICE OF SUMMONS.³

See also list of statutes cited *supra*, note 2, p. 1033.

1. *New York*. — Cook's Code Crim. Proc. (1901), § 681.

See also list of statutes cited *supra*, note 2, p. 1033.

2. *New York*. — Cook's Code Crim. Proc. (1901), § 675 *et seq.*

See also list of statutes cited *supra*, note 2, p. 1033.

3. For forms relating to service of writs and papers, generally, see the title SERVICE OF WRITS AND PAPERS, *ante*, p. 24.

1. Affidavit of Service.

Form No. 19555.¹In the Superior Court of the County of *Alameda*, State of *California*.*John Doe*, plaintiff,
against*Richard Roe*, defendant.State of *California*, } ss.County of *Alameda*, }

Affidavit of Service of Summons.

William West,² being duly sworn, deposes and says, that at the time of service hereinafter mentioned he was over the age of *eighteen* years, and not a party to, or interested in, the above entitled action; that on the *tenth* day of *May*, 1902, at the county of *Alameda*, state of *California*, he personally served the annexed summons in the above entitled action on the defendant, *Richard Roe*, by then and there delivering to and leaving with *Richard Roe*, the said defendant, personally, a copy of said summons;³ that with the summons so as aforesaid served, he served upon, delivered to and left with the said defendant personally, upon whom summons was so served, a copy of the complaint in the above entitled action;⁴ that the defendant, *Richard Roe*, at the time of the said service upon him, was a resident of the county of *Alameda*, state of *California*.

Subscribed and sworn to before me this *tenth* day of *May*, 1902.*William West*.*Samuel Short*, Notary Public.Form No. 19556.⁵State of *Colorado*, }
County of *Arapahoe*, } ss.

William West, being first duly sworn, deposes and says that he is over the age of *twenty-one* years, and is not interested in or a party to the within entitled action; that he received the within summons, together with a copy of the complaint in the within stated action, on the *tenth* day of *May*, A. D. 1902, and personally served the same upon *Richard Roe*, the within named defendant, on the *eleventh* day of *May*, A. D. 1902, by delivering to and leaving with the said defendant personally, in the county of *Arapahoe*, a copy of the within sum-

1. *California*. — Code Civ. Proc. (1897), § 410.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Affidavit Necessary. — Where a person other than an officer serves the summons, such person must make affidavit of his service. Cal. Code Civ. Proc. (1897), § 410.

2. **Who may Serve.** — Any person over the age of eighteen who is not a party to the action may serve the summons. Cal. Code Civ. Proc. (1897), § 410.

3. **Copy of Summons Delivered.** — Service of summons is made by delivering

a copy thereof to the defendant. Cal. Code Civ. Proc. (1897), § 411.

4. **Copy of Complaint Served.** — A copy of the complaint must be served with the summons upon the defendant. Cal. Code Civ. Proc. (1897), § 410.

5. *Colorado*. — Mills' Anno. Code (1896), § 37.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Affidavit Necessary. — Where service is made by a person other than an officer, such person must make affidavit of his service. Mills' Anno. Code Colo. (1896), §§ 37, 43.

mons,¹ together with a copy of the complaint,² in the action therein mentioned, thereto attached; and deponent further says that he knows the person served as aforesaid to be the person mentioned and described in said summons and copy of complaint as the defendant in the action therein mentioned.

William West.

Subscribed and sworn to before me this *eleventh* day of *May*, A. D. 1902.

Samuel Short, Notary Public.

Form No. 19557.³

State of *Minnesota*, }
County of *Ramsey*. } ss.

William West, being first duly sworn, says that at *White Bear Lake*, in the county of *Ramsey* and state of *Minnesota*, on the *tenth* day of *May*, 1902, he served the within summons,⁴ and the complaint⁵ thereto attached, upon *Richard Roe*, personally, by handing to and leaving with said *Richard Roe* (or by leaving at the house of his usual abode, with a person of suitable age and discretion then resident therein) true and correct copies thereof.

William West.

Subscribed and sworn to before me this *eleventh* day of *May*, 1902.

Samuel Short, Notary Public, *Minnesota*.

Form No. 19558.⁶

State of *North Dakota*, }
County of *McIntosh*. } ss. In District Court,
Fourth Judicial District.

John Doe, plaintiff, }
against }
Richard Roe, defendant. }
State of *North Dakota*, } ss.
County of *McIntosh*. }

William West, of the city of *Ashley*, county of *McIntosh*, in the state of *North Dakota*, being duly sworn, says that he is above the age of *eighteen* years, and that at the city of *Ashley*, in the county of

1. Copy of Summons Delivered. — Service may be made by delivering a copy of the summons to the defendant named within. Mills' Anno. Code (1896), §§ 37, 43.

2. Copy of Complaint Served. — A copy of the complaint may be served with the summons. Mills' Anno. Code (1896), § 34.

3. *Minnesota*. — Stat. (1894), § 5196 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Affidavit Necessary. — Where service is made by a person not an officer, such person must make affidavit of his service. Minn. Stat. (1894), § 5203.

4. Copy of Summons Delivered. — Service of summons may be made by delivering a copy thereof to the defendant. Minn. Stat. (1894), § 5199.

5. Copy of Complaint Served. — A copy of the complaint is sometimes served with the summons. Minn. Stat. (1894), § 5196.

6. *North Dakota*. — Rev. Codes (1895), § 5252 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Affidavit Necessary. — Where service is made by any person other than an officer, such person must make affidavit of his service. N. Dak. Rev. Codes (1895), § 5262.

McIntosh and state of *North Dakota*, on the *tenth* day of *May*, A. D. 1902, he served the annexed summons on the defendant in this action, by (*Here state manner of service*). He further says that he knew the person served as aforesaid to be the person mentioned and described in the said summons as the defendant therein.

William West.

Subscribed and sworn to before me this *eleventh* day of *May*, A. D. 1902.

Samuel Short, Notary Public.

Form No. 19559.¹

Circuit Court, Rock County.

John Doe, plaintiff, }
 against
Richard Roe, defendant. }

State of *Wisconsin*, } ss.
Rock County. }

William West, being first duly sworn, on oath says that he is the managing clerk in the office of *Jeremiah Mason*, the plaintiff's attorney, and that on the *tenth* day of *May*, 1902,² at *Janesville*, in the county of *Rock* and state of *Wisconsin*,³ he duly served the summons in the above entitled action, hereto annexed, upon the above named *Richard Roe*, the defendant in said action, by delivering to and leaving with said *Richard Roe*, personally, a copy thereof,⁴ and that deponent knew the person so served to be the defendant mentioned in the summons aforesaid.⁵

William West.

Subscribed and sworn to before me this *eleventh* day of *May*, A. D. 1902.

Samuel Smith, Notary Public.

2. Return of Officer.

a. Defendant Not Found.

Form No. 19560.⁶

State of *North Dakota*, } ss. In *District Court*.
County of *McIntosh*. } *Fourth Judicial District*.

1. *Wisconsin*. — Stat. (1898), § 2635.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Affidavit Necessary. — Where the service is by a person other than an officer, such person must make affidavit of his service. Wis. Stat. (1898), § 2642.

2. **Time of service** must be shown. Wis. Stat. (1898), § 2642.

3. **Place of service** must be shown. Wis. Stat. (1898), § 2642.

4. **Manner of service** must be shown. Wis. Stat. (1898), § 2642.

And where service is made by deliv-

ering to the defendant a copy of the summons, and leaving the same with him, this must be shown in the affidavit. Wis. Stat. (1898), § 2642.

5. **Identity of Defendant Established.** — The affidavit must show that affiant knew the person served to be the defendant mentioned in the summons. Wis. Stat. (1898), § 2642.

6. *North Dakota*. — Rev. Codes (1895), § 5252 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary. — Where the

John Doe, plaintiff, }
 against
 Richard Roe, defendant. }
 State of North Dakota, } ss.
 County of McIntosh. }

I, William Jones, sheriff of said county, hereby certify and return that the summons in the above entitled action, which is hereto attached, came into my hands for service on the *tenth* day of *May*, 1902; that I have made diligent search and inquiry for the above named defendant *Richard Roe*, upon whom to make legal service of said summons; but after such search and inquiry I have been unable to find said defendant in *McIntosh* county, *North Dakota*, upon whom to make service thereof.

Dated the *eleventh* day of *May*, 1902.

William Jones, Sheriff of McIntosh County, N. D.

Fees, \$1.50.

b. Served by Delivering Copy of Summons or Copies of Summons and Complaint with Defendant Personally.

Form No. 19561.¹

Executed this *tenth* day of *May*, 1902, by leaving a copy of the within summons and complaint with *John Doe*, defendant.

Charles Hatch, Deputy Sheriff.

Form No. 19562.²

State of Colorado, }
 County of Arapahoe. } ss.

I do hereby certify that I have duly served the within summons, together with a copy of the complaint in the within stated action, on this *tenth* day of *May*, A. D. 1902, by delivering to and leaving with the said defendant, personally, in the county of *Arapahoe*, a copy of the said summons,³ together with a copy of the complaint⁴ in the action therein mentioned, thereto attached.

Stephen Brown, Sheriff.

By Charles Hatch, Deputy.

service of summons is by an officer, he must make certificate of such service. N. Dak. Rev. Codes (1895), § 5662.

1. *Alabama*.—Civ. Code (1896), § 3272.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Leaving Copy of Summons and Complaint.—The summons must be executed by leaving a copy of the summons and complaint with the defendant, which fact the officer must return with the process. Ala. Civ. Code (1896), § 3272.

2. *Colorado*.—Mills' Anno. Code (1896), § 37.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary.—When the summons is served by the sheriff or his deputy, a certificate of such service is necessary. Mills' Anno. Code Colo. (1896), § 37.

3. **Copy of Summons Delivered.**—The summons may be served by delivering a copy thereof to the defendant. Mills' Anno. Code Colo. (1896), § 38.

4. **Copy of Complaint Served.**—A copy of the complaint is often served with the summons. Mills' Anno. Code Colo. (1896), § 35.

Form No. 19563.¹

State of *Idaho*, }
County of *Boise*. } ss.

I hereby certify that I received the within summons on the *tenth* day of *May*, A. D. 1902, and personally served the same on the *eleventh* day of *May*, A. D. 1902, on *Richard Roe*, the defendant named in said summons, by delivering to and leaving with the said defendant, personally, in the county of *Boise*, a copy of said summons,² and I also, at said time and place, delivered to and left with said defendant, personally, a certified copy of the complaint³ in the action named in said summons, attached to said copy of summons.

Dated this *eleventh* day of *May*, A. D. 1902.

Charles Hatch, Sheriff.

Form No. 19564.⁴

State of *Michigan*, }
County of *Wayne*. } ss.

I hereby certify and return that on the *tenth* day of *May*, A. D. 1902, at *Detroit*, in said county, I served the within summons, personally, on *Richard Roe*, the defendant named in said summons, by then and there, at the place and on the date mentioned above, showing to said above named defendant the within summons, with the seal impressed thereon, and delivering to said defendant a true copy of said summons.⁵

Charles Hatch, Sheriff of said County.

My fees, \$1.50.

Form No. 19565.⁶

State of *North Dakota*, } In *District Court*,
County of *McIntosh*. } ss. *Fourth Judicial District*.

John Doe, plaintiff, }
against }
Richard Roe, defendant. }

State of *North Dakota*, }
County of *McIntosh*. } ss.

I, *William Jones*, sheriff of said county, hereby certify and return that on the *tenth* day of *May*, 1902, within the said county of

1. *Idaho*. — Code Civ. Proc. (1901), § 3193 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary. — Where the summons is served by the sheriff, he must make a certificate of such service. *Idaho* Code Civ. Proc. (1901), §§ 3193, 3198.

2. Copy of Summons Delivered. — The summons may be served by delivering a copy to the defendant. *Idaho* Code Civ. Proc. (1901), § 3194.

3. Copy of Complaint Served. — It is sometimes necessary to serve a copy of the complaint. *Idaho* Code Civ. Proc. (1901), § 3193.

4. *Michigan*. — Comp. Laws (1897), § 9994.

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

5. Showing Summons and Delivering Copy. — Writs of summons shall be served by showing the original writ to the defendant and delivering to him a copy thereof. *Mich. Comp. Laws* (1897), § 9994.

6. *North Dakota*. — Rev. Codes (1895), § 5249 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary. — Where the service of summons is by an officer, he must make a certificate of such service. *N. Dak. Rev. Codes* (1895), § 5262.

McIntosh, I served the summons in the above entitled action, which is hereto attached, on *Richard Roe*, the defendant in said action, by delivering a copy of said summons¹ to said defendant personally.

William Jones,
Sheriff of *McIntosh* County, *N. D.*

Sheriff's fees:

Service	\$0 50
Copies.....	25
Mileage ——— miles.....	1 00
Total.....	\$1 75

Form No. 19566.³

State of *Oregon*, }
County of *Linn*. } ss.

I hereby certify that I served the within summons within said county, this *tenth* day of *May*, 1902, on the within named *Richard Roe*, defendant, by delivering a true copy thereof,³ prepared and certified to by me, as sheriff, together with a copy of the complaint,⁴ prepared and certified to by *Calvin Clark*, clerk of said county, to said *Richard Roe*.

William Jones, Sheriff of *Linn* County.
By *Charles Hatch*, Deputy.

Form No. 19567.⁵

State of *South Dakota*, }
County of *Brown*. }

John Doe, plaintiff, }
against }
Richard Roe, defendant. }

State of *South Dakota*, }
County of *Brown*. }

I, *William Jones*, sheriff of the county of *Brown*, in the state of *South Dakota*, hereby certify and return that the annexed summons came into my hands on the *tenth* day of *May*, 1902, and that I served the same upon the within named *Richard Roe*, the defendant, by

1. **Copy of Summons Delivered.** — The summons may be served by delivering a copy thereof on the defendant personally. N. Dak. Rev. Codes (1895), § 5252.

2. **Oregon.** — Bellinger & C. Anno. Codes & Stat. (1902), § 54 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary. — Where the service of the summons is by an officer, a certificate of such service must be made. Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 62.

3. **Copy of Summons Delivered.** — The summons must be served by delivering a copy to the defendant. Bellinger &

C. Anno. Codes & Stat. Oregon (1902), § 55.

4. **Copy of Certificate Delivered.** — A copy of the complaint prepared and certified to by the plaintiff, his agent or attorney, or by the county clerk, must be delivered to the defendant along with the summons. Bellinger & C. Anno. Codes & Stat. Oregon (1902), § 55.

5. **South Dakota.** — Stat. (1901), § 6095 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Certificate Necessary. — Where the service is by an officer, he must make a certificate of such service. S. Dak. Stat. (1901), § 6105.

delivering to and leaving with him personally¹ a true copy of the same at *Aberdeen*, in the county of *Brown*, state of *South Dakota*,² on the *eleventh* day of *May*, 1902,³ and that I know the person so served to be the same person mentioned in said summons as defendant.

William Jones, Sheriff.

Form No. 19568.⁴

Sheriff's Return.

Came to hand, the *tenth* day of *May*, 1902, at *ten o'clock A. M.*, and executed the *eleventh* day of *May*, 1902, by delivering to the within named defendant *Richard Roe*, in person, a true copy of this writ,⁵ together with the certified copy of plaintiff's petition which accompanied the same.⁶

William Jones, Sheriff, *Travis County, Texas*.

By *Charles Hatch*, Deputy.

Fees:

Serving copy.....	\$0 25
Mileage	50
Total.....	\$0 75

c. Served by Leaving Copy of Summons at Defendant's Usual Place of Abode.

Form No. 19569.¹

State of *Iowa*, *Fremont County*, ss.

The within notice came into my hands on the *tenth* day of *May*, 1902, and on the *eleventh* day of *May*, 1902, I served the same on the within named defendant by leaving a true copy thereof at the house of *Samuel Short*, situated in the township of *Thurman*, the same being the usual place of residence of said defendant, with *Samuel Roe*, a member of said defendant's family over *fourteen* years of age, the defendant not being found within said county.

All done in *Thurman* township.

William Brown, Sheriff of *Fremont County, Iowa*.

By *Charles Hatch*, Deputy.

1. **Manner of service** must be stated. S. Dak. Stat. (1901), § 6105.

2. **Place of service** must be stated. S. Dak. Stat. (1901), § 6105.

3. **Time of service** must be stated. S. Dak. Stat. (1901), § 6105.

4. *Texas*. — Rev. Stat. (1895), art. 1218 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989, note 1, p. 1007.

5. **Copy of Summons Delivered.** — The summons must be served by delivering to the defendant a true copy of such summons. Tex. Rev. Stat. (1895), art. 1218.

6. **Copy of Petition Delivered.** — Where the summons is served without the

county in which the suit is pending, the officer shall also deliver to the defendant, in person, a certified copy of the petition. Tex. Rev. Stat. (1895), art. 1219.

7. *Iowa*. — Code (1897), § 3516 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Leaving Copy at Usual Place of Residence. — Where service is made by leaving a copy of the summons with the family of defendant at the usual place of residence of the defendant, the return must state at whose house the same was left, and that it was the usual place of residence of the defendant, and the township, town or

Form No. 19570.¹

State of *Minnesota*, }
 County of *Hennepin*. } ss.

I hereby certify and return, that at the town of *Champlin*, in said county, on the *tenth* day of *May*, A. D. 1902, I served the annexed summons upon the within named defendant, *Richard Roe*, by leaving a true and correct copy thereof at his last usual place of abode, in said county, with one *William White*, a person of the age of *eighteen* years and of suitable age and discretion, then resident therein, in said county, defendant not being found.

Dated this *tenth* day of *May*, 1902.

Charles Smith, Sheriff, *Hennepin* County, *Minn.*
 By *Charles Hatch*, Deputy.

Sheriff fees:

Service.....	\$1 00
Mileage	50
	\$1 50

Form No. 19571.²

State of *North Dakota*, } In *District* Court.
 County of *McIntosh*. } ss. *Fourth* Judicial District.

John Doe, plaintiff, }
 against }
Richard Roe, defendant. }

State of *North Dakota*, }
 County of *McIntosh*. } ss.

I, *William Jones*, sheriff of said county, hereby certify and return that on the *tenth* day of *May*, 1902, at said county of *McIntosh*, I served the summons in the above entitled action, which is hereto attached, on *Richard Roe*, defendant in said action, by leaving a copy of said summons at his dwelling-house in the presence of *William Roe*, who was, at the time of said service, a member of said defendant's family, and over the age of *fourteen* years; and I further testify and return, that at the time of such service said defendant was not at his said dwelling-house or place of residence, and could not conveniently be found; that at said time I made inquiry at divers places,

city in which the house was situated, the name of the person with whom the same was left, or a sufficient reason for omitting to do so, and that such person was over fourteen years of age and was a member of the family. Iowa Code (1897), § 3519.

1. *Minnesota*. — Stat. (1894), § 5197 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Leaving Copy at Usual Abode. — The summons may be served by leaving a copy of the same at the house of the defendant's usual abode, with some

person of suitable age and discretion then resident therein. Minn. Stat. (1894), § 5199.

2. *North Dakota*. — Rev. Codes (1895), § 5252 *et seq.*

See also lists of statutes cited *supra*, note 2, p. 989; note 1, p. 1007.

Leaving Copy at Dwelling-house. — If the defendant cannot conveniently be found, service may be made by leaving a copy thereof at his dwelling-house in the presence of one or more of the members of his family, over the age of fourteen years; or, if the defendant resides in the family of another, with one

and especially at said defendant's dwelling-house and residence of said *William Roe*, as to said defendant's whereabouts, and was unable to ascertain the same.

William Jones,
Sheriff of *McIntosh* County, *N. D.*

Sheriff's fees:

Service	\$0 50
Copies	25
Mileage, ——— Miles...	1 00
Total	\$1 75

Form No. 19572.¹

State of *South Dakota*, }
County of *Brown*. }

John Doe, plaintiff, }
against }
Richard Roe, defendant. }

State of *South Dakota*, }
County of *Brown*. }

I, *William Jones*, sheriff of the county of *Brown*, in the state of *South Dakota*, hereby certify and return that the annexed summons came into my hands on the *tenth* day of *May*, 1902, and that I served the same upon the within named *Richard Roe*, defendant, by leaving a copy of said summons at his dwelling-house in the town of *Claremont*, in said county of *Brown*, in the presence of *William Roe*, who was at the time of said service a member of defendant's family and over the age of *fourteen* years; and I further certify and return that at the time of such service said defendant was not at his dwelling-house or place of residence and could not conveniently be found; that at said time I made inquiry at divers places, and especially at said defendant's dwelling-house and residence of said *William Roe*, as to said defendant's whereabouts, and was unable to ascertain the same; that at the time of said service I knew the said *William Roe* to be a member of said defendant's family, and the place of service mentioned to be the dwelling-house of the defendant herein.

William Jones,
Sheriff of *Brown* County, *South Dakota*.

(*Sheriff's fees.*)

of the members of the family in which the defendant resides over the age of fourteen years. N. Dak. Rev. Codes (1895). § 5252.

1. *South Dakota*. — Stat. (1901), § 6095.

See also lists of statutes cited *supra*, note 2, p. 989, note 1, p. 1007.

Leaving Copy at Dwelling-house. — If the defendant cannot conveniently be

found, service may be made by leaving a copy of the summons at his dwelling-house in the presence of one or more of the members of his family, over the age of fourteen years; or, if the defendant resides in a family of another, with one of the members of the family in which he resides, over the age of fourteen years. S. Dak. Stat. (1901), § 6100.

SUNDAY LAWS, VIOLATIONS OF.

By HAROLD N. ELDRIDGE.

I. AT COMMON LAW, 1045.

II. UNDER STATUTE, 1046.

1. *In General*, 1046.
 - a. *Indictment*, 1046.
 - b. *Warrant*, 1046.
2. *Being Found Off Premises with Firearms*, 1047.
3. *Carrying On Theatrical Exhibition*, 1047.
4. *Engaging in Baseball Game*, 1048.
5. *Engaging in Butchering*, 1050.
6. *Furnishing Public Entertainment to Persons Not Travelers or Lodgers*, 1050.
7. *Keeping Open Shop*, 1051.
8. *Running Freight Train*, 1053.
9. *Selling Merchandise*, 1053.
10. *Taking Kelp from Beach*, 1054.

CROSS-REFERENCES.

For other Forms in Prosecutions for Offenses Denounced by Statute, see the title STATUTORY OFFENSES, ante, p. 428.

I. AT COMMON LAW.

Form No. 19573.

(2 Chit. Cr. L. (5th Am. from 2d Lond. ed.) 20.)

(Commencing as in Form No. 10678) that *Richard Roe*, late of the parish of *St. Paul, Covent Garden*, in the county of *Middlesex*, butcher, on the *twentieth* day of *February*, in the *sixth* year of the reign of our sovereign lord *George the Fourth*, by the grace of God of the United Kingdom of Great Britain and Ireland, king, defender of the Faith, and continually afterwards until the day of the taking of this inquisition at the said parish of *St. Paul, Covent Garden*, in the said county of *Middlesex*, was and yet is a common Sabbath breaker and profaner of the Lord's day, commonly called Sunday; and that the said *Richard Roe*, on the said *twentieth* day of *February*, being the Lord's day, and on divers other days and times, being the Lord's days during the time aforesaid, at the said parish of *St. Paul, Covent Garden*, in the said county of *Middlesex*, in a certain place there called *Claremarket*, did keep a common public and open shop, and in the same shop did then, and on the said other days and times, being the Lord's days, there openly and publicly sell, and expose to

sale, flesh meat, to divers persons to the jurors aforesaid as yet unknown, to the evil example of all others, to the common nuisance of all the liege subjects of our said lord the king, and against the peace of our said lord the king, his crown and dignity.

II. UNDER STATUTE.

1. In General.

a. Indictment.¹

Form No. 19574.²

(Ala. Crim. Code (1896), § 4923, No. 86.)

(Commencing as in Form No. 10680, and continuing down to *) *John Doe* unlawfully engaged in hunting (or shooting or gaming or card-playing or racing, as the case may be; or being a merchant or shop-keeper, and not a druggist, kept open store, or did compel his child or apprentice or servant, in the alternative, as the case may be, to perform labor not the customary duties of daily necessity or comfort, or works of charity) on Sunday, against (concluding as in Form No. 10680).

b. Warrant.

Form No. 19575.³

Commonwealth of Virginia, } To wit:
York County.

To *John Lynch*, Constable of said County:

Whereas, complaint on oath has this day been made before me, *Abraham Kent*, a justice of said county, by *Richard Roe*, that on a Sabbath day, to wit, on the *first* day of *January*, 1899, in said county,

1. Requisites of Criminal Complaint, Indictment or Information, Generally.—

For the formal parts of a criminal complaint, indictment or information in a particular jurisdiction see the titles CRIMINAL COMPLAINTS, vol. 5, p. 930; INDICTMENTS, vol. 9, p. 615; INFORMATION IN CRIMINAL CASES, vol. 9, p. 768.

In Language of Statute.—Where the offense is charged in the language of the statute, the complaint or indictment is sufficient. *Cleary v. State*, 56 Ark. 124; *Elsner v. State*, 30 Tex. 524.

Committed on Sunday.—That the offense was committed on Sunday must be alleged. *Robinson v. State*, 38 Ark. 548; *Jackson v. State*, 88 Ga. 787; *Werner v. State*, 51 Ga. 426; *State v. Land*, 42 Ind. 311; *Effinger v. State*, 47 Ind. 235; *Com. v. Messenger*, 4 Mass. 462; *People v. Ball*, 42 Barb. (N. Y.) 324; *Com. v. Gelbert*, 170 Pa. St. 426; *State v. Eskridge*, 1 Swan (Tenn.) 413.

But under a statute providing that the Lord's day shall extend from the midnight preceding the sun-setting of that day, a complaint or indictment need not set forth on what part of the Lord's day the work or labor was done; it is sufficient to allege the fact on the Lord's day generally. *Com. v. Messenger*, 4 Mass. 462.

Negating Exceptions.—Where the enacting clause of a statute making certain actions unlawful if done on Sunday contains exceptions, such exceptions must be negated. *Cleary v. State*, 56 Ark. 124; *Com. v. Shannihan*, 145 Mass. 99; *Kline v. State*, 44 Miss. 317.

2. *Alabama.*—Crim. Code (1896), § 5542.

See also, generally, *supra*, note 1, this page.

3. *Virginia.*—Code (1887), § 3799.

John Doe was laboring at his trade and calling, and did then, on said Sabbath, labor at his trade and calling by (*Here state what labor or business he was engaged in*), and which was neither a work of necessity or charity; these are therefore to command you, in the name of the commonwealth of *Virginia*, to summon the said *John Doe* to appear at my office in *Yorktown*, in said county, on the *twenty*th day of *January*, 1899, at *ten* o'clock in the *forenoon*, before me, or such other justice of said county as may then be there to hear the said complaint, to answer the same, and to be further dealt with according to law.

Given under my hand and seal this *second* day of *January*, 1899.

(SEAL)

Abraham Kent, Justice of the Peace.

2. Being Found Off Premises with Firearms.

Form No. 19576.¹

(Precedent in *State v. Howard*, 67 N. Car. 24.)²

[(*Venue and title of court and cause as in Form No. 10711.*)]³

The jurors of the state upon their oath present that *Isaac Howard*, late of the county aforesaid, on the *1st* day of *January*, 1870, with force and arms, at and in the county aforesaid, was found off his premises on the Sabbath day, having with him a shot-gun, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

[(*Signature and indorsements as in Form No. 10711.*)]³

3. Carrying On Theatrical Exhibition.⁴

1. *North Carolina*. — Code (1883), § 3783.

2. It was held that a conviction was sustainable under this indictment.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Requisites of Criminal Complaint, Indictment or Information, Generally*. — See *supra*, note 1, p. 1046.

Precedents. — In *People v. Maguire*, 26 Cal. 635, the complaint was as follows:

"*State of California, City and County of San Francisco, Police Judge's Court.*

Personally appeared before me this *20th* day of *June*, 1864, *A. J. Hoyt*, who deposes and says, that on the *19th* day of *June*, 1864, at *Pine street*, in said city and county, the crime of misdemeanor was committed, to wit, by *Thomas Maguire*, who then and there did wilfully and unlawfully, on the first day of the week, commonly called Sunday, to wit, on the Sabbath day, get up, and in getting up and in opening of

a theatre there, all of which is contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the *State of California*; and said deponent accuses *Thomas Maguire* of having committed said crime, and prays that a warrant may be issued for the arrest of said *Thomas Maguire*, and that he may be brought before a magistrate and dealt with according to law."

A demurrer to this complaint was overruled. The court said "that the foregoing complaint is inartificial and ungrammatical cannot be denied; but in our judgment it contains, in substance, a sufficient statement of the facts constituting the offense intended to be charged. It substantially charges the defendant with getting up a theatre on the Sabbath day, at the time and place stated, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the people of the state of

Form No. 19577.¹(Precedent in *McCarthy v. State*, 56 Ind. 204.)²

[(Commencing as in Form No. 10692) that one *Simon McCarthy*, late of said county,]³ on the 26th day of *November*, A. D. 1876, at and in the county of *Marion* and state of *Indiana*, was then and there found unlawfully at common labor and engaged in his usual avocation, to wit, then and there operating, managing and carrying on a theatre and a theatrical exhibition, and presenting to all persons, who did and might attend the same, a musical and dramatic entertainment, and a large number of persons did attend said exhibition and entertainment, the same being then and there exhibited and presented by the said *McCarthy*, for the purpose of gain, he, the said *McCarthy*, being then a person over fourteen years of age, [and] the said 26th day of *November*, A. D. 1876, being the first day of the week, commonly called *Sunday*, [and such common labor and usual avocation not being then and there work of charity or necessity, contrary to (concluding as in Form No. 10692).]³

4. Engaging in Baseball Game.⁴

California. This is one of the offenses created by the act in question, and the foregoing is a sufficient statement of the facts constituting it."

In *People v. Hoym*, (N. Y. Super. Ct. Spec. T.) 20 How. Pr. (N. Y.) 76, the complaint stated, in substance, that the defendants, on Sunday, the 20th day of May, 1860, did exhibit to the public, and aided by advertisement and otherwise, in exhibiting to the public, in the building and room situated at numbers 37 and 39 Bowery, within the city of New York, and known as the New York "Stadt Theatre," a play called "One of Our People," or the "Brave Isaac," and certain parts therein, and certain other dramatic performances, whereby the defendants had become subject to a penalty of \$500, according to the provision of the statute after mentioned, and are indebted to the Society for the Reformation of Juvenile Delinquents, in the city of New York, to the amount of the said sum of \$500, whereby an action has accrued according to the provisions of an act entitled "An act to preserve the public peace and order on the first day of the week, commonly called Sunday," passed April 17th, 1860, and of the first and second sections of the said act. That the Society for the Reformation of Juvenile Delinquents in the city of New York, in the name of the plaintiffs, the people of the state, sue for the said penalty, for the use of the said society,

according to the provisions of the statute. A general demurrer to this complaint was overruled.

1. *Indiana*. — Horner's Stat. (1901), § 2000.

2. A motion to quash the indictment was overruled. The court said: "It is objected that the indictment is bad for duplicity, because two offenses are included in the charge that the defendant was found at common labor and engaged in his usual avocation on Sunday. Also that the indictment ought to have averred what the usual avocation of the defendant was, preliminary to the charge constituting the supposed offense complained of. Objections similar to these have heretofore been ruled upon by this court and settled adversely to the position assumed by the defendant. See *Shafer v. State*, 26 Ind. 191; *Foltz v. State*, 33 Ind. 215. We think the court did not err in overruling the motion to quash the indictment."

3. The matter enclosed by and to be supplied within [] will not be found in the reported case.

4. *Requisites of Criminal Complaint, Indictment or Information, Generally*. — See *supra*, note 1, p. 1046.

Fee Charged. — That a fee for admittance was charged must be alleged, but it is not necessary to set out the name of any person paying such fee for admittance. *State v. Hogreiver*, 152 Ind. 652.

Form No. 19578.¹

(2 Rev. Swift's Dig. 873.)

State of Connecticut, }
 Hartford County. } Town of Hartford.

To *Abraham Kent*, Esq., a justice of the peace for *Hartford* county, in said town: Comes *Richard Roe*, a grand juror in and for said town of *Hartford*, and on his oath of office, complaint and information makes, that *John Doe*, of the town of *Hartford*, in said county of *Hartford*, on the *first* day of *January*, in the year one thousand eight hundred and *ninety-nine*, between the rising and the setting of the sun of that day, it being the Lord's day, with divers other persons to the said grand juror unknown, at said town of *Hartford*, in said county, did engage in vain sport and recreation, and then and there, with said persons unknown to said grand juror, unlawfully used and played the game of ball (or *played the game of quoits*), against the peace, contrary to the form of the statute in such case made and provided and to the disturbance of the good people of the state.

Wherefore, the grand juror aforesaid prays process that the said *John Doe* may be arrested and examined touching the allegations contained in this complaint and be thereon dealt with according to law.

Dated at *Hartford*, this *tenth* day of *January*, A. D. 1899.

Richard Roe, Grand Juror.

Form No. 19579.²(Precedent in *State v. Hogreiver*, 152 Ind. 653.)³

State of Indiana, }
 Marion County, } ss.
 City of *Indianapolis*. }

Be it remembered that on this day, before the judge of the police court of the city of *Indianapolis*, personally came *Chris Kruger*, who, being duly sworn, upon his oath says, that *Albert H. Pardee*, *George Hogreiver*, *Ed. H. Deady*, *Jess Hoffmeister*, late of said city and county, on the *22nd* day of *May*, in the year 1898, at and in the city of *Indianapolis*, county aforesaid, did then and there unlawfully engage in playing a game of baseball, where an admittance fee of *twenty-five* cents was charged and paid by the spectators then and there being, the said day being the *first* day of the week, commonly called Sunday, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of *Indiana*.

Chris Kruger.

Subscribed and sworn to before me this *23rd* day of *May*, 1898.

Charles E. Fox, Judge.

1. *Connecticut*.—Gen. Stat. (1888), § 1569 *et seq.*

2. *Indiana*.—Horner's Stat. (1901), § 2000a.

3. A judgment quashing the affidavit

was reversed. The court said, "we are of the opinion that the affidavit in this case was sufficient in form and substance."

5. Engaging in Butchering.

Form No. 19580.¹

(Precedent in *State v. Knight*, 29 W. Va. 341.)²

[*(Commencing as in Form No. 10726)*]³ that *H. T. Knight*, on a Sabbath day, to wit, on the ——— day of *July*, 1885, in the said county, was then and there found unlawfully laboring at a trade and calling, to wit, butchering, the same not being household or other work of necessity or charity, against the peace and dignity of the State.

[*(Signature and indorsements as in Form No. 10726.)*]³

6. Furnishing Public Entertainment to Persons Not Travelers or Lodgers.⁴

1. *West Virginia*. — Code (1899), c. 149, § 16.

2. The court held this indictment to be sufficient.

3. The matter to be supplied within [] will not be found in the reported case.

4. *Requisites of Criminal Complaint, Indictment or Information, Generally*. — See *supra*, note 1, p. 1046.

Number of Persons Entertained. — The precise number of persons entertained must be alleged. Com. v. Maxwell, 2 Pick. (Mass.) 139.

Negating Exceptions. — That the persons entertained were not travelers, strangers or lodgers must be alleged. Com. v. Crowther, 117 Mass. 116; Com. v. Maxwell, 2 Pick. (Mass.) 139.

Precedent. — In Com. v. Crowther, 117 Mass. 116, the indictment charged "that *Hatfield Crowther*, of *Fall River*, in the county of *Bristol*, on the *nineteenth* day of *July*, in the year eighteen hundred and *seventy-four*, the same being the Lord's day, at *Fall River*, in the county of *Bristol*, was the keeper of a certain house, shop and place of public entertainment and refreshment, and did then and there wilfully suffer certain persons, whose names are to the jurors unknown, to the number of *twenty*, to abide and remain in said house, shop and place of business, drinking and spending their time idly; said persons not being then and there travelers, strangers or lodgers in said house, shop and place of said business; and did then and there wilfully entertain said persons, to the number of *twenty*,

in his said house, shop and place of said business, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The defendant moved to quash the indictment and assigned the following causes therefor:

"1. The defendant is charged as the keeper of a certain house, shop and place of public entertainment and refreshment, and subsequently, in the same count, that said defendant did suffer certain persons whose names are to the jurors unknown, to abide and remain in said house, shop and place of business, drinking, etc., when it is not previously set out that said defendant had any place of business.

2. It does not appear by the allegation in said count that said persons alleged to be spending their time idly, were so spending it in the aforesaid place of public entertainment and refreshment.

3. It is alleged that said persons in said place of business were not travelers, strangers or lodgers, leaving the charge indefinite whether they were either travelers, strangers or lodgers.

4. On account of the uncertainty, insufficiency and want of direct and certain and consistent allegations in said indictment against said defendant.

5. It does not appear in said indictment where said house, shop and place of public entertainment and refreshment is situated, whether in the county of *Bristol* or elsewhere."

This motion was overruled.

Form No. 19581.¹

(Commencement as in Form No. 10699.)

The jurors for the commonwealth of *Massachusetts* on their oath present:

That *John Doe*, late of *Northampton*, in the county of *Hampshire*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, the said day being the Lord's day, at *Northampton* aforesaid, in the county of *Hampshire* aforesaid, was the keeper of a certain house, shop and place of public entertainment and refreshment, and on said *first* day of *January* the said *John Doe* did then and there, at *Northampton* aforesaid, in said house, shop and place of public entertainment and refreshment, wilfully suffer to abide and remain drinking and spending their time idly, certain persons to the number of *twenty*, to wit: (*naming them or whose names are to the jurors aforesaid unknown*), and then and there in said house, shop and place of public entertainment and refreshment, said persons he, the said *John Doe*, did entertain, said persons not being then and there travelers, strangers or lodgers in said house, shop and place of public entertainment and refreshment, against (*concluding as in Form No. 10699*).

7. Keeping Open Shop.²

1. *Massachusetts*. — Rev. Laws (1902), c. 98, § 6.

See also, generally, *supra*, note 4, p. 1050.

2. *Requisites of Criminal Complaint, Indictment or Information, Generally*. — See *supra*, note 1, p. 1046.

Purpose of Opening Shop. — The purpose for which a shop is kept open must be alleged, and it must appear from such allegation that the purpose is an unlawful one. *Com. v. Lynch*, 8 Gray (Mass.) 384; *Com. v. Collins*, 2 Cush. (Mass.) 556.

An allegation that the shop was opened for the purpose of doing business therein is sufficient without stating the particular kind of business. *Com. v. Wright*, 12 Allen (Mass.) 187.

Need Not Aver Criminal Intent. — In *Arkansas*, it is held that an indictment for keeping open a store on Sunday need not aver a criminal intent, as the statute makes the act itself an indictable offense. *Brittin v. State*, 10 Ark. 299.

Negating Exceptions. — A complaint for unlawfully keeping open a shop on the Lord's day need not negative the exceptions contained in the statute. *Com. v. Shannihan*, 145 Mass. 99.

Precedents — Sufficient. — In *Com. v. Lynch*, 8 Gray (Mass.) 384, the com-

plaint alleged that the defendant, at Boston, on the 16th day of September, 1855, being the Lord's day, "did keep open his shop, there situate, for a long time, to wit, for the space of *one* hour, for the purpose of doing labor, business or work therein, namely, selling goods and merchandise therein, on said Lord's day, as aforesaid, the same not being works of charity or necessity, against the peace of said commonwealth, and the form of the statute in such case made and provided." There was a conviction under this complaint.

In *Whitcomb v. State*, 30 Tex. App. 269, the indictment charged that "*W. M. Whitcomb and Sol Maier*, composing the firm of *Whitcomb & Co.*, in the county of *Anderson*, and State of *Texas*, on the *5th* day of *October*, A. D. 1890, on Sunday, were merchants and grocers, and dealers in wares and merchandise, and traders in a lawful business, and as such they did then and there, unlawfully and wilfully, permit their place of business to be open for the purpose of traffic." No objection was made to this indictment.

See also other precedents which were held sufficient in *Com. v. Starr*, 144 Mass. 359; *Com. v. De Voe*, 159 Mass. 101; *Com. v. Shannihan*, 145 Mass. 99.

Form No. 19582.

(Precedent in *Kansas City v. Grubel*, 57 Kan. 437.)¹

[(*Title of court and cause as in Form No. 6729.*)]²

J. A. Walsh complains of *F. C. Grubel*, and, being duly sworn, on oath says, that the said *F. C. Grubel*, on the 26th day of *May*, 1895, the same being the first day of the week, commonly called Sunday, did unlawfully keep open after 10 o'clock A. M., on said day a certain place of business for the purpose of doing business therein, at number 532 *Minnesota* avenue, in the city of *Kansas City*, *Wyandotte* county, *Kansas*, and then and there, and after 10 o'clock A. M. of said day, did expose for sale therein, goods, wares and merchandise, the same then and there not being drugs, medicines or articles of immediate necessity, in violation of section No. 31³ of Ordinance No. 793, of the ordinances of said city of *Kansas City*.

[(*Signature and jurat as in Form No. 6729.*)]²

Form No. 19583.⁴

(Precedent in *Com. v. Marzynski*, 149 Mass. 68.)⁵

[(*Commencing as in Form No. 10699*) that *Philip Marzynski*, late of *Boston*, in the county of *Suffolk*, at *Boston* aforesaid, in the county of *Suffolk* aforesaid, on the twenty-second day of *July*, in the year of our Lord one thousand eight hundred and eighty-eight, that day being the Lord's day,]⁶ did keep open his shop there situate, and numbered one hundred and four in *Eliot* street, for the purpose of doing business therein; the same not being then and there works of necessity or charity [against (*concluding as in Form No. 10699*).]⁶

Form No. 19584.⁷

(*Commencement as in Form No. 10721.*)

That *John Doe*, on the first day of *January*, A. D. one thousand eight hundred and ninety-nine, the said day being Sunday, in the

Insufficient. — In *Com. v. Collins*, 2 Cush. (Mass.) 556, the indictment contained four counts. The first alleged, "that the defendant, on the ninth day of *August*, 1846, at *Salem*, etc., did keep open his shop, and did suffer persons to resort thereto, the said ninth day of *August* being the Lord's day, against the peace of the commonwealth aforesaid, and contrary to the form of the statute in such case made and provided." The other three counts were in the same form, except that the offenses therein complained of were alleged to have been committed on different days. This indictment was held insufficient because it did not contain a statement of the purpose for which the shop was kept open.

1. A judgment sustaining a motion to quash the complaint was reversed.

2. The matter to be supplied within [] will not be found in the reported case.

3. The section referred to is as follows:

"Sec. 31. Any person who shall keep open any place of business or sell or expose for sale on the first day of the week, commonly called Sunday, after 10 o'clock A. M., any goods, wares or merchandise, other than drugs, medicines or articles of immediate necessity, shall, upon conviction thereof, be fined in any sum not exceeding fifty dollars (\$50)."

4. *Massachusetts*. — Rev. Laws (1902), c. 98, § 2.

See also, generally, *supra*, note 2, p. 1051.

5. There was a conviction under this indictment.

6. The matter enclosed by and to be supplied within [] will not be found in the reported case.

7. *Texas*. — Pen. Code (1895), art. 199.

county of *Freestone* and state of *Texas*, was then and there a merchant and butcher and dealer in wares and merchandise, and on said day did then and there, in said county, unlawfully and wilfully open and permit to be open his store and place of business for the purpose of traffic and sale, against (*concluding as in Form No. 10721*).

Form No. 19585.¹

(*Commencement as in Form No. 10724*) that *John Doe*, on the *first* day of *January*, in the year one thousand eight hundred and *ninety-nine*, at the county aforesaid, and continually afterwards until the day of the taking of this inquisition, on the *twentieth* day of *February*, in the year one thousand eight hundred and *ninety-nine*, in the county aforesaid, was and yet is a common Sabbath-breaker and profaner of the Sabbath day; and that the said *John Doe*, on the *first* day of *January*, in the year one thousand eight hundred and *ninety-nine*, being a Sabbath day, and at divers other days and times, being a Sabbath day, during the times aforesaid, did keep open his, said *John Doe's*, shop, he, the said *John Doe*, being then a merchant, and did keep an open and common public shop; and in the said shop did then and there, and on the said other days and times, being Sabbath days, openly and publicly carry on his business as merchant, and did sell and expose to sale goods, wares and merchandise to divers persons, to the great injury and common nuisance of all the citizens of said commonwealth, and against the peace and dignity of the commonwealth of *Virginia*.

(*Indorsement as in Form No. 10724*.)

8. Running Freight Train.

Form No. 19586.²

(*Commencement as in Form No. 10689*.) For that the said *John Doe*, on the *first* day of *January*, in the year of our Lord one thousand eight hundred and *ninety-nine*, in the county aforesaid, was the superintendent of transportation and the officer having charge of the business of the department of transportation of the *Georgia Central Railroad*, which on said day, at the county aforesaid, was a corporation owning and operating a steam railroad through said county; that on said *first* day of *January*, the said day being the Sabbath day, in the county aforesaid, a freight train was run and did run on said railroad, contrary (*concluding as in Form No. 10689*).

9. Selling Merchandise.³

1. See, generally, *supra*, note 2. p. 1051.

2. *Georgia*. — 3 Code (1895), § 420.

3. **General Allegation as to Merchandise Sold.** — An allegation that the defendant was found engaged in his usual avocation, to wit, selling and delivering merchandise to customers, is suf-

ficient without showing the kind of merchandise sold, to whom sold and the price received. *State v. Saurbaugh*, 122 Ind. 208.

Insufficient Precedent. — In *Com. v. Gelbert*, 170 Pa. St. 426, an information upon which a warrant issued was as follows:

Form No. 19587.¹(Precedent in *State v. Saurbaugh*, 122 Ind. 209.)²[(*Venue as in Form No. 827.*)]³

William Schmidt swears that on the 13th day of *January*, A. D. 1889, which was the first day of the week, commonly called Sunday, *Marion Saurbaugh*, who was at that time a person over fourteen years of age, at the county of *Allen*, and in the state of *Indiana*, was then and there found unlawfully at common labor and engaged in his usual avocation, to wit: selling and delivering merchandise to sundry persons and waiting on customers; and was then and there found unlawfully at common labor and following his usual avocation on Sunday, said common labor and usual avocation not being then and there a work of charity or necessity.

[(*Signature and jurat as in Form No. 827.*)]³Form No. 19588.¹(Precedent in *Carver v. State*, 69 Ind. 62.)⁴

[(*Commencing as in Form No. 10692.*)]³ That on the 16th day of *November*, 1879, which was the first day of the week commonly called Sunday, *Sidney A. Carver*, who was then and there a person over the age of fourteen years, at and in the county of *Decatur* and state of *Indiana*, did then and there unlawfully engage in common labor and his usual avocation, in this, to wit, that he did then and there unlawfully sell and deliver to one *Harvey D. Stagg* two cigars, and receive from him the sum of ten cents in payment for the same, the said act of common labor not being [then and there a work of charity or necessity, contrary to (*concluding as in Form No. 10692.*)]⁵

10. Taking Kelp from Beach.

Form No. 19589.⁴

(Commencement as in Form No. 10699.)

The jurors for the commonwealth of *Massachusetts* on their oath present, that *John Doe*, late of *Scituate*, in the county of *Plymouth*,

"The information of *F. A. Doney*, of the city of *Scranton*, taken upon his oath, before *I. L. Post*, Esquire, an alderman in and for the 17th ward of said city, the 8th day of *May*, A. D. 1894; the said *F. A. Doney* saith that on the sixth day of *May*, A. D. 1894, *Emma G. Gelbert* did have her place of business, 19 *Lackawanna* avenue, in said city of *Scranton*, open for business, and did herself do and perform worldly business by the sale of sodawater, bread, milk, candy and other articles, contrary to the act of assembly of April 22, 1894." This information was held insufficient because it failed to allege that the sixth day of May was Sunday.

1. *Indiana*. — *Horner's Stat.* (1901), § 2000.

2. The judgment quashing the affidavit in this cause was reversed.

3. The matter to be supplied within [] will not be found in the reported case.

4. No objection was made to the sufficiency of the indictment.

5. The matter enclosed by and to be supplied within [] will not be found in the reported case.

6. *Massachusetts*. — *Rev. Laws* (1902), c. 98, § 2.

Except as to the formal parts, this indictment is substantially like the complaint in *Com. v. Sampson*, 97 Mass. 407. There was a conviction under that complaint, which was affirmed.

at *Scituate* aforesaid, in the county of *Plymouth* aforesaid, on the *tenth* day of *May*, in the year of our Lord one thousand nine hundred and *two*, that day being the Lord's day, did and performed certain labor, business and work, to wit, by pitching kelp or sea manure into a cart and hauling the same up a beach in said *Scituate*, the said labor, business and work not being then and there work of necessity or charity, against the peace (*concluding as in Form No. 10699*).

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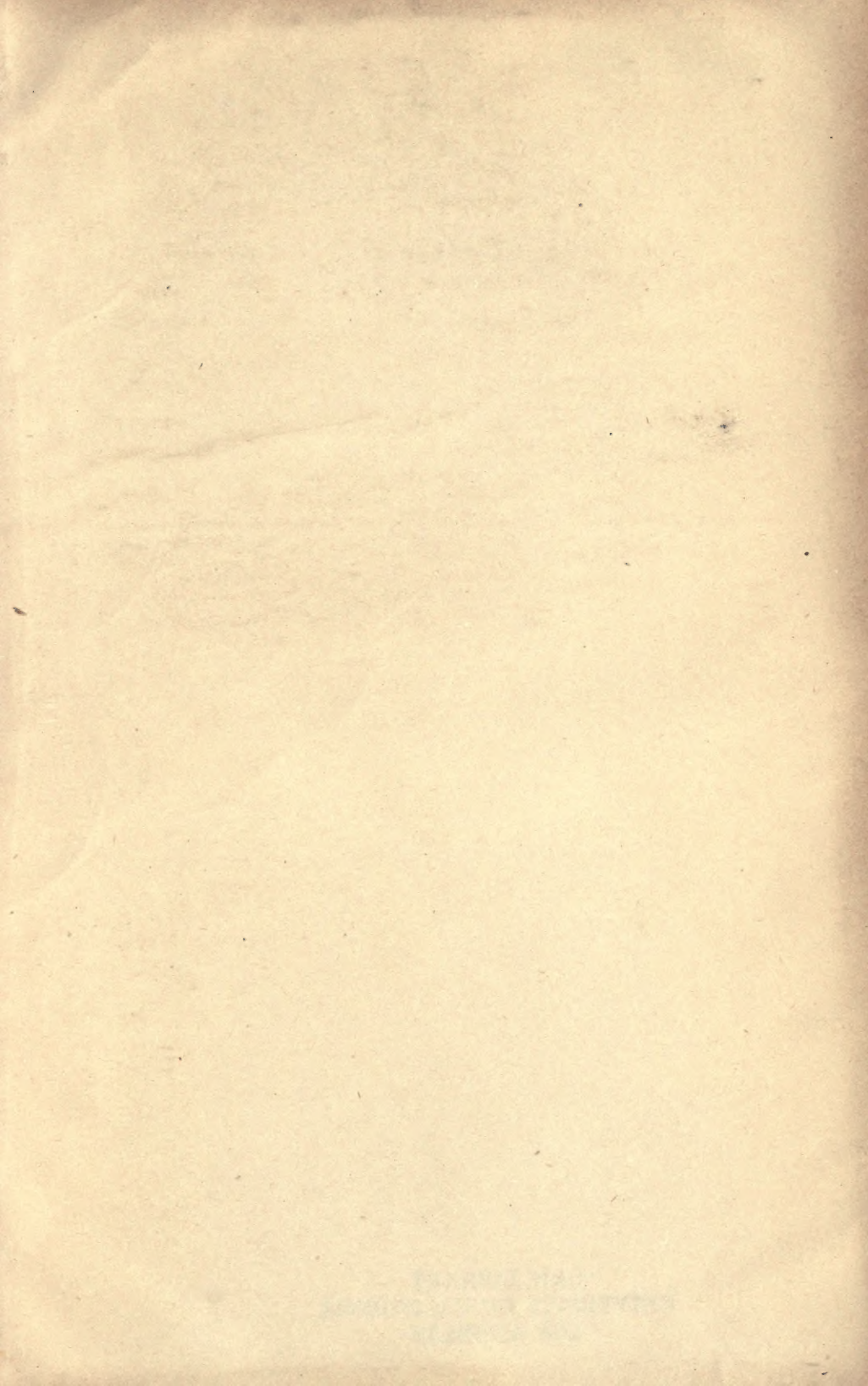
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